

**Attention is drawn to the
order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 101
5411916

BETWEEN

KRYSTAL GREEN
Applicant

A N D

C&T INTERNATIONAL
LIMITED t/a ILAM BAKERY
Respondent

Member of Authority: David Appleton

Representatives: Jessica Babe, Counsel for Applicant
Wei Tao, Advocate for Respondent

Investigation Meeting: 30 May and 2 July 2014 at Christchurch

Submissions Received: 2 July 2014 from Applicant
2 July 2014 from Respondent

Date of Determination: 8 July 2014

DETERMINATION OF THE AUTHORITY

- A. The Applicant was unjustifiably dismissed and is awarded lost wages in the gross sum of \$774.34, together with compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$7,500.**
- B. Costs are reserved**

Prohibition from publication

[1] Save to the extent set out in this determination, I prohibit from publication medical information relating to Ms Green, evidence about which was given to the Authority by Ms Green and her GP in oral and written form.

Employment relationship problem

[2] Ms Green complains that she was unjustifiably dismissed from her employment with the respondent on 26 November 2012 and seeks payment of seven days' lost wages in the sum of \$774.34 gross, together with compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in the sum of \$10,000.

[3] The respondent, by way of an amended statement in reply dated 16 April 2014, lodged by its then counsel, Mr Goldstein, concedes that the respondent did not follow a fair and reasonable process when it dismissed Ms Green but maintains that it had good reasons to dismiss Ms Green by reason of her conduct and performance and asserts that Ms Green contributed 100% to the situation giving rise to the personal grievance. It also asserts that Ms Green failed to mitigate her loss.

Brief account of events leading to the dismissal

[4] Ms Green was employed originally by the Waimairi KB's Bakery from April 2009, taking up a permanent role at the shop in November 2009. The shop and business was sold to the current respondent on or around 18 October 2012. Ms Green states that she was introduced to a lady called Tina (Chen Chen) and a man, Tina's husband, called George (Wei Tao). They are the current directors of the respondent company. Ms Green says that, before the business was sold, Chen Chen told her that she would continue working in the bakery, being paid \$14.75 per hour and working from 6.30am to 1.30 or 2pm Tuesday to Saturday. No written agreement was given to Ms Green, and no probationary period or trial period was discussed with her.

[5] Ms Green says that she was required to train new members of staff hired by Chen Chen and Wei Tao after they took over the shop, most of whom appeared to be family members. She believes she trained six people, including Chen Chen. Wei Tao did not work in the shop during the week as he is an accountant.

[6] On Tuesday, 27 November 2012, Wei Tao handed a letter to Ms Green which stated the following:

Dear Krystal,

This is to refer to your employment with Ilam Bakery Food Bar from 18th of October which requires you to undergo a probationary period of 3 (three) months before full employment is offered.

Based upon a recent evaluation by us, we regret to inform you that we are unable to confirm your employment. We feel our environment may not be the best match for your skills and work style. Your last day will be 1st of December and you will, of course, be paid for all hours you work during that week.

We wish you the best of luck in all your future endeavors [sic].

*Yours sincerely
George & Tina
Directors
C&T International Limited
26/11/12*

[7] Ms Green said that she asked Wei Tao what the issue was with her and he stated that it was *a personality clash* and that they did not consider that she had *the right kind of customer service skills for the role*.

[8] Ms Green described herself as being very upset, shocked and humiliated at receiving the letter, said that she had not been aware of any recent evaluation of her performance and that neither Wei Tao nor Chen Chen had indicated that they had any concerns with her performance. She says that she was later sent home from work that day by Chen Chen because Ms Green had sprained her ankle.

[9] The following day, on Wednesday 28 November 2012, Ms Green arrived at work and says that she was being *ordered around* by Chen Chen's brother, Zach (Xianjun Chen). She says the atmosphere was very tense and she was very upset as she was not sure why she was being let go. She eventually asked to leave early again as her ankle was still painful and she could not cope with the tense atmosphere. This was allowed.

[10] The following day, on Thursday 29 November 2012, she said that Zach was very threatening and intimidating to her and that Chen Chen and Zach began to talk to each other *in a foreign language* which Ms Green could not understand. She says that Chen Chen asked her, while she was having a cigarette break, whether she had used

the telephone, to which Ms Green said that she had used it to place orders. She said that she had also called a friend on her cellphone during her break. She said that Chen Chen was very unhappy with this and told her that she had been asked not to use her cellphone in work time. Ms Green said that the atmosphere was very tense again and that Chen Chen and her family would not speak to her, but only to each other in their own language.

[11] Ms Green then says that she began to serve customers and told one of the regular ones that she would not be there from the end of the week because she had been let go. She says that once all the customers had been served and left, Chen Chen told her she was to stay out the back for the rest of the shift and not to serve any more customers, but did not explain why.

[12] Ms Green says that she asked Chen Chen what she wanted her to do but that Chen Chen would not tell her and that, again, no one would talk to her *other than to order [her] around*. She says that she decided she could not cope, and could not work until 1 December in those circumstances. Accordingly, she told Chen Chen that she did not feel she was being treated fairly and that she could not work there any longer. She gathered her belongings together and went outside, and called her grandfather to ask him to collect her. She said that she was crying at this time and very distressed. She says that Chen Chen asked her for the keys to the shop but that Ms Green was too upset to talk to her. She says that her grandfather eventually collected her and that she did not return to work.

[13] It is the evidence of the respondent that, when it first employed Ms Green, it did not know that a trial period needed to be incorporated into a written agreement.

[14] The respondent says that customers complained about the service they were getting from Ms Green, and that she took smoking breaks every hour without notice and used her mobile phone during work time. The respondent says that it asked the previous owner, Nicky Garvin, to have a conversation with Ms Green about her work performance and the need for improvement, and that, after this conversation, whilst Ms Green's performance did improve a little, it reverted to the way it had originally been after a couple of weeks. The respondent also says that Ms Green refused to serve customers, which was a very serious matter.

[15] The respondent also says that Ms Green told customers that they were no longer a KB franchise and that, if they did not have any particular product, she made no effort to sell the customer an alternative product. The respondent also says that, usually on a Tuesday or Wednesday, which was the day before pay day, Ms Green would cause food to fall on the floor and she would then ask if she could eat it as it was not fit for sale. The respondent also says that Ms Green would deliberately overcook food in the deep fryer so that the food was not saleable so that she could eat it. In addition, the respondent says that Ms Green used her mobile phone and texted during work hours.

[16] The respondent says that it was for these reasons that it decided it was necessary to terminate Ms Green's employment.

[17] Ms Green essentially refutes all of these allegations, and said that she had no idea that there were any concerns about her performance. She denies that the conversation she had with Ms Garvin was about her performance.

Issues

[18] The respondent concedes that no fair or reasonable process was followed in the dismissal of Ms Green and it is, therefore, not necessary to examine in detail whether or not Ms Green was unjustifiably dismissed. It is clear simply from the evidence of the respondent itself that Ms Green's dismissal by the respondent was unjustified in accordance with the test set out in s.103A of the Act.

[19] Accordingly, it is necessary to determine what, if any, remedies are due to Ms Green.

Remedies

[20] Wei Tao accepts that seven days wages for Ms Green would have been the gross sum of \$774.34. Although the statement in reply lodged on behalf of the respondent by Mr Goldstein alleged that Ms Green had failed to mitigate her loss, no evidence was given or submissions made to substantiate this assertion. Indeed, Ms Green managed to find new employment within two weeks of being dismissed, and I am therefore satisfied that Ms Green did take reasonable steps to mitigate her loss.

[21] The next issue to decide is what compensation should be awarded to Ms Green for humiliation, loss of dignity and injury to her feelings, under s.123(1)(c)(i) of the Act.

[22] Ms Green's evidence is that the dismissal of her by the respondent had a significant impact upon her. She said that she was completely shocked and devastated when she was dismissed, and that nothing like that had happened to her before. She also states that the behaviour of Chen Chen, Wei Tao and their family towards her after she had been given notice of her dismissal further humiliated her. She refers to them excluding her by speaking in their own language and to Chen Chen telling her that she was not to serve customers any more without any explanation. She said that she felt she was being punished but she did not know what for.

[23] Ms Green says that she is still feeling the effects of her dismissal now and that she suffers from anxiety and she considers that this has become much worse since she was dismissed. She says she is embarrassed and ashamed about being dismissed and that she feels she has let her family down by being dismissed.

[24] Ms Green's grandfather, Mr Anthony Green, gave evidence that the effect of what happened to Ms Green was devastating. He said that her confidence and self-esteem was completely lost and that she seemed to lose faith in people. He told me in his oral evidence that Ms Green used to love working with customers but that she could now no longer *find her feet* in retail.

[25] Evidence was also given by Dr Nicholls, Ms Green's GP. Dr Nicholls had a consultation with Ms Green prior to her being given the letter of dismissal, when Ms Green told her that she had increased her prescribed medication by herself to help her cope with her feelings of stress. Ms Green's next appointment was with Dr Nicholls' colleague, which occurred after the dismissal, by which time Ms Green had found new employment. The dosage of medication was not decreased however.

[26] Ms Green did not attend her GP during the period between being given the letter of dismissal and finding a new job. Ms Green's explanation for this is that she could not afford to. She also said that she increased her medication dosage again on her own initiative during this period for a short time, to the maximum daily dosage that could be prescribed, to help her cope with the effects of the dismissal. I accept that evidence.

[27] Dr Nicholls confirmed that the medication Ms Green was on to address feelings of stress had been first prescribed prior to November 2012. On the whole, Dr Nicholls' evidence as to the effect on Ms Green of the dismissal is inconclusive, and I am unable to make use of this evidence in determining that the dismissal led to an adverse impact on Ms Green's health.

[28] However, I am satisfied from the evidence given by Ms Green and her grandfather that Ms Green did suffer humiliation, loss of dignity and injury to her feelings by being suddenly and unceremoniously dismissed.

[29] As no disadvantage grievance has been raised in respect of that period preceding the dismissal letter, I cannot take into account any stress caused to Ms Green during that period when fixing an appropriate level of remedy under s.123(1)(c)(i). In any event, I believe that it is highly likely that some at least of the stress suffered by Ms Green prior to the dismissal letter derived from her having to work with new owners, who had different ways of working, and who had different, but not necessarily unreasonable expectations of Ms Green compared to her previous bosses, the Garvins. I believe that Ms Green was already vulnerable to stress prior to Wei Tao and Chen Chen taking over the business and that Ms Green found the differences in working stressful. This is not necessarily the fault of the new owners however.

[30] However, I note that a personal grievance was raised on behalf of Ms Green on 20 December 2012 by her legal representatives which included a grievance about the treatment that she suffered in the two day period after having been given the letter terminating her employment and prior to her leaving her employment. The grievance refers to her being told that she was not allowed to talk to customers or to serve customers and states that a hostile and uncomfortable workplace had been created and that the respondent's attitude to Ms Green was inappropriate and unacceptable.

[31] On balance, I believe that Ms Green did experience an uncomfortable working environment after she had been handed the dismissal letter due to the actions of the employer. This was probably largely due to communication problems between her and Tina (who stated in evidence that she did not speak very good English). I believe that this treatment caused Ms Green disadvantage.

[32] I also accept that the actions of the employer were not what a fair and reasonable employer could have done in all the circumstances at the time the action occurred, and that this disadvantage was therefore unjustified. Although I believe communication difficulties largely contributed to the unjustified actions of the employer, that does not excuse an employer from the duty to comply with its duties of good faith. This duty required the respondent to tell Ms Green about its concerns, and to discuss actions it was proposing (such as asking her to cease serving customers) prior to taking those actions. Although the respondent attributed to cultural differences their reluctance to tell Ms Green about their concerns, that also does not override the respondent's duty to comply with the provisions of the Act.

[33] Although Ms Green suffered effects both from receiving the dismissal letter and from the unjustified disadvantage that followed, I do not consider that it is appropriate to try to separate out the effects in terms of remedies to which she is entitled under s.123(1)(c)(i) of the Act. Taking into account all the evidence I have heard, I believe that an appropriate sum to justly compensate Ms Green for the effects of the dismissal, together with the effects of the respondent's conduct towards her on 28 and 29 November 2012, is \$7,500.

Contribution

[34] Section 124 of the Act provides that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly. It is well established that the contributory actions must be blameworthy.

[35] There are significant differences in the evidence between Chen Chen and Ms Green as to how Ms Green performed in her role under the new ownership, and what Chen Chen told Ms Green about her concerns about that performance.

[36] Chen Chen and Wei Tao both referred to their culture, in which it is not acceptable to embarrass someone. However, Chen Chen said that she had told Ms Green that her performance needed to improve or she would be dismissed, after Ms Garvin had spoken to Ms Green at Chen Chen's request.

[37] Ms Garvin's evidence was that she had been asked by Chen Chen to speak to Ms Green after about one week of the respondent buying the business, because Chen Chen was concerned that Ms Green was not recommending alternative products to customers and because of Ms Green's attitude. Ms Garvin said that she did not recall exactly what Chen Chen said about Ms Green's attitude. Ms Garvin said that she was not surprised that Chen Chen had asked her to speak to Ms Green because she had noticed that Chen Chen had been reluctant to speak to her staff herself when she had helped train Chen Chen in running the business.

[38] Ms Garvin said she had her own agenda in speaking to Ms Green and that, as she had recommended the continued employment of Ms Green to the respondent, she was not very comfortable disciplining Ms Green on the respondent's behalf. She said that, when she did speak to Ms Green, she let her do all the talking and heard concerns from Ms Green about how the respondent was running the business. Ms Garvin made clear in her evidence to the Authority that she had not told Ms Green that Chen Chen had asked her to speak to Ms Green nor had passed on to Ms Green Chen Chen's concerns.

[39] It is my conclusion that Chen Chen and Wei Tao did have some genuine concerns about Ms Green's performance, and her customer service, if only because Ms Green was not doing things the way Chen Chen wanted her to. However, I am not convinced that Chen Chen ever clearly articulated those concerns to Ms Green. For example, Chen Chen and Wei Tao concede that they never put anything in writing to Ms Green to warn her about their concerns. They also both mentioned their cultural sensitivities about not embarrassing people, which is supported by Ms Garvin's evidence. Whilst Chen Chen may have believed that she did make clear to Ms Green her dissatisfaction, I believe that it is much more likely that she did not do so clearly. It is plain that Ms Garvin did not pass on to Ms Green Chen Chen's concerns.

[40] In the absence of a clear message to an employee that their performance is not satisfactory, and needs to be improved, I do not accept that a repeat of those performance shortcomings can be held to be blameworthy. This is also the case with many kinds of minor misconduct. Whilst an action by an employee may seem by an employer to be misconduct, it may well appear to the employee to be an innocent action in the absence of a prior indication by the employer that that action is not tolerated. This is not the case with all misconduct of course, where certain acts are

inherently unacceptable (such as theft, violence, sabotage, and so forth) but I do not believe that any of the allegations against Ms Green amount to allegations of serious misconduct.

[41] The complaints by the respondent's directors about Ms Green are a mix of allegations of poor performance (poor customer service and not telling customers about alternative products) and allegations of misconduct (taking smoking breaks without permission, refusing to serve customers, asking if she could eat food that she had dropped deliberately, telling customers that the job was no longer a KB franchise, using her mobile phone during work hours and using the company phone to wish someone a happy birthday).

[42] The potentially most serious allegations are that Ms Green took breaks without permission and refused to serve a customer. Ms Green's evidence, which is not contested, is that she had to take her breaks when she could because there were no set breaks. Chen Chen says that Ms Green could have taken her breaks when the shop was not busy. It is impossible to know exactly what happened on a day to day basis, but I suspect that Ms Green did take breaks when she could, without always asking permission. However, I am not convinced that Chen Chen made clear to her that she had to ask permission.

[43] Regarding the refusal to serve customers, it transpires from evidence that this was probably when Ms Green was taking a break. I do not believe that Chen Chen made clear to Ms Green what the new rules were about what to do when the shop became busy during a break.

[44] All in all, I do not believe that there is sufficient evidence to enable me to reach the conclusion that Ms Green's contribution towards the situation giving rise to the personal grievance was blameworthy, as I do not believe that she was given clear guidance from the new owners of the shop what was expected of her. Accordingly, I decline to reduce the remedies awarded by the Authority.

The respondent's financial position

[45] Mr Wei Tao stated in his submissions that the respondent was suffering a difficult financial position, and that it was *tough to break even*, implying that this should be reflected in the quantum of the remedies to be awarded. However, the financial position of a respondent does not have a bearing on the quantum of remedies

under s.123(1)(b) or (c) that may be awarded to a successful applicant. Its only relevance is to s.123(2) of the Act, which states that, when making an order under s.123(1)(b) or (c) of the Act, (reimbursement of wages or compensation), the Authority or the Court may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[46] At the conclusion of the Authority's investigation meeting, neither I nor the parties knew what, if any, remedies were to be awarded to Ms Green. Therefore, it would not have been appropriate for the respondent to have been asked to support an argument as to whether any award should be paid by instalments, as that argument would depend on the quantum of award it would be faced with.

[47] It has been established in *Benge v Canterbury Language College Ltd* [2012] NZERA Christchurch 232, that the Authority is able to entertain an application for payment by instalments after the original order for reimbursement of wages and compensation has been made. Accordingly, the orders below are for the respondent to pay the sums awarded to Ms Green within 14 days of the date of this determination. However, if the respondent believes that its financial position requires payment of these sums by instalments, it must make an application to the Authority within 14 days of the date of this determination, identifying the instalment programme it says it can pay and, at the same time, providing sufficient affidavit evidence of its financial position to enable the Authority to determine that application. Ms Green would then have a further 14 days within which to respond.

Orders

[48] I order the respondent to pay to Ms Green the following sums:

- a. The gross sum of \$774.34 in lost wages; and
- b. The sum of \$7,500 pursuant to s.123(1)(c)(i) of the Act.

Costs

[49] The parties are to seek to agree between themselves how costs are to be dealt with. If no agreement is reached within 28 days of the date of this determination, then Ms Green may serve and lodge a memorandum of counsel within a further 14 days, and the respondent may reply by serving and lodging a memorandum within a further

14 days. If the respondent applies for payment by instalments pursuant to paragraph 47, these costs directions shall be suspended, and new directions shall be made at the determination of such application.

David Appleton
Member of the Employment Relations Authority