

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 308
3007331

BETWEEN SANJANA PRAKASH
 Applicant

A N D WENDCO (NZ) LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: John Crocker, Advocate for Applicant
 Justine Foden, Advocate for Respondent

Investigation Meeting: 1, 2 and 28 August 2017 at Auckland

Submissions Received: 28 August 2017 from Applicant
 28 August 2017 from Respondent

Date of Determination: 5 October 2017

DETERMINATION OF THE AUTHORITY

- A. The dismissal of Ms Sanjana Prakash by Wendco (NZ) Limited was justified. For that reason Ms Prakash does not have a personal grievance.**
- B. Costs are reserved.**

Employment relationship problem

[1] The applicant, Ms Sanjana Prakash, was dismissed from her employment on 17 November 2016 by the respondent, Wendco (NZ) Limited (Wendy's) for serious misconduct following a disciplinary investigation. The dismissal was confirmed in a letter to Ms Prakash dated 21 November 2016 from the Human Resources (HR) Manager of Wendy's at the time, Ms Cathy Matthews.

[2] Wendy's is a quick service restaurant providing fast food meals from outlets throughout New Zealand. Ms Prakash worked at Wendy's in Te Atatu as a crew member for approximately nine years. For two of the nine years, she was a shift supervisor. Ms Prakash says that on 25 July 2016, she joined Unite Union (the union). Ms Prakash says it was after joining the union that she was subjected to unfair scrutiny by Ms Matthews, and by Ms Anjana Prasad, the District Manager.

Ms Prakash's claims

[3] On 23 and 31 August 2016, Ms Prakash says she was required to attend meetings with Ms Matthews and Ms Prasad about "clocking in" for somebody else and about giving food to another crew member, without receiving payment for it. Following hearing Ms Prakash's explanation at a meeting with her union representative, Mr Mike Treen, this investigation was discontinued by Wendy's.

[4] However, Ms Prakash says another investigation was immediately commenced by Wendy's in to an allegation of serious misconduct. The allegation was that on 16 June 2016 she gave food to her son which was not paid for.

[5] Ms Prakash says the transaction on the 16 June 2016 had occurred approximately 2 $\frac{1}{2}$ months before the allegation was raised with her. Ms Prakash could not remember the details of the transaction and says she did not give away any food to her son without payment.

[6] Ms Prakash says the investigation process for the first allegations relating to "clocking in and out" and giving food to a crew member and the subsequent investigation relating to the 16 June 2016 transaction were carried out in an unfair manner. Specifically, Ms Prakash says when she was first spoken to on 23 and 31 August 2016, she was not aware of the allegations against her, was not invited to have a representative present and did not have a representative present.

[7] With regard to the second investigation concerning the 16 June 2016 transaction, Ms Prakash says the investigation was unfair, and the outcome was predetermined.

[8] Ms Prakash says her dismissal was unjustified, both substantively and procedurally and she seeks remedies including reinstatement to her former position.

Ms Prakash also seeks compensation for the hurt and humiliation and the loss of remuneration she says she suffered as a result of the grievance.

Response by Wendy's

[9] Wendy's says the meetings held with Ms Prakash concerning the "clocking in and out" and giving food to a crew member without payment were to get facts and were not disciplinary meetings. After obtaining the facts, hearing Ms Prakash's explanation and that of Mr Treen on her behalf, the investigation was discontinued.

[10] With regard to the incident on 16 June 2016, Ms Matthews says the investigation was thorough and fair. Ms Matthews and Ms Prasad met with Ms Prakash, Mr Treen and her support person to discuss the allegation. Ms Prakash explained that she was paid the exact amount of cash for the particular order by the customer, who she said was not her son.

[11] Ms Matthews says the video footage demonstrated that Ms Prakash did not take payment for the food order. Ms Matthews viewed an extensive amount of video footage after meeting with Ms Prakash. Following further meetings with Ms Prakash, representatives from the union and her daughter, Ms Matthews concluded that Ms Prakash had given food away to her son which was not paid for by him.

[12] Ms Matthews concluded this conduct amounted to serious misconduct. Ms Prakash handled cash and operated the till every day as part of her job. Ms Matthews says she no longer had trust and confidence in Ms Prakash to do her job. Ms Lendich, Wendy's CEO says she met with Ms Matthews before the decision to dismiss was made, viewed the video footage and notes of meetings and concurred with Ms Matthews that Ms Prakash had given food to her son without receiving payment. Ms Lendich agreed that this was very serious and that immediate dismissal was justified.

The investigation meeting

[13] As permitted under s.174E of the Employment Relations Act 2000 (the Act), this determination has not set out all the evidence required. The determination states findings, relevant facts, legal issues and makes conclusions in order to efficiently dispose of the matter.

[14] The investigation in the Authority took place over 3 days and took two full days. The investigation meeting was adjourned after the first 2 days in order for the Authority to summons and hear from Ms Ashika Prasad, the restaurant manager working at the time of the alleged incident on 16 June 2016.

[15] Ms Prakash, and Mr Mike Treen filed witness statements. Ms Prakash's daughter, Sheetal Shivaghni, who also works at Wendy's, attended the Authority's investigation meeting and answered questions. For Wendy's, Ms Matthews, Ms Anjana Prasad, and Ms Lendich, all filed witness statements. Ms Ashika Prasad answered questions by telephone.

[16] Each witness either swore on oath or affirmed their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[17] An independent interpreter proficient in the Hindi language attended the investigation meeting to assist the Authority with its investigation.

The issues

[18] The issues for the Authority to determine are as follows:

- (a) Was Ms Prakash's dismissal justified;
- (b) If the dismissal was not justified, what remedies should be payable to Ms Prakash;
- (c) If remedies are payable to Ms Prakash, did she contribute to the dismissal, and if so, should the remedies be reduced by the Authority pursuant to s.124 of the Act?

Was Ms Prakash's dismissal justified?

[19] Ms Prakash was employed by Wendy's as a crew member and this was the position she was employed in at the date of her dismissal. As a crew member, Ms Prakash's duties included taking food orders, completing food orders and using the till or the EftPos machine to receive payment for food orders made. Ms Prakash was dismissed by Wendy's as a result of conduct which it says amounted to serious

misconduct when she was servicing an order on 16 June 2016 from the drive-through line at Wendy's in Te Atatu.

Joining the union – 25 July 2016

[20] Ms Prakash decided to join the union on 25 July 2016 after meeting one of the union organisers at Wendy's. Ms Prakash says she wished to join the union in order to enjoy more benefits than she was currently receiving. Ms Prakash completed an application on-line and emailed it to the union. The following day, the union sent Ms Prakash's application for union membership to Wendy's and asked for union fees to be deducted from Ms Prakash's wages.

[21] Ms Prakash says shortly after joining the union, she was targeted by Ms Matthews and Ms Prasad.

Meeting with Ms Prakash - 23 August 2016

[22] On 23 August 2016, Ms Prakash attended a meeting with Ms Matthews and Ms Prasad. Ms Prakash says she was not given any notice of the meeting which occurred in the dining room at Wendy's. Ms Matthews and Ms Prasad wanted to talk to Ms Prakash about clocking in and clocking out using someone else's number on two occasions.

[23] Ms Prakash gave her explanation that she had clocked in using Sheetal's (her daughter) login number because her daughter was unable to work the shifts. Ms Prakash explained that because she had already worked a number of days in a row, it meant that if she worked Sheetal's shifts it would mean her own hours would exceed 50 which were too many for the week and not allowed by Wendy's.

[24] To avoid this, Ms Prakash worked her daughter's shifts and clocked in using her daughter's login details. Ms Prakash says she explained to Ms Matthews and Ms Prasad that the managers at the restaurant at the time knew about it. She apologised. Ms Prakash's explanation was accepted and that investigation was discontinued.

[25] I do not consider that investigation was to target Ms Prakash because she had joined the union. Ms Prakash had clocked in and out for someone else, her daughter, and Wendy's wanted an explanation. That was understandable. Ms Matthews and

Ms Prasad were satisfied with the explanation and the investigation was discontinued. This was subsequently confirmed in writing by Wendy's.

Investigation into incident on 16 June 2016

[26] On 23 August 2016, while discussing another matter with Ms Ashika Prasad, Ms Anjana Prasad was alerted to an issue with a transaction at the drive thru counter at Wendy's Te Atatu on 16 June 2016. Ms Prakash was at the counter and it was her transaction. Ms Ashika Prasad was the restaurant manager at the time the transaction took place. Ms Ashika Prasad had been on annual leave and did not raise the matter until after she returned.

[27] Ms Ashika Prasad described Ms Prakash's actions in pushing her away from the cash register when her son came through as "weird". Ms Ashika Prasad told Ms Anjana Prasad that she had kept details including a receipt. Ms Anjana Prasad asked her to provide the details to her.

[28] On 24 August 2016, Ms Anjana Prasad sent a text to Ms Ashika Prasad asking her to provide the receipt. Ms Ashika Prasad replied that she was in hospital. Ms Anjana Prasad waited until Ms Ashika Prasad was out of hospital to follow up again.

[29] When Ms Ashika Prasad returned from sick leave on 31 August 2016, she provided the time and date of the transaction to Ms Anjana Prasad who viewed the camera footage. Ms Anjana Prasad was of the view that the camera footage showed Ms Prakash giving food to her son without receiving payment for it. Ms Prakash's son had previously worked at Wendy's and Ms Anjana Prasad recognised him in the car which pulled up to the drive thru window.

[30] Ms Anjana Prasad raised the matter with Ms Cathy Matthews and set out in a written statement dated 1 September 2016, details of the matter and how it had been raised with her.

Meeting with Ms Prakash – 31 August 2016

[31] On 31 August 2016, Ms Matthews and Ms Anjana Prasad visited Ms Prakash at work to tell her the clock in/clock out matter had been resolved. However, there was another issue they wanted to discuss with her.

[32] Ms Matthews showed Ms Prakash camera footage on her laptop which Ms Matthews said seemed to show that Ms Prakash was giving away food. Ms Prakash denied that she had given any food away.

[33] Ms Prakash wrote to the union on the same day saying that she felt these actions by Ms Matthews and Ms Prasad were evidence that she was being targeted by Wendy's for joining the union.

Disciplinary process

Letter of 22 September 2016

[34] On 22 September 2016, Ms Matthews wrote to Ms Prakash inviting her to attend a disciplinary investigation meeting. The letter was copied to Mr Treen from the union. The letter was as follows:

I am writing to invite you to attend a disciplinary investigation meeting on Friday 30 September 2016 at 10am at Support Office, Level 1, 288 Te Atatu Road, Auckland.

The purpose of this meeting is to consider the following serious misconduct allegation that on:

- Thursday 16 June 2016 you gave away food that was not paid for to a customer.

Specifically this customer was your son and you have given out the order without taking payment.

This raises serious concerns in the trust and confidence we place in you as Crew of the Te Atatu restaurant to do your role with honesty and integrity. You are welcome to have a support person or representative present at this disciplinary meeting.

I have enclosed all relevant documents and camera footage for your perusal.

At this meeting you will be given an opportunity to provide more information if needed. Full consideration will be given to your explanation before any decision is reached, which may have disciplinary action following. Disciplinary action may include a verbal warning, written warning or summary dismissal. A decision may be made in your absence if you fail to attend this meeting.

If you are unable to attend this meeting please call on the contact numbers below. If you have any queries or questions regarding this letter, please call us as soon as possible ...

Kind regards,
Cathy Matthews

[35] The documents attached to the letter from Ms Matthews to Ms Prakash included the statement from Ms Anjana Prasad dated 1 September 2016. Ms Anjana Prasad's statement included the following:

“...Ashika said I wanted to tell you before I went on my annual leave, I've got a receipt with me that she thinks where Sanjana had done something weird and was pushing her away from the register when her son came through. Ashika said I've got the dates and everything...Ashika came back to work and spoke to her on 31 August and was told it was on drive thru on 16 June 2016 and approximate time of 2pm. I looked at the camera footage and could see that it looked like her son who used to work for us. I found the footage, it looks like Sanjana's son come in DT [drive thru], place his order (receipt attached), Sanjana pretends to take money/swipe card, cash drawer opens, she closes the drawer. She also gives out Coke float instead of small Coke only. I have put bookmarks if you want to watch footage. Attached is the cash envelope as well, she is only \$2.50 up in cash, so it is strange that her register is nearly balanced. Ashika does not have the receipt any more from that transaction.

[36] Mr Treen and Ms Prakash viewed the video footage and asked further questions about the allegation that Ms Prakash had given away food on 16 June 2016 to her son.

[37] Following a request from Mr Treen, Ms Matthews did provide him with notes from a telephone call that she had made to Ms Ashika Prasad who was the restaurant manager at the time of the alleged incident on 16 June 2016.

[38] The disciplinary meeting did not proceed on 30 September 2016 so that Wendy's could provide further information requested by Ms Prakash and Mr Treen. Following provision of the information requested, a further disciplinary meeting was proposed for 10 October 2016. The meeting proceeded. Ms Prakash, Mr Treen and Ms Sheetal Shivaghni attended. Ms Matthews conducted the meeting.

Disciplinary meeting – 10 October 2016

[39] Ms Prakash says that she was unable to remember the specific events of 16 June 2016 because they had occurred so long before the meeting of 10 October 2016. Ms Prakash says she did not recognise the driver of the car who she was serving, as her son as the video was not clear. She also told Ms Matthews that she had taken the exact change from the customer and put it to the side of the till, a practice that she did all the time and that other managers were aware of.

[40] After meeting with Ms Prakash and hearing what she had to say, Ms Matthews made further inquiries and watched additional camera footage for over a number of days to see how Ms Prakash acted on other occasions when she had received exact change from a customer paying for a transaction. After viewing the video footage, Ms Matthews was not satisfied with Ms Prakash's explanation regarding how she took the cash from the customer on 16 June 2016.

[41] Ms Matthews was of the view that the video footage showed that there was no cash being exchanged. Ms Matthews decided that a further investigation meeting was required with Ms Prakash and she wrote a letter inviting her to a disciplinary meeting on 3 November 2016.

Letter of 28 October 2016

[42] In her letter of 28 October 2016, Ms Matthews refers again to the specific date on which the alleged incident occurred and to the allegation that the customer in question was Ms Prakash's son. Ms Matthews then stated in relation to Ms Prakash's statement at the disciplinary meeting on 10 October 2016:

... you stated that the customer provided the correct amount of money, in cash and you put everything in the left side of the drawer. I have therefore reviewed the footage on 16 June 2016, and I have viewed other footage that I selected randomly from days when you were on the drive thru register to look for other occasions where I may have been able to observe the practice that you were providing. I was not able to find another occasion when I observed the practice of putting the cash in the left-hand side, or such a swift till opening/closing, even on other occasions where you appear to have received the exact cash. From my further viewing of 16 June 2016, I have the following observation and I wish to provide you with an opportunity to comment:

- It looks to me like you were given a credit card or EftPos card, which I think is visible in your hand in this transaction. If that is the case, can you please explain why it was not swiped for payment.
- I do not believe that your explanation, that you were able to put notes and coins in the left hand of the till in the time available is credible. From my further viewing on other days, I have the following observation, and further questions. However I have not seen any evidence of the practice that you describe. The transaction in question is the only one that can be seen where the drawer is opened and money allegedly put on the left side of the register.

- Can you please explain this? Why was this specific transaction on 16 June 2016 treated differently?

[43] The letter goes on to include the usual statement that disciplinary action may follow. The meeting was unable to go ahead on 3 November 2016 and proceeded on 16 November 2016.

Disciplinary meeting – 16 November 2016

[44] Ms Matthews says Mr Treen became extremely agitated at the meeting and shouting aggressively at her. Ms Matthews says she had no alternative but to leave the room for her own wellbeing. After Ms Matthews obtained the support of the company accountant, the meeting proceeded.

Disciplinary meeting – 17 November 2016

[45] A further meeting was held on 17 November 2016. Ms Matthews and the company accountant attended. Ms Prakash attended with Mr Treen. Ms Matthews came to the conclusion that she was not satisfied that payment had been taken by Ms Prakash for the transaction on 16 June 2016. Accordingly, it was her view that Ms Prakash's conduct constituted serious misconduct for which immediate termination was appropriate.

Authority's investigation meeting

[46] The Authority viewed the camera footage of the incident on 16 June 2016. Ms Ashika Prasad was summonsed to attend the meeting and respond to the Authority's questions.

[47] Ms Ashika Prasad is Ms Sanjana Prakash's cousin. She is also a current employee at Wendy's. In my view these were factors in her reluctance to attend the Authority's investigation meeting.

[48] Ms Ashika Prasad is currently employed as a co-manager at Wendy's and has been employed by Wendy's for four years. Her role is to manage the store, the staff and oversee cash handling. Ms Prakash reported to Ms Ashika Prasad when she was on duty. Ms Ashika Prasad confirmed that she worked with Ms Prakash on 16 June 2016. Ms Prakash had never seen the video footage of the incident. When asked about the incident on 16 June 2016, Ms Prasad said that Ms Prakash's son, Shiveen, who she knew and recognised, was at the drive thru window of Wendy's in a car.

Normally, Ms Ashika Prasad says, a customer will place an order at the speaker box, before driving to the drive thru window, but Shiveen did not. He drove straight to the window. Ms Ashika Prasad was wearing a headset at the time and heard the order. Ms Ashika Prasad says that Shiveen did not place an order at the speaker box as is usual for customers, rather he placed it directly at the drive thru window.

[49] Ms Prakash put her arm out when Ms Ashika Prasad came into her area. When she took the order Ms Prakash told Ms Ashika Prasad to pack the order quickly as it was getting late and there were cars waiting. Ms Prasad packed the order and she saw Ms Prakash hand the order to Shiveen.

[50] Ms Ashika Prasad says she saw Ms Prakash's son give her an EftPos card. She saw the till opening and when she looked at the receipt, the order had been paid in cash, not with the EftPos card. When asked why she had not reported the matter, Ms Ashika Prasad said she was not sure what had happened and she did not take it any further because she was going on holiday. When asked whose car Shiveen was driving, Ms Ashika Prasad said it was Ms Prakash's car.

[51] I prefer the evidence of Wendy's witnesses. Ms Prakash gave evidence which was unreliable in my view. Ms Prakash claimed not being able to recall the transaction, but at the disciplinary investigation undertaken, Ms Prakash was able to explain the actual transaction to Ms Matthews and Ms Anjana Prasad. Ms Prakash told the Authority that she could not recognise the driver of the car as her son or a customer she knew. This seems unusual, as the footage was clear enough to see the driver of the car and if the driver was Ms Prakash's son, he would have been recognisable.

[52] Ms Anjana Prasad recognised Ms Prakash's son in the camera footage as the customer who was served by and to whom Ms Prakash gave the food. This was confirmed at the Authority's investigation meeting by Ms Ashika Prasad. There was no reason for either to lie about the identification of Ms Prakash's son, in my view.

[53] Ms Anjana Prasad was a witness who gave clear and in my view reliable, consistent evidence about how she had been told about the 16 June 2016 incident and steps she took to investigate the matter further.

The law

[54] The test of justification is set out in s.103A of the Employment Relations Act 2000 (the Act). It is “whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred”.

[55] As the Court of Appeal stated in *Northern Distribution Union v BP Oil New Zealand Ltd*¹ a definition of serious misconduct is not possible as it is always a matter of fact and degree. The Court concluded that “usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship”.

[56] In my view, a fair and reasonable employer could in the circumstances have reached the conclusion that on 16 June 2016, Ms Prakash did give her son food which he did not pay for. Ms Matthews and Ms Anjana Prasad investigated the matter fully and having viewed the video footage, interviewed Ms Prakash with her representative, Mr Treen. After undertaking further investigation, Ms Matthews came to the conclusion that Ms Prakash had given her son food without him paying for it. This was the information that was available to the employer at the time of making its decision and in my view it was able to reach the conclusion that it did and dismissal was appropriate in the circumstances.

[57] Ms Prakash was in a position of trust when handing cash and the till. Wendy’s has a number of policies dealing with cash handling and theft, which are essential to its business. Section 103A of the Act endorses a range of responses in terms of disciplinary outcome and a range of approaches in terms of reaching that disciplinary outcome.

[58] There was clear evidence in my view that was available to Wendy’s to conclude that Ms Prakash had given her son food without receiving payment for it. It was open for Wendy’s in the circumstances to decide this amounted to serious

¹ [1992] 3 ERNZ 483 (CA) at 487

misconduct. Termination was not a disciplinary outcome that was outside the range of responses available to Wendy's.

[59] The Authority's role is to consider whether the outcome Wendy's came to was one that was open to it as a fair and reasonable employer in the circumstances. It is my view that Wendy's dismissal of Ms Prakash was such a decision that a fair and reasonable employer could make in the circumstances.

[60] For these reasons, Ms Sanjana Prakash does not have a personal grievance and accordingly no remedies are required.

Costs

[61] Costs are reserved. Wendy's has 14 days within which to file a memorandum as to costs and Ms Prakash has 14 days within which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority