

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 55  
5551607

BETWEEN                      JOANNE PUPUALII  
   Applicant  
  
A N D                              HAPPY DAYS MANAGEMENT  
   LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Danny Gelb, Advocate for Applicant  
   May Moncur, Counsel for Respondent  
  
Investigation Meeting:        15 & 16 February 2016 at Auckland  
  
Submissions Received:        16 February 2016 from Applicant and from Respondent  
  
Additional information        18 February 2016 from Respondent  
  
Date of Determination:        24 February 2016

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]     The Applicant, Ms Joanne Pupualii, claims that she has been unjustifiably dismissed for serious misconduct by the Respondent, Happy Days Management Limited (Happy Days).

[2]     Happy Days denies that Ms Pupualii was unjustifiably dismissed and claims that she was justifiably dismissed on the grounds of serious misconduct such that her misconduct destroyed Happy Days' trust and confidence in her.

**Issue**

[3]     The issue for determination is whether or not Ms Pupualii was unjustifiably dismissed by Happy Days.

## **Background facts**

[4] Happy Days is a buffet style restaurant (the Restaurant) which at the time Ms Pupualii was employed had approximately twenty employees working on a shift basis, ten working in the kitchen area and ten front of house staff including four members of the management team.

[5] Ms Pupualii commenced employment in 2012 as a pastry chef on a casual basis; her employment subsequently becoming full-time employment. Her duties were the baking and display of desserts on the dessert station on the buffet table.

[6] Mr Tony Zheng, a Duty Manager at Happy Days, said that the Restaurant offered a breakfast buffet service between 7.30am and 10.30am, a lunch buffet service between 12pm to 2.30pm, and a dinner buffet service between 5.30pm and 9pm, operating until 10pm on Friday and Saturday.

[7] He explained that it was the front of house employees' job to keep the buffet area clean. The kitchen employees including Ms Pupualii were responsible for placing the dishes on the buffet and for removing empty dishes and replacing them with full ones during the course of the buffet service. At the end of an evening, the kitchen staff would remove the dishes from the buffet table and Ms Pupualii would be responsible for removing the desserts and placing them in a storage area or disposing of what was left.

[8] Mr Brian Anesto-Juli, Ms Rachel Tafale-Daoe and Ms Lisa Rayner, all previous employees at Happy Days, said it was the usual practice for the kitchen staff to shake food particles onto the floor when clearing the buffet.

[9] Ms Pupualii said it was her usual practice and that of the other kitchen staff to clear the white cloths that covered the buffet table and to shake any food particles on the floor for the front of house staff to Hoover and sweep up at the end of the evening.

[10] She said that she would also throw bits of food onto the floor; and that there were paper serviettes under the salad dishes which were seated on ice which she would scrunch up and throw on the floor. She said these items would be cleaned up by the front of house employees because: "*they got paid to do that*".

[11] Ms Marlene Kingi, a Duty Manager at Happy Days, said that provided there were no customers still remaining in the Restaurant, she or Mr Zheng would advise the employees that the buffet could be cleared. Otherwise the normal time to commence clearing the buffet was at 9.00 p.m. after the buffet closed. Mr Zheng and Mr Wong's evidence was that it would take approximately 15-30 minutes to clear the buffet at the end of an evening.

[12] Ms Kingi agreed that during the course of a buffet service some food particles would be dropped on the floor and that this was normal. When advised that there was a food spillage on the floor she said the front of house employees would be told to clear it immediately in order for the buffet to be in a clean condition for the customers.

*Thursday 15 January 2015*

[13] On the evening of Thursday 15 January 2015, Ms Kingi said she was on duty and had seated some customers in the Restaurant at 8.30 p.m. and explained to them that the buffet would close at 9.00 p.m.

[14] Ms Kingi said she had spoken to Mr Hasan Ullah as he had commenced clearing the buffet at 8.45 p.m. although there were still customers in the Restaurant. At that time Mr Ullah was employed as a senior chef at Happy Days and was responsible for the preparation and presentation of the hot dishes for the buffet. Mr Zheng, who had been on duty in the bar area of the Restaurant, said that Ms Kingi had spoken to him, told him that she had asked Mr Ullah to stop clearing the buffet and he had told her to: "*F... off*".

[15] Mr Ullah said that at about 8.45 p.m. to 8.50 p.m. he had started to clear away the dirty dishes on the hot side of the buffet. He said a customer had arrived at the dessert section of the buffet and he had asked him if he and the customers with him would require further hot food, but the customer had responded that they just required dessert. So he had continued clearing the buffet and removing the hot food dishes.

[16] Ms Kingi said that by 9.05pm both Mr Ullah and Ms Pupualii had clocked out on the time clock and left the Restaurant, following which a front of house employee had spoken to her. The employee was clearly upset because she had had to clean some food spillage on the floor and carpet. Ms Kingi had inspected the buffet; and found that there were food items thrown on the floor and it appeared that cream had been deliberately smeared onto the buffet area.

[17] Ms Kingi said that because what she saw was exceptional and not the usual amount of food spillage at the end of the evening; she had taken photographs and informed Mr Zheng of her concern. She believed that the customers who were still in the Restaurant had looked at her askance and she had the impression that they had not approved of the early clearance of the buffet table.

[18] Mr Zheng said he had gone into the Restaurant area and seen there was cream smeared over the buffet area and also on the floor. He said it was obvious to him that someone had deliberately made the food mess when clearing the buffet.

[19] After inspecting the incident, Mr Zheng had then rung Mr Harry Wang, the General Manager and joint owner of Happy Days, and told him what had occurred. Mr Wang had left a family dinner and arrived at the Restaurant and inspected the CCTV footage in order to check what had been reported to him by Mr Zheng.

[20] Mr Wang explained there were four CCTV cameras located in and outside the Restaurant. He could not see clearly what was occurring on one of the cameras which recorded the buffet area, however on the other camera covering that area he could clearly see Ms Pupualii throwing the paper serviettes from the buffet table on to the floor.

[21] Mr Wang said he had been concerned at what he had seen because it was not normal practice and had upset a front of house employee, so he had decided to hold a meeting with Mr Ullah and Ms Pupualii the following day.

[22] Mr Bruce Wong, Restaurant Manager, who was responsible for the overall general operation of the Restaurant, said he had not been on duty the evening of 15 January 2015 but had received a telephone call from Mr Wang that night. Mr Wang had told him that the buffet had been cleared early, there had been a food mess in the buffet area and there would be a meeting with Mr Ullah and Ms Pupualii the following day.

*Friday 16 January 2015*

[23] Ms Pupualii and Mr Ullah said that when they arrived for work the following morning, Friday 16 January 2015, they had been called into a meeting by Mr Wang. Attending the meeting were Mr Wang, Mr Wong and Mr Zheng.

[24] Ms Pupualii said that the meeting had commenced by Mr Wong asking her what had occurred the previous evening and inquiring why the dessert section of the buffet had been left in an unacceptable condition.

[25] Mr Ullah said that he had explained during the meeting that the messy condition of the buffet the previous evening had been caused by him when the trolley he had been using to clear away the hot dishes had run over his foot causing it to tip and cause spillage from the dishes on it. He had also moved the trolley very quickly towards the kitchen area as he was in pain and this had caused some additional spillage on the way.

[26] Ms Pupualii said that she had had an opportunity to explain how she felt during the meeting and to give her version of events.

[27] Part way through the meeting there had been an altercation between Mr Wang and Mr Ullah, during which Mr Wang had sworn at Mr Ullah because he was constantly interrupting when Ms Pupualii was being questioned, and he had then left the meeting.

[28] Ms Pupualii said that after Mr Ullah had left the meeting there had been other issues raised with her, including her unacceptable work ethics and complaints that had been received from other employees about her bullying and inappropriate communication with them. Ms Pupualii said these issues had never been raised with her before and she had never been subject to any form of disciplinary procedure whether formal or informal prior to this meeting.

[29] Ms Pupualii said the meeting ended with Mr Wang informing her that she could take the following two days off with full pay and that the meeting would reconvene on Monday 19 January 2015.

[30] Mr Ullah said he had become angry when he saw Ms Pupualii exit the meeting room as she was visibly upset. He had re-entered the meeting room and informed Mr Wang that he was resigning. He wrote out his resignation letter and passed it to Mr Wang, who accepted the resignation and closed the meeting.

[31] Mr Ullah said that he had been angry because Mr Wang had sworn at him and Mr Wong had ejected him from the meeting. When Ms Pupualii had come out of the meeting he could see that she was upset and this had made him angrier than he had felt following his altercation with Mr Wang during the meeting, and that was the reason for him deciding to resign his employment.

[32] Mr Wong said that Ms Pupualii and Mr Ullah left the premises together, although when questioned at the Investigation Meeting he had stated that he had not seen them do so.

[33] Mr Zheng said he had seen Ms Pupualii and Mr Ullah leave the restaurant together and heard them both say: "*F...ing Chinese*". He had reported this to Mr Wang.

[34] Mr Ullah said he was still very angry as he left the Restaurant where Ms Pupualii was waiting for him in their car and he was swearing and showing his stomach and bottom to the video cameras as he left the Restaurant and saying: "*F... you, you f...ing Chinese*".

[35] Ms Pupualii said she had left the Restaurant and was waiting in their car for Mr Ullah who had gone back into the meeting room. She said she did not know Mr Ullah had resigned until he got into the car and told her.

[36] Ms Rayner said she had been on duty on the morning of Friday 16 January 2015. She had seen Ms Pupualii leave the meeting in an upset state, had briefly spoken to her, following which Ms Pupualii had left the Restaurant to wait in the car for Mr Ullah. Mr Ullah had left the Restaurant shortly afterwards.

*Text Messages*

[37] On Saturday 17 January 2015 Ms Pupualii sent a text to Mr Wong in which she stated:

*Hey Bruce, Just needing to know what your decision is with my current employment at Happy Days, so I can take on another job or not. I am sure you can understand where I'm coming from. Thanks Jo.*

[38] Mr Wong replied:

*Hi Jo. If you have another offer for a job then grab it dear. I really don't think you will regret it. You need to gain experience dear and to be honest Happy Days is pretty limited. Let me know what you decide. Thanks.*

[39] Ms Pupualii replied:

*I haven't done anything yet Bruce. I just wanted to know what you've decided because of what Harry said about seeing you on Monday at 11am. Thanks for the advice. I am not resigning. I just needed to know if you've let me go or not.*

[40] The following day Ms Pupualii emailed Mr Wong again saying:

*Hi Bruce, do I still have to come see you tomorrow at 11am like Harry said? Or ?*

[41] Mr Wong responded:

*Hi Jo ... its not absolute necessary dear. I'll have Daisy prepare your final pay etc. Have you found another job as yet?*

[42] Ms Pupualii replied:

*So that means I'm fired is it?*

*Because I didn't resign Bruce.*

[43] Mr Wong replied:

*Yes dear. I know you didn't resign. Harry has decided that in light of all that has transpired it's in the company's best interest to terminate your employment with us.*

[44] Mr Wong said that on Sunday 18 January 2015 Mr John Lala, a chef at Happy Days, showed him a text message he had received from Mr Ullah stating that he had found new employment in Shortland Street as head chef and that Ms Pupualii had also been offered a job. The text read:

*I threw my resignation in the f...ing Chinese face. I am working at Shortland Street as a head chef and Joanne will start on Monday. We alright now.*

[45] Mr Wong said he had understood from the text message to Mr Lala that Ms Pupualii had obtained other employment and concluded that she had accepted it. That had been the reason he had agreed it was not necessary for her to attend the scheduled Monday meeting.

[46] Mr Ullah said he had not told Ms Pupualii he had sent the text message about the potential job at Shortland Street which did not, in fact, transpire. Ms Pupualii said she did not know that Mr Ullah had been offered a job and he had not spoken to her about it.

#### *Decision to Dismiss Ms Pupualii*

[47] Mr Wang said that Mr Zheng had approached him after the meeting to say he had heard Ms Pupualii swearing at management. He said Mr Zheng had been particularly upset when he had heard one of them say: "*F... the Chinese.*"

[48] He had also understood from Mr Wong that Ms Pupualii had told Ms Rayner that she would not clear the buffet properly as 'she was not paid enough to do that'.

[49] He said he had been deeply disappointed and disturbed to hear about these incidents as they indicated to him that Ms Pupualii and Mr Ullah were disruptive employees, and it became clear to him that Ms Pupualii could not work as part of an effective staff team.

[50] On Sunday 18 January 2015 Mr Wong had contacted him and advised him that Ms Pupualii and Mr Ullah had both found new jobs. He said he had felt relieved at their gaining alternative employment, and he told Mr Wong that he had in any event decided to terminate Ms Pupualii's employment. At this point he said he did not know whether or not Ms Pupualii was going to attend the scheduled Monday meeting.

[51] He said he felt he had no choice but to dismiss Ms Pupualii because (i) he could not trust an employee who hated him, management and their colleagues, (ii) the employment relationship had been damaged beyond repair, and (iii) he had also been personally hurt by her actions.

[52] Mr Wang said he decided that if Ms Pupualii did come to the meeting he was going to tell her how upset he was and why she had been dismissed.

[53] Ms Pupualii did not attend for work on Monday 19 January 2015 and did not attend the meeting which had been scheduled for that day.

[54] Her final payment was made as agreed and advised by Mr Wong.

[55] On 20 April 2015 Ms Pupualii filed a Statement of Problem with the Authority.

### **Determination**

[56] Ms Pupualii was dismissed by means of the text message sent by Mr Wong on 18 January 2015 which stated:

*Yes dear, I know you didn't resign. Harry has decided that in light of all that has transpired it's in the company's best interest to terminate your employment with us.*

The reference to 'Harry' refers to Mr Wang.

[57] The test of justification in s103A Employment Relations Act 2000 (the Act) states:

#### ***S103A Test of Justification***

- i. 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 applying the test in subsection (2).*
- ii. The test 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.*

[58] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Happy Days must establish that the dismissal was a

decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[59] Mr Wang believed that Ms Pupualii was guilty of serious misconduct. He had based this conclusion on:

- The deliberate spillage and cream smearing on the buffet on the evening of Thursday 15 January 2015;
- The early clearing of the buffet area;
- Her racist and offensive comments;
- Her comments about her salary and clearing the buffet; and
- Her attitude to her work and other employees

[60] A decision to dismiss based on the grounds of serious misconduct must be fair and reasonable.

(i) *Alleged Comments*

[61] Mr Zheng said the racist comments which Ms Pupualii had made had occurred when she and Mr Ullah were leaving the Restaurant. However Ms Pupualii denies making the alleged remark and said she left the Restaurant before Mr Ullah. Her evidence is supported by Mr Ullah and Ms Rayner.

[62] Ms Pupualii was unaware of the racist comments she had been alleged to have made, or the comment Ms Rayner had allegedly made to Mr Zheng about Ms Pupualii's view of her salary level and its reflection on the quality of work she carried out, comments which Ms Rayner denied she made.

[63] Whilst it is clear that Mr Ullah had made offensive racist remarks, there is no evidence that Ms Pupualii did so.

[64] I find that a fair and reasonable employer would have investigated the alleged remarks fully and provided Ms Pupualii with the opportunity to explain prior to reaching a decision that the remarks had occurred which contributed to a finding of serious misconduct meriting dismissal.

(ii) *Issues in respect of work performance*

[65] Ms Pupualii said that during the meeting on Friday 16 January 2015 issues had been raised relating to her work ethic and her attitude towards other employees. These were issues she said had not previously been raised with her. Although Happy Days said these performance matters had been previously raised verbally with her, there is no documentary evidence to support that being the case.

[66] I find that a fair and reasonable employer would have investigated these issues and advised Ms Pupualii of them prior to the meeting on 16 January 2015 in order that she could consider them and offer an explanation before reaching a finding that they were contributory factors to a finding of serious misconduct meriting dismissal.

(iii) *Food Mess*

[67] Although it appears that it was the usual practice for some food spillage to occur during the evening which was regularly tidied up throughout the evening by the front of house employees, and at the end of the evening due to the shaking of the buffet table cloths, I accept that the evidence of the Happy Days management team that the amount of spillage of food items on the night of 15 January 2015 was not usual.

[68] Ms Pupualii in her evidence at the Investigation Meeting confirmed that she threw food on to the floor, and Mr Wang had viewed her throwing paper serviettes on the floor in the CCTV footage. Ms Kingi in her evidence stated that a front of house employee had complained about the spillage she had had to clear up that night as it was not the usual amount of cleaning required to be undertaken at the end of an evening.

[69] The fact that the buffet was cleared early that night is supported by the uncontested evidence that Ms Pupualii clocked out at 9.04 p.m. which implied that the buffet could either not have been cleared in 4 minutes, or if it had, had been cleared hastily and not to an acceptable standard.

[70] However in light of Ms Pupualii's clean work record to that date, I find a fair and reasonable employer would have considered alternative options rather than terminating Ms Pupualii's employment.

[71] I also find flaws in the procedure followed in addition those already noted:

- Ms Pupualii was given no advance notification of the disciplinary meeting held on 16 January 2015;

- Ms Pupualii was not provided with details of the allegations prior to the meeting held on 16 January 2015;
- Ms Pupualii was not provided with a support person.
- The decision to dismiss was based in part on the text message sent by Mr Ullah to Mr Lala, which was never explained to Ms Pupualii, nor was she given an opportunity to explain. Further she had stated in the text messages to Mr Wong that she had not resigned but the dismissal decision by Mr Wang had been made irrespective of this information.
- Mr Wang had determined that Ms Pupualii was to be dismissed prior to the meeting scheduled for Monday 18 January 2015 and the conclusion of the disciplinary process.

[72] I find the flaws in the procedure carried out by Happy Days were more than minor and resulted in Ms Pupualii being unfairly treated.

[73] I determine that Ms Pupualii was unjustifiably dismissed by Happy Days.

### **Remedies**

[74] Ms Pupualii has been unjustifiably dismissed and is entitled to remedies.

#### *Reimbursement of Lost Wages*

[75] Ms Pupualii obtained alternative employment in July 2015.

[76] Employees are under a duty to mitigate their loss following the unjustifiable termination of their employment. Ms Pupualii has provided evidence that she actively applied for some positions, however no evidence has been provided to substantiate that she applied for any jobs during the period 23 February to 13 May 2015.

[77] When questioned by Ms Moncur at the Investigation Meeting, Ms Pupualii explained that she had experienced financial difficulty during that period which resulted in her not having access to the internet in order to make online job applications in that period. When further questioned as to why she had not accessed the internet via the public library facilities which are free, Ms Pupualii said she had: “*other things to do*”.

[78] When I questioned Ms Pupualii on the nature of ‘*other things*’, she explained that these ‘other things’ were household chores. I do not accept that the undertaking of household chores is an acceptable reason not to actively seek alternative employment.

[79] Ms Pupualii is to be reimbursed lost wages at the ordinary weekly wage rate calculated in accordance with the Holidays Act 2003 in relation to the period between 18 January and 23 February 2015. Ms Pupualii is also entitled to a statutory holiday entitlement payment on that amount to be calculated in accordance with the Holidays Act 2003.

[80] I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

#### *Interest*

[81] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum<sup>1</sup>.

[82] I consider that it is appropriate that Happy Days is ordered to pay interest on the outstanding sums owed to Ms Pupualii.

[83] Happy Days to pay interest of 5% on the outstanding sums due as lost wages and holiday pay entitlement to Ms Pupualii.

#### *Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

[84] Ms Pupualii is also entitled to compensation for humiliation and distress. I accept that she experienced distress at the loss of her employment with Happy Days.

[85] I order Happy Days to pay Ms Pupualii the sum of \$4,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

#### *Contribution*

[86] I have considered the matter of contribution as I am required to do under s124 of the Act. Ms Pupualii did not contribute to the situation which resulted in her dismissal and there is to be no reduction in the remedies awarded.

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<sup>1</sup> Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

## **Costs**

[87] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[88] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**