

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 8/09
5120918

BETWEEN MAXINE GRIFFITHS
 Applicant

AND TODD & STACEY
 TREGOWEATH AND
 THOMAS HARRIS & DAWN
 MARTIN T/A ZINC
 INNOVATION INTASTE
 RESTAURANT
 Respondent

Member of Authority: Vicki Campbell

Representatives: Alan Taylor for Applicant
 No Appearance for Respondent

Investigation Meeting: 16 December 2008 at Rotorua

Determination: 12 January 2008

DETERMINATION OF THE AUTHORITY

[1] Ms Maxine Griffiths claims she was unjustifiably dismissed from her employment with Todd & Stacey Tregoweath and Thomas Harris & Dawn Martin trading as Zinc Innovation Intaste Restaurant (Zinc). I have been advised that the restaurant has now closed.

[2] Ms Griffiths endeavoured to resolve her employment relationship problem with the use of mediation, however, the respondent has failed to co-operate with the mediation service.

[3] No statement in reply was received from the Respondent. In a memorandum dated 23 October 2008 the Respondent was advised that the matter had been set down and reminded that should it attend the investigation meeting it would require leave to reply or respond to Ms Griffiths' application. The Notice of Investigation Meeting

sets out the consequences for the Respondent if it does not attend the investigation meeting.

[4] As at the scheduled commencement time for the 16 December 2008 investigation meeting, no representative of Zinc was present. I am satisfied Zinc received the notice of investigation meeting. The Authority contacted Mr Todd Tregoweth, who advised that he did not intend appearing at the investigation meeting.

[5] Zinc has not shown good cause for its failure to appear or be represented. I therefore proceeded under clause 12 of Schedule 2 to the Employment Relations Act 2000 to hear and determine the matter as if Zinc had attended or been represented.

Unjustified dismissal

[1] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

[2] Although the Authority does not have unbridled licence to substitute its decision for that of the employer (*X v Auckland District Health Board* [2007] 1 ERNZ 66) it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome (*Air New Zealand v Hudson* [2006] 1 ERNZ 415).

[6] Ms Griffiths was employed as a Restaurant Manager for Zinc on 10 December 2007. The restaurant opened for business on or about 15 December 2007. During her interview she disclosed to Mr Tregoweth that she was a party to legal proceedings which were ongoing. Ms Griffiths disclosed the nature of the proceedings as she was concerned about how it would impact on the restaurant. Mr and Mrs Tregoweth advised her that the issues would not affect her employment application and she was consequently appointed.

[7] For completeness it is appropriate for me to add here that prior to her employment at Zinc Ms Griffiths had been a sworn member of the NZ Police. At the

time of the charges being laid against her, other more serious charges were being laid against a group of nine men and women in conjunction with the supply of the drug P in the Rotorua area. The arrests of the nine adults occurred following a surveillance operation codenamed "Operation Avalanche". Ms Griffiths was not one of those arrested.

[8] During her employment Ms Griffiths says she kept her employers up to date with her legal proceedings and advised both the Rotorua District Council and the Rotorua Police of the situation. Both organisations supported Ms Griffiths in her application for a temporary Manager's licence as her legal proceedings were neither drug nor alcohol related.

[9] On 2 February 2008 Ms Griffiths was demoted from restaurant manager to waitress. Mrs Tregoweth advised Ms Griffiths that this action was necessary as the Police and City Council had informed her that the restaurants' on licence could be in jeopardy if she [Ms Griffiths] continued as restaurant manager.

[10] Three days later Ms Griffiths consulted with her lawyer over the demotion and asked Mrs Tregoweth to make contact with her lawyer to discuss the matter. That invitation was never taken up by the respondents and on 6 February a new manager commenced employment at the restaurant.

[11] On 7 February Mr Tregoweth advised Ms Griffiths that her legal proceedings were having an impact on the restaurant. Ms Griffiths also noticed a cooling in the attitudes of other staff toward her and also from other restaurant owners and their employees. Ms Griffiths put this down to Mr Tregoweth telling others of her legal situation.

[12] On Monday 11 February Mr Tregoweth telephoned Ms Griffiths and advised her that she was no longer required to attend work. Her employment was terminated that day.

[13] As there had been no issues with Ms Griffiths' performance during her employment I have concluded she was dismissed for misconduct.

[14] The Court in *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35 sets out the minimum requirements of procedural fairness to be applied by an employer in an investigation into misconduct:

- notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
- a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
- an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

[15] In this case I am satisfied there has been a complete absence of procedural fairness. Mr Tregoweth and his partners met and decided, in the absence of any discussion with Ms Griffiths, that she could no longer be employed at the restaurant.

[16] I find Ms Griffiths' dismissal was unjustified. Ms Griffiths was dismissed in the absence of any notion of procedural fairness. Mr Tregoweth telephoned her and notified her of the dismissal without any prior communication that such a step may be taken. The decision was clearly made without any reference back to Ms Griffiths for her input or any explanation.

[17] The actions and how the respondent acted were not what a fair and reasonable employer would have done in all the circumstances of this case. I find Ms Griffiths' dismissal was unjustified and she is entitled to remedies.

Remedies

Lost wages

[18] Ms Griffiths told me at the investigation meeting that immediately following her dismissal she felt unable to bring herself to looking for alternative work. Word had quickly spread through the hospitality industry, fuelled by input from Mr Tregoweth that Ms Griffiths was somehow caught up in the arrests associated with Operation Avalanche. Ms Griffiths eventually obtained employment in June 2008, however, she is only claiming lost wages for a period of 13 weeks.

[19] Ms Griffiths seeks interest on any lost wages awarded to her. I am satisfied this is an appropriate case in which to exercise my discretion to award interest.

Todd & Stacey Tregoweth and Thomas Harris & Dawn Martin trading as Zinc Innovation Intaste Restaurant are ordered to pay to Ms Griffiths the sum of \$6,513.00 gross pursuant to section 123(1)(b) of the Employment Relations Act 2000 plus interest at the rate of 6% per annum from 11 February 2008 until the date payment is made.

Compensation

[20] This was an arbitrary unjustified dismissal. Ms Griffiths seeks compensation for hurt, humiliation and injury to feelings in the sum of \$6,500. I have had regard to the circumstances surrounding Ms Griffiths' dismissal. Ms Griffiths gave compelling evidence to the effect the dismissal had on her.

Todd & Stacey Tregoweth and Thomas Harris & Dawn Martin trading as Zinc Innovation Intaste Restaurant are ordered to pay to Ms Griffiths the sum of \$6,500 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

Contribution

[21] The Authority is bound by section 124 of the Act to consider the extent to which the actions of Ms Griffiths contributed towards the situation that gave rise to her personal grievance, and if those actions so require, to reduce the remedies.

[22] The non-attendance of the respondent has prevented the Authority from hearing any claim by it that Ms Griffiths must share some of the blame in relation to the situation that gave rise to her personal grievance. I am satisfied the remedies must be awarded without any deduction for contributory fault.

Costs

[23] Ms Griffiths seeks a contribution to her costs. I am satisfied that the discretion under clause 15 of Schedule 2 of the Act ought to be exercised in favour of Ms Griffiths.

[24] The following principles are appropriate where the Authority is exercising its discretion in relation to costs (*PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, [2005] 1 ERNZ 808):

- There is a discretion as to whether costs should be awarded and what amount;
- The discretion is to be exercised in accordance with principle;

- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[25] Ms Griffiths' costs are subject to a contingency fee formula whereby Ms Griffiths is liable for a \$1500 base fee, 33% of any financial awards, plus GST and disbursements. I am aware that Ms Griffiths was put to additional costs, as a result of the requirement from the Authority that she personally serve the Statement of Problem and the Notice of Investigation Meeting on the respondent, as the Authority was unsuccessful in serving these documents.

[26] The matter was not complex and the hearing lasted less than half a day. Taking into account the preparation required and the length of the hearing, Todd & Stacey Tregoweth and Thomas Harris & Dawn Martin trading as Zinc Innovation Intaste Restaurant is to contribute \$1500 plus \$70.00 disbursements towards Ms Griffiths' costs.

[27] An order is made accordingly.

Summary of orders

Todd & Stacey Tregoweth and Thomas Harris & Dawn Martin trading as Zinc Innovation Intaste Restaurant are ordered to pay to Ms Griffiths the sum of \$6,513.00 gross pursuant to section 123(1)(b) of the Employment Relations Act 2000 plus interest at the rate of 6% per annum from 11 February 2008 until the date payment is made.

Todd & Stacey Tregoweth and Thomas Harris & Dawn Martin trading as Zinc Innovation Intaste Restaurant are ordered to pay to Ms Griffiths the sum of \$6,500 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

Todd & Stacey Tregoweth and Thomas Harris & Dawn Martin trading as Zinc Innovation Intaste Restaurant are ordered to pay to Ms Griffiths the sum of \$1,570 being a contribution to costs.

Vicki Campbell
Member of Employment Relations Authority