

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 346/08
5130287

BETWEEN Karen Kirk

AND Todd & Stacey Tregowearth,
 Thomas Harris & Dawn
 Martin t/a Zinc Innovation
 Intaste Restaurant

Member of Authority: Janet Scott

Representatives: Alan Taylor for applicant
 No appearance for Respondent

Investigation Meeting: 25 July 2008 at Rotorua

Submissions Received 29 September 2008

Determination: 1 October 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant claims she was unjustifiably dismissed by the respondents. To remedy her claimed grievance she seeks lost remuneration, compensation for hurt and humiliation, interest and costs including the cost of filing her claim with the Authority.

[2] I am advised the restaurant in question has closed. There was no appearance by or for the respondents. I am, however, satisfied that Mr Todd Tregowearth has been served with the Statement of Problem and Notice of the Investigation Meeting. He made no appearance and neither did he or the other named respondents contact the Authority to seek information, challenge the identification of the respondents or to explain their failure to appear. Having waited for a reasonable period to allow for the respondents having been delayed I heard and now make a determination in the matter as I am entitled to do pursuant to Cl.12 Schedule 2 of the Act.

Background

[3] Ms Kirk gave evidence that she was previously employed in a front of house role at a local restaurant. Mr Todd Tregoweath was employed at the same restaurant as Head Chef. Ms Kirk said they got on well.

[4] At some stage Mr Tregoweath advised that he intended to open his own restaurant. He was apparently scouting among other staff for staff for his restaurant but he did not approach Ms Kirk at this time.

[5] Ms Kirk says that on 5 December 2007 she was sitting on her deck at home when Mr Tregoweath pulled up in his vehicle. He offered her a job as Duty Manager at his new restaurant at \$17 per hour. Her hours were to be 10am – 5pm. Ms Kirk accepted the position and gave and worked out her notice at her current job.

[6] On 16 December - the day prior to the opening of Zinc restaurant - Ms Kirk attended a staff meeting at the new restaurant. Rosters were handed out and an announcement made that two other persons would be day and night managers respectively. Ms Kirk queried this because she had been offered and accepted the day manager's position. She was told this was a new business and that was the way it was. Ms Kirk says she now believes that another person had been offered the day manager's position but that person had not indicated her acceptance of the role. She believes that Todd Tregoweath had panicked and offered her the job as well.

[7] Ms Kirk says she commenced work on 17 December regardless because she is the sole earner for her family. Her rostered hours were variable and they did not equate with the agreement between her and Todd Tregoweath. Ms Kirk said she raised the matter of her hours several times during her employment. She got no satisfactory resolution to the matter.

[8] The applicant says that on 29 December she was speaking to Stacey Tregoweath and their discussion developed into a heated discussion on the subject of the hours Ms Kirk was working. Ms Tregoweath told her, her hours were those set out in her

contract. Ms Kirk advised she had no written contract. The exchange ended with Ms Tregoweth telling her “*If you’re not happy you can leave now*”. Ms Kirk told Ms Tregoweth she was the sole earner in her home and she could not leave.

[9] Later that day Ms Kirk was advised by the night manager that the respondents were not happy with her and she would now be working nights.

[10] On 31 December, Mr Tregoweth advised her by phone to come in prior to the commencement of her shift at 4pm. When she arrived she was asked to attend a meeting with Todd Tregoweth. He said to her “*We have had nothing but trouble from you Karen*” He told her that staff at their previous restaurant had told him she was complaining about them. He would not divulge to whom he had been speaking. He also said that he had had a call from someone who said that she (Karen) had complained that they “*could not run a whorehouse in a brothel*”. She was then dismissed for serious misconduct.

[11] Ms Kirk told me she had never heard this expression before and she had not said this about her employers. She advised she left the restaurant at that point with a few choice words about how she hoped they would go bust.

Legal Test

[12] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new s.103A.

For the purposes of s.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.

[13] In determining this matter I must make an objective assessment of the employer’s actions and weigh those actions against those ***of a fair and reasonable employer... in all the circumstances.... at the time....***

[14] The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06). It was held there that the effect of s. 103A is to separate out the employers actions (including the decision to dismiss) for evaluation

by the Authority or the Court against the specified objective of what a fair and reasonable employer would have done in all the circumstances. At paragraph 144 the Court said in respect of the case before it.

*“The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. **It must however show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct.** The employer is not required to conduct a trial or even a judicial process but **there are some fundamental requirements of natural justice which are appropriate** and which, in this case, are reinforced by the company’s policies. **As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her.**”* (Emphasis mine)

[15] The Court also noted that the objects of the Act including the object of good faith must inform any objective assessment of what a fair and reasonable employer would do in all the circumstances.

Discussion and Findings

[16] Ms Kirk presented as a credible witness and I have no reason to disbelieve her evidence.

[17] I find that Ms Kirk was an unhappy camper in her employment at Zinc Restaurant and that her questioning of the hours she was asked to work became a source of tension in the workplace. However, this is hardly surprising given the mismatch between what was promised and contracted to between Mr Tregoweth and Ms Kirk and the reality of the role and hours that she was expected to perform. At the very least there should have been a willingness by the respondents to address this problem - of Mr Tregoweth’s making - in good faith with a view to resolving it.

[18] In terms of addressing with Ms Kirk any concerns he had as to what she might or might not have been saying to others about the restaurant and its owners Mr Tregoweth did not follow a fair process that would have allowed him to arrive the

view that there had been serious misconduct on the part of Ms Kirk that justified her dismissal. This dismissal was, on the facts before me, unjustified.

Determination

[19] Ms Kirk was unjustifiably dismissed from her employment. She has a personal grievance against her former employers.

Remedies

Contribution

[20] On the evidence before me I cannot find that Ms Kirk has contributed to the circumstances that gave rise to her grievance.

Lost Remuneration

Ms Kirk should have received paid notice on leaving her employment. I find a week's notice would have been reasonable. The respondents are therefore directed to pay to Ms Kirk \$473.28 net as notice. The respondents are also directed to pay interest on this sum at 9% per annum from the date of dismissal until the date of payment.

[21] Ms Kirk said that after she was dismissed she immediately started looking for work. However, it was 5 weeks before she obtained new employment. I therefore direct the respondents to pay to the applicant the sum of \$1,893.12 net (being four weeks net pay in addition to notice awarded above) to compensate her for remuneration lost as a result of her unjustified dismissal.

Compensation pursuant to s. 123 (1) (c) (i)

[22] This was an arbitrary unjustified dismissal. I direct the respondents to pay to the applicant the sum of \$2,500 net to compensate her under this head.

Costs

[23] The respondents are directed to pay to Ms Kirk the sum of \$1,070.00 net in costs.

Janet Scott

Member Employment Relations Authority