New Zealand Employment Relations Authority Decisions

Rosenthal v Buckland t/as Bucky's Diner [2011] NZERA 16; [2011] NZERA Auckland 14 (14 January 2011)

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Last Updated: 4 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 14 5285951

BETWEEN THERESE ROSENTHAL

Applicant

AND CRAIG & ANGELINE

BUCKLAND trading as BUCKY'S DINER Respondents

Member of Authority: Representatives:

Investigation Meeting: Submissions received:

Dzintra King

Kevin Murray, Counsel for Applicant Angeline Buckland, Advocate for Respondent

9 and 10 November 2010 at Keri Keri

3 December 2010 from Applicant 20 December 2010 from Respondent

Determination:

14 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Therese Rosenthal, says she has been unjustifiably dismissed by the respondent, Craig and Angeline Buckland trading as Bucky's Diner. She also says that she has been unjustifiably disadvantaged, that the actions of the respondent amount to a breach of good faith and that it has breached s.4 Wages Protection Act 1983.

[2] She seeks compensation of $20,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act, reimbursement under s.128 for the sum of $1,020 and statutory entitlements, compensation under s.123(1)(c)(ii) for $10,000, compensation for lost wages under s.123(1)(b) of the Act for $7,280, a penalty under s.4 for breach of good faith and a penalty under s.63A(3) for not providing an employment agreement to the applicant.

[3] The respondent says that Ms Rosenthal was not dismissed but that she effectively resigned by returning her key and uniform after she had been confronted with the fact that she had been stealing from her employer, which she admitted.

[4] The employer further says that there has no breach of the Wages Protection Act 1983 as Ms Rosenthal signed an agreement forfeiting her final pay after she had agreed to repay what she had taken.

Background

[5] Ms Rosenthal was employed as a team member at Bucky's Diner on 18 May 2009 when the Diner first opened as a new business.

[6] The respondent accepts there was no written employment agreement.

[7] Mrs Angeline Buckland said that in mid June 2009 it came to the attention of her and her husband and the office manager, Ms Elizabeth Moffitt, that large amounts of raw fish, fresh shellfish and bulk red meat purchased for store stock were unaccounted for. An excessive amount of kitchen beer was being purchased and restocked on a frequent basis. The beer was used to make beer batter. During this time the respondent purchased and installed a security system hard drive with four operating cameras for surveillance.

[8] In late June 2009 Mrs Buckland met with all staff and voiced her concerns. She did so again shortly afterwards on an individual basis.

[9] A staff member informed Mrs Buckland that she had witnessed Ms Rosenthal delivering cooked food from the hot food display and drinks from the kitchen chiller out to her de facto partner who was waiting in the car in the customer carpark. Ms Rosenthal's children were also in the vehicle. She told Mrs Buckland she did not witness Ms Rosenthal paying for the goods.

[10] As a general rule, staff members were to serve each other. If staff were rostered on by themselves they were to sign the receipt and leave it in the register for management to collect. Staff had a 50% discount on all food consumed on duty and duty breaks.

[11] Mrs Buckland said in late June 2009 it was clear that consumables and cash were being stolen. During July she monitored very closely the purchase of stock and associated sales and daily cash balances. On return from a trip to Wellington, a staff member alerted Mrs Buckland about the disappearance of prime steak that had been delivered to the shop before Mrs Buckland had departed on holiday. She told Mrs Buckland she remembered seeing it in the chiller during her shift but could not locate it the following day.

[12] Mrs Buckland frequently worked between rostered shifts. This gave her the opportunity to balance the till float between staff members' shifts. She discovered a pattern on Ms Rosenthal's shift. Cash balances were down between $30 and $80, dependent on the day of the week. Towards late July Ms Rosenthal frequently started to print customer receipts of larger sales and register the sale as an "over-ring".

[13] During July 2009 and early August 2009 Mr and Mrs Buckland viewed security footage on a nearly daily basis at the shop.

The footage showed Ms Rosenthal leaving the store by herself when closing up with a tray of eggs. It showed her partner's vehicle parked beside the shop. Further viewing showed Ms Rosenthal during the daytime leaving the store with what appeared to be bulk food wrapped in her uniform apron.

[14] Unfortunately, the video footage is no longer accessible. The evidence satisfies me that there was a fault in the recording equipment which inadvertently led to material being deleted.

[15] In late July 2009 Mr and Mrs Buckland went to the Kerikeri Police Station in an attempt to gain legal advice from the police regarding the stock loss from the shop. They advised the constable on duty they had followed their suspicions and had witnessed on the security recording that Ms Rosenthal was removing stock from the shop. At that point they were also aware that while she was on duty she was delivering cooked packaged food out to her de facto partner waiting in the car with her children. This had also been witnessed by Mr Buckland on two occasions while driving past at 4.30pm to collect their children from town. The police advised Mr and Mrs Buckland to collect as much evidence as they could of the alleged situation. They said they would only prosecute with firm evidence.

Friday 7 August

[16] On the morning of Friday 7 August Mrs Buckland viewed the security footage from the day before. The footage viewed on that occasion showed Ms Rosenthal coming out of the chiller with an object and inserting it into her handbag in the kitchen. At 4pm she began to pace up and down the dining room looking out the large windows into the carpark. Ms Rosenthal did that four times over the course of seven minutes.

[17] At 4.07pm Mr Joseph Thomas, her partner, arrived at the shop in the carpark, walked past the front door entrance and entered through the secondary entrance. Mrs Buckland held a conversation with him inside the doorway. During the conversation he waved his hand at Ms Rosenthal. Over a period of 14 minutes Ms Rosenthal walked quickly in and out of the kitchen three times. At 4.22pm Mr Thomas walked to the furthest counter and greeted the only other staff member on duty who was at that time located in the kitchen. Ms Rosenthal remained standing between the kitchen door and the external doorway. The staff member approached the front service counter and greeted Mr Thomas. At that point Ms Rosenthal went into the kitchen and took an object from her handbag and put it in her apron front pocket. She re-entered the dining area and walked towards Mr Thomas to stand directly to his left side rear. He put his left hand behind his hip area and Ms Rosenthal placed the contents from the apron into his hand. Mr Thomas then put the object in his pocket and left the shop with his hand firmly in his pocket.

[18] This activity was concealed from the other staff member present, Ms Mariska Howe, who had been rostered to finish at 4pm. Unbeknownst to Ms Rosenthal, she had arranged with another team member to continue on until 4.30pm.

[19] Ms Rosenthal later claimed the object was a tinny, and not money. It is clear from the evidence that money, which was stored in the chillier, did go missing that day. When Ms Rosenthal was asked why she concealed the passing of the object to her partner, she said it was because having a tinny was illegal. However, she also claimed that Ms Howe had bought the marijuana in that morning. If Ms Howe knew about the drugs there seems little point in concealing them.

[20] On the evening of Friday 7 August Mrs Buckland returned to the shop. At that time Ms Rosenthal was attending to dishes in the kitchen area. Mrs Buckland went to the chiller and retrieved the float container, placing it on the bench to Ms Rosenthal. Mrs Buckland counted the float money off against the float balance sheet. The float was $80 in gold coins. Mrs Buckland said Ms Rosenthal became flustered, red in the face and left the shop for a duty break. Mrs Buckland then removed the security hard drive from the shop after telling all staff rostered on at the time. At that point Ms Rosenthal was to the rear of the shop having a cigarette. Mrs Buckland told Ms Rosenthal she was leaving with the security hard drive.

[21] On Saturday 8 August Mr and Mrs Buckland again attempted to remove the evidence from the hard drive system on to a laptop without success.

Sunday 9 August

[22] In the late afternoon of Sunday 9 August Mrs Buckland received a text message from Ms Rosenthal asking to leave work early for a whanau meeting. Mr and Mrs Buckland agreed to cut the day short. Knowing that Ms Rosenthal was rostered on by herself they agreed it would be a good opportunity to speak to her with a degree of privacy. Mrs Buckland phoned Ms Rosenthal and said she would complete her shift.

[23] Before going to the shop on Sunday 9 August Mr and Mrs Buckland discussed the situation again and how to handle it. They discussed a number of different options for different scenarios. If Ms Rosenthal denied the allegation then the footage

would be taking directly to the Kerikeri Police and charges would be laid against Ms Rosenthal and Mr Thomas. If she admitted her crime then the action taken would be dependent on the regret and situation of Ms Rosenthal. At that stage there had not discussed recovery of losses. If Ms Rosenthal became angry or volatile then the meeting would cease immediately, subsequently the footage would be taken directly to the Kerikeri Police and charges would be laid against Ms Rosenthal and Mr Thomas.

[24] Mr and Mrs Buckland arrived at the shop at approximately 3.30pm. They waited until all dining customers had vacated the shop. Mrs Buckland then asked Ms Rosenthal to join her and Mr Buckland in the dining area prior to leaving her shift. Ms Rosenthal had already removed her apron and picked up her handbag and she followed Mrs Buckland into the dining room.

[25] Mrs Buckland told Ms Rosenthal that they had watched the security tape and asked whether she had anything to tell them. Ms Rosenthal asked what they meant. Mrs Buckland asked whether she had been thieving from the shop. Ms Rosenthal replied she didn't know what Mrs Buckland meant. At that stage Mrs Buckland said that she had footage of Ms Rosenthal and Mr Thomas taking the float on Thursday. She had seen Ms Rosenthal hand it to Mr Thomas in front of Ms Howe while he distracted her. It was on tape.

[26] Ms Rosenthal did not claim that the object was a tinny. She did not say anything. Mrs Buckland then said *Do you know what you have done, you have literally taken food of my baby's plate and put it on your own?* At that stage Ms Rosenthal said *I know, I am very sorry.* Mrs Buckland asked what Ms Rosenthal was going to do about it. Ms Rosenthal said she would pay it all back. She then apologised. Mrs Buckland then told her to go to her meeting. At that stage Ms Rosenthal was in tears and went into the bathroom. She reappeared with tissue paper and said *I will go then, I am very sorry Craig and Ange, I am very sorry.* Mrs Buckland said she was concerned that Ms Rosenthal was upset and crying and told her to just leave.

[27] Ms Rosenthal has a different version of the events of 9 August. She said after customers left Mr Buckland asked if she had a minute. Mrs Buckland ripped the receipt list off the till. She had her fists clenched and was yelling at Ms Rosenthal. She denied that Mrs Buckland said anything about seeing her or her partner taking the float and in her evidence she said she did not mention anything about her baby. She said Mrs Buckland did say they had seen the video and she asked to see it. Despite saying in her brief that Mrs Buckland had not said anything about taking food off her baby, in the course of her oral evidence to the Authority, Ms Rosenthal had a clear recollection that that had been said.

[28] Ms Rosenthal said that Mr Buckland waved some sort of gadget in front of her. She said that it looked like a skinny white iphone. She said she did not apologise to the Bucklands because she had done nothing wrong and she was being accused of things she had not done. She did not offer to pay any money back. Ms Rosenthal said that Mrs Buckland yelled at her and told her to get the fuck out of the shop. She left immediately and took the key back about an hour later. It was the last time she spoke to Mrs Buckland.

[29] Ms Rosenthal said she had been told by the Bucklands they had contacted the police.

[30] Mr and Mrs Buckland deny that Ms Rosenthal asked to see the tapes. Ms Rosenthal said that Mrs Buckland had her fists clenched and threatened to smash her. Mrs Buckland denied that.

[31] I prefer the Bucklands' account of what took place to that of Ms Rosenthal. It makes no sense for Mrs Buckland to have refused to show Ms Rosenthal the tapes given that she later offered to show them to Ms Rosenthal's mother, who did not take up the offer. Ms Rosenthal was aware the offer had been made to her mother. When I asked why she did not then ask to see the tapes, she said she had already been refused once. In the notes she made of her conversation with Mr Feist who phoned Mrs Buckland after Ms Rosenthal had contacted him regarding non payment of wages, Ms Buckland noted that she told him that Ms Rosenthal had admitted the theft. This leads credence to Mr and Mrs Buckland's version of the events of 9 August.

Subsequent Events

[32] Ms Rosenthal said she returned her uniform on the Monday and that Ms Howe was in the shop and they had a conversation about what had happened. She said that Ms Howe seemed quite upset for her. Mrs Buckland was not in the shop. However, pay records show that Ms Howe was not on duty on the Monday.

[33] Ms Rosenthal said she did not see Mrs Buckland after 9 August. Mrs Buckland says that Ms Rosenthal went into the shop on Monday 10 August and gave Mrs Buckland her uniform with her key.

[34] Mrs Buckland asked what she was going to do about it. Ms Rosenthal said she did not know and that she would pay it back. Mrs Buckland asked how she would be able to do that. Ms Rosenthal said Mrs Buckland could keep her pay and she would just go. Mrs Buckland told her to come into the office the following day and she would arrange for Ms Moffitt to draw up a document signing over the wages. Ms Rosenthal again said she was sorry.

[35] Mrs Buckland tried several times to contact Ms Rosenthal. On the Tuesday afternoon Mrs Buckland went to the BP Station where Ms Rosenthal's mother worked. She asked Mrs Rosenthal if she would get her daughter to contact Mrs Buckland. Mrs Rosenthal was surprised that her daughter was not at work.

[36] Mrs Buckland told her her daughter and partner had been caught on camera stealing and that Ms Rosenthal was to contact her or she would take the tapes to the police.

[37] Later that day Ms Rosenthal phoned Mrs Buckland. Mrs Buckland reminded her of the conversation they had had and told her to go to the office the following day to meet with Mr Buckland and Ms Moffitt. Ms Rosenthal agreed.

[38] The Bucklands had the document forfeiting final pay and holiday pay drawn up in response to Ms Rosenthal's admission and offer of reimbursement.

[39] The document reads as follows:

Therese Doris Rosenthal

Re: Final Pay

As per the attachedpayslip

I Therese Doris Rosenthal accept that I have received full and final entitlement from Buckys Diner and will make no further claims. The attached final payslip for $1020 is settlement to Buckys Diner.

[40] When the document was given to her she came with her partner. Mr Buckland met her at the car. She got out. Mr Thomson stayed in the car. Mr Buckland read the document to her. She signed it. Ms Rosenthal complained that she did not understand it but accepted she did not ask for clarification of any sort. She said she thought she had to sign it to get her final wages. She and Mr Thomson left before receiving a copy of the document which Mr Buckland went to photocopy.

[41] Two days later Ms Rosenthal phoned Ms Moffitt and asked when she would receive her final pay. Ms Moffitt told her she had signed a document forfeiting it.

[42] Ms Rosenthal contacted Mr Feist because she had not received her final wages, not because she thought she had been dismissed. Mr Feist phoned Mrs Buckland who told him Ms Rosenthal had admitted theft. Dismissal does not appear to have been raised during the course of the phone call Mr Feist had with Mrs Buckland.

[43] On a number of occasions Ms Rosenthal phoned and texted her former fellow workers. They found the calls and texts upsetting. On 21 April Mr Buckland went to the police, who spoke to Ms Rosenthal. The calls then ceased.

[44] Ms Rosenthal deposed that in her text messages and phone calls she had stated that she had been dismissed. The evidence from the other staff was that this was not the case.

[45] On 9 September 2009 Mr Kerry Amodeo replied by email to correspondence from Mr Shayne Boyce of 31 August raising a personal grievance. He stated: *I will be writing to you directly but can indicate at this stage that on my instructions Therese was dismissed for theft as a servant.*

[46] That view was derived from a letter sent to Mr. Amodeo by Ms Moffitt, which set out a summary of events from her perspective. It stated that on 9 August Ms Rosenthal had been sacked by the Bucklands. Her letter further says *When Therese was approached by Craig and Angeline she admitted to stealing money and product and said she would pay them back hence the signed letter which in no way is full payment.* Ms Moffitt did not show this letter to either of the Bucklands before sending it.

Decision

[47] The letter setting out the agreement to forfeit the final pay could have been worded more expeditiously but it does

expressly state that the money is *settlement to Bucky's Diner.* By signing this document Ms Rosenthal consented to not receiving her final pay.

[48] I do not accept the submission that this was done under duress or in ignorance. It is clear from the Bucklands' evidence that there was an agreement to forfeit the money. While Ms Rosenthal may have changed her mind later she is bound by what she signed.

[49] Ms Rosenthal was not dismissed. She left her employment after her actions had been discovered. She accepted that she had never been told that she was dismissed or sacked or anything similar. Mrs. Buckland did not tell her to *fuck off.* Ms Rosenthal handed in her key and uniform to Mrs Buckland. The termination of employment was not at the initiative of the employer.

[50] Whatever view was expressed about the termination of employment by Ms Moffitt cannot override the reality that Ms Rosenthal admitted stealing and left her employment as a result.

[51] The respondent accepted that there had been no employment agreement in place. Having an employment agreement is a statutory requirement. The respondent is to pay a penalty of $500 to the Crown.
[52] This is a case where it appropriate that costs lie where they fall. Dzintra King
Member of the Employment Relations Authority

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