

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 298/08
5121019

BETWEEN

MIRIAN LAUAGO
Applicant

AND

MARKETING PROMOTIONS
SYSTEMS LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: In person, for Applicant
No appearance for Respondent

Investigation Meeting: 12 August 2008

Determination: 18 August 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Miriam Lauago worked at Wisk from December 2004 until January 2008. Wisk is a home ware and kitchen shop, located in the Glenfield mall. Ms Lauago fitted her work at Wisk around her full-time study commitments; during term time she worked part-time hours, during semester breaks she worked full-time hours.

[2] The respondent, Marketing Promotions Systems Limited, purchased Wisk in October 2007. Ms Lauago worked for the respondent company from that time until her employment ended. She says she was unjustifiably dismissed from her employment.

[3] The respondent has not filed a statement in reply.

[4] The parties have attended mediation at the direction of the Authority.

[5] The respondent did not appear at the scheduled investigation meeting. I am satisfied that the respondent was properly served with the statement of problem, notice of investigation meeting and direction to mediation. After the scheduled commencement time of the investigation meeting I had the support officer attempt to contact the respondent to ascertain whether or not it would attend. As no statement in reply had been filed the Authority held no contact details for the respondent. The support officer searched the White Pages for a telephone number for the respondent and its sole director, Jason Fenandos. There were no listings. She then obtained the telephone contact number for the respondent held by Mediation Services. The number was disconnected.

[6] I am satisfied that the respondent has been given a fair opportunity to defend this employment relationship problem, that it has been advised of the consequences of failing to attend the scheduled investigation meeting and has not advised the Authority of any reason why it could not attend.

[7] It was on this basis that I proceeded with the investigation meeting 20 minutes after the scheduled commencement time and it is on this basis that I proceed to determine the employment relationship problem in accordance with the provisions of Clause 12 of the Second Schedule of the Act.

[8] In determining this employment relationship problem I rely solely on the evidence provided by and in support of Ms Lauago. This is a consequence of the respondent's failure to provide a statement on reply or attend the investigation meeting.

Background

[9] At the end of Ms Lauago's shift on Sunday, 13 January 2008, without warning Mr Fenandos presented her with a letter and asked her to read it.

[10] The letter was from a co-worker and recorded that on 2 January 2008 she (the co-worker) saw Ms Lauago wearing work merchandise, a necklace, during work time and observed her leave the store wearing it. The letter goes on that the co-worker advised Mr Fenandos of this incident, that the necklace was not returned when Ms

Lauago was next at work, 4 January 2008, Mr Fenandos told the co-worker he had spoken with Ms Lauago about the necklace and had asked her to return it. Also, the co-worker records she later saw the necklace in the showcase and new padlocks had been fitted in the store, for which all staff did not have keys.

[11] Ms Lauago read the letter up to where it stated the necklace had not been returned. She said to Mr Fenandos that removing the necklace was a mistake, he had acknowledged that in an earlier conversation and the necklace had been returned.

[12] In response Mr Fenandos said *“What you did was criminal, I will take you to court and fight you in court.”*

[13] Ms Lauago asked for a copy of the letter. Mr Fenandos said the provided copy was hers. She then left the store.

[14] Ms Lauago said she was shocked and upset and was not sure what was happening. Her next rostered work day was 17 January 2008.

[15] On 15 January 2008 Mr Fenandos sent Ms Lauago the following txt message:

“Your pay including holiday is banked in yr ac”

[16] Ms Lauago said that she understood she had been dismissed and that receiving her holiday pay was final.

[17] Notwithstanding, on Wednesday, 16 January 2008 she attended Wisk, with her mother as a witness, to hand in a letter terminating her employment with Wisk and return her work key. She asked Mr Fenandos to acknowledge receipt of the key by signature, which he did. She said she took this step in relation to the return of the key because she did not want to be accused of anything else.

[18] Ms Lauago said she wrote the 16 January 2008 letter because she felt hurt and upset and wanted to terminate the relationship with the respondent. She said she was not thinking straight and is now of the view Mr Fenandos terminated her employment with the respondent.

[19] There was no further contact between the parties until mediation.

Was Ms Lauago dismissed?

[20] The termination of Ms Lauago's employment was at the initiation of Mr Fenandos. Putting Ms Lauago's final pay in her bank account and notifying her by txt message terminated the employment.

[21] I find Ms Lauago was dismissed.

Was Ms Lauago's dismissal unjustified?

[22] Serious issues were raised in the letter of complaint. Removing merchandise without authorisation is a serious issue. It was appropriate that Mr Fenandos raised those issues with Ms Lauago.

[23] Mr Fenandos was obliged to raise his serious concerns with Ms Lauago in a manner which would give her a fair opportunity to provide an explanation. This did not occur. Ms Lauago did not have a fair opportunity to put her explanation to Mr Fenandos before he advised her that it was his view her actions were criminal.

[24] Ms Lauago had a reasonable explanation for her conduct; she was wearing the necklace to merchandise it, she forgot to remove it at the end of her shift, she took it off when she discovered she was still wearing it, she told Mr Fenandos the following day she would return it when he raised it with her during a telephone conversation and she returned the necklace during her next shift.

[25] I find Ms Lauago's dismissal relates to the letter of complaint tabled on 13 January 2008 and Mr Fenandos' expressed conclusions that her actions were criminal. Mr Fenandos did not have a reasonable basis to find Ms Lauago's actions were criminal. Ms Lauago was not given a fair chance to provide an explanation for her actions. If she had then Mr Fenandos would have been aware of all the circumstances in which the events took place and could not have reasonably concluded that Ms Lauago intended to permanently deprive the respondent of its property.

[26] For these reasons I find Ms Lauago's dismissal was unjustified.

Remedies

(i) lost wages

[27] Ms Lauago seeks reimbursement of lost wages consequent to her dismissal. She said it took her a month and a half to find another job after her dismissal and that she commenced that new job on 26 February 2008. She said Mr Fenandos had guaranteed her full time duties until she returned to her studies in March.

[28] Ms Lauago is entitled to reimbursement of six weeks wages calculated at \$13.50 per hour for 40 hours per week.

[29] **Marketing Promotions Systems Limited is ordered to pay Ms Lauago \$3240 (gross) pursuant to section 123(1)(b) of the Employment Relations Act 2000.**

(ii) hurt and humiliation

[30] Ms Lauago said the removal of the necklace was an honest mistake and she was shocked and intimidated by Mr Fenandos' raising the issue with her on 13 January 2008. She seeks a payment equivalent to three months wages under this heading.

[31] **Marketing Promotions Systems Limited is ordered to pay Ms Lauago \$2000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

Contribution

[32] I accept that Ms Lauago made an honest mistake wearing the necklace out of shop. However, she ought to have alerted her employer immediately to the mistake. This is particularly so given, on her evidence, Ms Lauago had not discussed with Mr Fenandos the long standing practise of staff wearing jewellery to merchandise it.

[33] The failure to immediately draw her employer's attention to the mistake, when he did not know staff wore merchandise, was conduct which contributed to the circumstances which have given rise to her personal grievance.

[34] The remedies awarded to Mr Lauago pursuant to section 123 of the Employment Relations Act 2000 are to be reduced by 10% pursuant to section 124 of the Employment Relations Act 2000.

Wage arrears

[35] Ms Lauago says Mr Fenandos increased her pay rate to \$13.50 per hour on 10 December 2007 and then unilaterally reduced it without explanation to \$13.00 per hour from 8 January 2008 until 13 January 2008 when her employment ended. She has provided wage slips in support of this claim.

[36] Marketing Promotions Systems Limited is ordered to pay Ms Lauago wage arrears of \$34.40 (gross) pursuant to section 131 Employment Relations Act 2000.

Holiday pay

[37] Ms Lauago says under the terms of her written employment agreement she is entitled to statutory holiday pay for Christmas Day 2007. I accept this is the case as is the relevant daily pay sought.

[38] Marketing Promotions Systems Limited is ordered to pay Ms Lauago \$121.50 (gross) pursuant to section 49 of the Holidays Act 2003 plus 8% holiday pay calculated at \$9.72.

Costs

[39] Ms Lauago is entitled to be reimbursed the \$70 filing fee incurred in lodging this application with the Authority.

[40] Marketing Promotions Systems Limited is ordered to reimburse Miriam Lauago the \$70 filing fee.

Marija Urlich

Member of the Employment Relations Authority