

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 387  
5134539**

BETWEEN                      MICHAL TILLER  
   Applicant  
  
AND                                NEW ZEALAND RENTAL CAR  
   SPECIALISTS 2004 LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Applicant in person  
   Justine O'Connell, Advocate for Respondent  
  
Investigation Meeting:        On the papers  
  
Submissions received:        6 August and 9 October 2012 from Applicant  
   27 August, 5 September and 17 October 2012 from  
   Respondent  
  
Determination:                26 October 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Ms Michal Tiller, claims that she was employed by the Respondent, New Zealand Rental Car Specialists Limited, (NZ Rental Car), during the period January to December 2007 and that she is owed outstanding wages and statutory holiday entitlement for that period.

[2]     Ms Tiller was suspended from employment on 18 December 2007 and claims that she was subsequently unjustifiably dismissed by NZ Rental Car.

[3]     NZ Rental Car agrees that Ms Tiller is owed an amount in respect of unpaid wages and statutory holiday entitlement, but denies that Ms Tiller was employed prior to 1 July 2007 or that she is owed wages or statutory holiday entitlement for that period.

[4]     NZ Rental Car further denies that Ms Tiller was unjustifiably dismissed on 3 January 2008, and claims that Ms Tiller was justifiably dismissed for serious misconduct

[5] The parties agreed to the Authority determining this issue 'on the papers' based on the Statements of Problem and in Reply and on the written submissions from the parties.

### **Issues**

[6] The issues for determination are whether:

- Ms Tiller is owed outstanding wages and statutory holiday entitlement for the period January to December 2007
- Ms Tiller is owed outstanding wages and statutory holiday entitlement for the period following 1 July 2007
- Ms Tiller was unjustifiably dismissed from her employment with NZ Rental Car.

### **Background Facts**

[7] NZ Rental Car, which commenced trading on 1 December 2004, was owned and operated by Mr Edwin Chan and Mr Daniel Alexander, joint shareholders and directors, Mr Chan being the majority shareholder.

[8] Mr Chan stated that NZ Rental Car had two branches, one in Christchurch which he managed, and one in Auckland which was managed by Mr Alexander.

[9] Ms Tiller stated that her employment commenced in December 2007; however Mr Chan stated that whilst he had been aware that Ms Tiller, who was the partner of Mr Alexander, occasionally went into the Auckland office to wait for, or to assist Mr Alexander, he did not agree to, or authorise, Ms Tiller being employed prior to July 2007.

[10] Ms Tiller stated that it had been agreed at the Directors meeting held on 8 December 2006 that another employee would be employed to assist with the operation of both the Christchurch and Auckland offices.

[11] Mr Alexander agreed that he had employed Ms Tiller in January 2007 after discussions with Mr Chan at the annual company meeting in November 2006, and that it had been agreed to pay Ms Tiller \$644.00 net weekly.

[12] Mr Chan disagreed that this issue had been discussed at the Directors meeting which he stated had been held on 8 December 2006, and submitted the handwritten minutes of the meeting in support of his assertion.

[13] Ms Tiller submitted bank account statements which showed two payments into an account in her name made in January and February 2007 as evidence that she had been employed by NZ Rental Car during the period January to July 2007.

[14] Mr Chan stated that he recalled Mr Alexander asking him to reimburse Ms Tiller for a mobile telephone and to transfer money owed to him into an account, the details of which he provided. Mr Chan said he had not been aware into whose bank account the payments were made, and reiterated that he had not authorised any wage payments to be made to Ms Tiller prior to July 2007.

[15] Mr Chan stated that he and Mr Alexander had agreed to Ms Tiller being employed with effect from 1 July 2007 initially on a part-time basis, at a weekly rate of \$400.00 gross. Mr Chan stated that there had been no discussion as to the exact number of hours Ms Tiller would be working, however he had been made aware that Ms Tiller would not be working full-time. No written employment agreement had been issued to Ms Tiller.

[16] Mr Chan stated that the first payment made to Ms Tiller had been on 2 July 2007 of \$400.00 gross, \$322.00 net, thereafter Ms Tiller had been paid a weekly amount of \$644.00 net until the weekly rate had been increased to \$800.00 gross with effect from the end of July 2007.

[17] Mr Chan stated that the increase had taken place at Mr Alexander's request, on the basis that Ms Tiller was pregnant. Mr Chan explained that Mr Alexander had informed him that the higher level of the weekly rate would enable Ms Tiller to claim a higher level of paid parental leave.

[18] Mr Chan stated that he had agreed to the higher level of remuneration, with the first payment at the new rate being made on 5 August 2007, and subsequent payments remaining at this level until Ms Tiller was suspended on 18 December 2007.

[19] During 2007 Mr Chan stated that he had become increasingly concerned about the performance of the Auckland branch which had not been making any profit. In particular Mr Chan had noticed a problem with the accounts which showed three withdrawals on the NZ

Rental Car refund card of \$1,000.00 each. Mr Chan explained that the refund card was used to provide refunds of over payments, bonds (if required) and car cancellations to customers.

[20] Mr Chan stated that these withdrawals had all been made on one day to different accounts and were all for a round amount of \$1,000.00 which had been unusual because any transactions on the refund card were for customer refunds and not usually for a round sum amount.

[21] Mr Chan had involved the Police in the matter and discovered on 6 August 2007 that these refund amounts had been paid into three personal accounts owned by Ms Tiller, one in the name of Judith Tiller and the other two in the name of Michal Tiller.

[22] Mr Chan explained that in August 2007 Ms Tiller had been charged with theft in connection with the refund car matters. The notes of Judge Malosi on sentencing confirm that the matter was heard in the District Court on 1 October 2008<sup>1</sup> and Ms Tiller was convicted on 23 charges under s 228B of the Crimes Act 1961 and ordered to make reparation of \$20,370.00 to NZ Rental Car. Mr Chan stated that this amount has not been paid to NZ Rental Car.

[23] Mr Chan stated in his affidavit dated 27 August 2007 that he had discussed the criminal charges relating to Ms Tiller with Mr Alexander who had urged him to keep Ms Tiller employed so that she could repay the money she had stolen. Mr Chan explained that Mr Alexander had also said that Ms Tiller needed to have employment in order that she could claim maternity pay.

[24] In addition, Mr Chan stated that Mr Alexander had told him that Ms Tiller's cousin had a travel business, and in return for agreeing to Mr Alexander's request to retain Ms Tiller in employment, the cousin would provide NZ Rental Car with many bookings by way of compensation.

[25] Ms Tiller stated that Mr Chan had signed on behalf of NZ Rental Car a "Paid Parental Leave Application for an Employee" IRD form for her which was dated 7 December 2007. On the form details had been entered which stated that Ms Tiller would have been employed by NZ Rental Car for 1 year and 6 months by the baby's due date, which was stated to be 15 February 2008.

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<sup>1</sup> NZ Police v ML Tiller CRI 2008-092-012049

[26] Mr Chan agreed that the signature on the form was his, but explained that he did not recall signing the form, and denied that he would have knowingly signed a form indicating that Ms Tiller would have been employed for 1 year and 6 months at the baby's expected due date.

[27] Mr Chan stated that he had continued to be concerned about the Auckland operation and he had consequently hired a private investigator. Mr Chan stated that in December 2007 he had received a report from the private investigator that revealed Mr Alexander, who had set up another company, New Zealand Rental Cars (2007) Limited, had been conducting fraudulent activities against NZ Rental Car for his own gain, and that Ms Tiller had been assisting him in this new business by renting NZ Rental Car to customers of the new business.

[28] Mr Chan explained that he had engaged solicitors and taken action against Mr Alexander with a court injunction being served on Mr Alexander on 18 December 2007. As a result of the court injunction all bank accounts of NZ Rental Car had been frozen.

[29] Mr Chan stated that on that same day, 18 December 2007, he had decided to suspend Ms Tiller from her employment in a meeting at which Mr Philip Mules, the new Auckland Manager, had been present. Mr Chan stated that following the refund card theft issue and the subsequent finding of the private investigator that Ms Tiller had been involved in Mr Alexander's fraudulent activities, he had felt NZ Rental Car could not trust her.

[30] Mr Chan stated that following Ms Tiller's suspension he had tried to contact her on 31 December 2007 by text message to arrange a meeting regarding her employment.

[31] Having received no response from Ms Tiller, Mr Chan stated that he had written a letter to Ms Tiller dated 3 January 2008. The letter stated:

*Further to my TXT sent to your phone on the 31<sup>st</sup> December 07 at 10.20 a.m. asking you to contact me regarding your employment, and having had no reply regarding this, I am writing to inform you after our investigation with your employment issues of serious misconduct which is in breach of your employment responsibilities, I have no choice but to terminate your employment as of 3<sup>rd</sup> January 2008.*

*We will pay your wages up to the 3<sup>rd</sup> January 2008 and holiday pay owing to this date.*

[32] Mr Chan stated that the letter also explained that due to the fraudulent activities of Ms Tiller and Mr Alexander, NZ Rental Car's bank account had been frozen pending legal action and therefore her final pay could not be made from the company's bank account:

*We have a problem paying you until we have mutual arrangement with Daniel Alexander, his Solicitor, and our Solicitor to give joint authority for BNZ Bank to release the funds.*

[33] Mr Chan stated that Mr Mules had taken the letter to Ms Tiller's home address and had attached it to her door. Mr Chan also stated that his partner, Ms Yvonne Allan, had posted a copy of the letter to Ms Tiller's home address. Mr Chan has provided an affidavit from Ms Allan to this effect.

[34] Ms Tiller stated that between December 2007 and 1 February 2008 she was at home on bed rest and denied that she received a copy of the letter dated 3 January 2008.

[35] Ms Tiller stated that her understanding was that she had been suspended on full pay on 18 December 2007 and she had not become aware that she had been dismissed until April 2008 as a result of Mr Chan providing her with an agreement to drop charges if she no longer continued with her employment claim. Ms Tiller produced in evidence copies of two documents, both of which appear to have been signed by Mr Chan.

[36] The second of these states:

*This is an agreement between Michal Tiller and New Zealand Rental Car Specialists 2004 Ltd.*

*New Zealand Rental Car Specialists 2004 Ltd will agree to drop the Criminal Charges of Fraud against Michal Tiller on the condition there be no future claims of any kind whatsoever against the Company or its Directors including claims of non-payment of wages.*

*This letter is to be signed in front of a JP or acknowledged by a Solicitor by 2.00 p.m. today and returned by fax to (03) 3599699*

[37] The date as noted on the top of the documents which appear to have been transmitted from a facsimile machine is 25 April 2008 and the telephone number from which they were sent is 09 4315253, which is an Auckland telephone number.

[38] Mr Chan stated that he had not drafted these documents and that he believed that Ms Tiller had traced his signature on to the form. Mr Chan stated that it had been Ms Tiller who had telephoned him, and she had told him that she had a document which she had wanted him to sign.

[39] In support Mr Chan states that Ms Tiller had told him that she would send the documents through from Mr Alexander's parents address and that the facsimile telephone

transmitted telephone confirms that the facsimile had been sent from Auckland, however he had been in Christchurch on that date.

## **Determination**

### **Is Ms Tiller owed outstanding wages and statutory holiday entitlement for the period January to December 2007?**

#### *January to July 2007*

[40] Ms Tiller and Mr Alexander state that Ms Tiller was employed with effect from the beginning of January 2007 on a weekly wage of \$644.00, however the bank account statements provided by Ms Tiller indicate that only two payments were received during this period, these being one of \$300.00 on 16 January 2007 and one of \$260.00 on 23 February 2007.

[41] Mr Chan's evidence was that whilst he recalled making two ad-hoc payments into a bank account at Mr Alexander's request, he did not authorise wage payments to Ms Tiller.

[42] The payments are shown in the bank statements as being received from NZ Rental Car and identified as 'NZRCSwages'. There appear to be no other payments during this period. The amounts identified in the bank statements are not consistent with Ms Tiller and Mr Alexander's evidence that it had been agreed that Ms Tiller would receive a weekly wage of \$644.00, however I find the payments to be consistent with Mr Chan's evidence as they are more indicative of ad-hoc one-off payments rather than payment for wages, which would be payable on a consistent weekly basis.

[43] Ms Tiller has submitted two emails in support of her contention that she was employed during this period: one is dated 29 May 2007 and is an exchange between Ms Tiller and Mr Art Segal, the second email is dated 26 June 2007 and has been sent from the email address 'M Yule-Tiller [mtiller@xtra.co.nz](mailto:mtiller@xtra.co.nz) to [yvonnea@xtra.co.nz,nz/rentalcar@gmail.com](mailto:yvonnea@xtra.co.nz,nz/rentalcar@gmail.com).

[44] Whilst the emails may be considered as being capable of supporting Ms Tiller's assertion that she was employed during this period, they are also consistent with Mr Chan's assertion that Ms Tiller occasionally went into the Auckland office to assist Mr Alexander, and consequently I find this email evidence inconclusive in establishing that an employment relationship subsisted at that time.

[45] Ms Tiller submitted the completed paid parental leave application form as evidence that she had been employed for 1 year and 6 months at the time of the baby's due date stated to be 15 February 2008. Mr Chan stated that he did not recall signing this form, although he agreed that the signature on the form was his.

[46] In circumstances in which Mr Chan stated that he had agreed to Mr Alexander's request that the weekly wage to Ms Tiller be increased at the end of July with the express purpose of allowing Ms Tiller to be able to claim a higher level of paid parental leave, I am not prepared to accept this form as providing credible evidence of Ms Tiller's commencement date of employment when weighed against the other evidence submitted.

[47] Mr Alexander was the director of the Auckland office and therefore directly responsible for employing and managing Ms Tiller on a day-to-day basis, however Mr Alexander has not provided any documentary evidence for the period January to July 2007 that supports an employment agreement having been entered into with Ms Tiller during that period.

[48] Mr Chan has provided wage and time records for the period July to December 2007, which he stated relate to the period of Ms Tiller's employment. The fact that there are no wage and time records for the period January to July 2007 relating to Ms Tiller supports his contention that she was not employed during this period.

[49] Most compelling I find is the lack of any evidence that either Ms Tiller or Mr Alexander raised the issue of non-payment of wages with Mr Chan throughout the period from January to July 2007.

[50] I would have expected this issue to have been raised with Mr Chan in the situation in which the alleged agreed weekly wage payment of \$644.00 net due to Ms Tiller had not been paid over a period of approximately 6 months.

[51] I do not find that Ms Tiller was employed by NZ Rental Car during the period January to July 2007 and accordingly determine that no payments are owed to her in respect of this period.

**Is Ms Tiller owed outstanding wages and statutory holiday entitlement for the period following 1 July 2007?**

[52] The bank account statements supplied by Ms Tiller are inconclusive as regards the amounts paid to her during the period July 2007 to 3 January 2008 since not every week during that period is represented. Mr Chan supplied time and wages records for the weekly pay period ended 8 July 2007 to 16 December 2007.

[53] The wage records indicate that Ms Tiller had been paid a weekly amount of \$800.00 gross. Mr Chan stated that he believed Ms Tiller to be owed an amount in the sum of \$1,032.26 in respect of unpaid wages up to 18 December 2007, and an amount in the sum of \$1,069.94 in respect of the total amount of holiday pay owed calculated at the rate of 6%.

[54] Ms Tiller contends that her employment was not terminated until April 2008 when the alleged facsimile documents came to her attention.

[55] I do not find that the facsimile documents submitted by Ms Tiller are credible in supporting her claim that her employment was not terminated until April 2008.

[56] I find it more credible that Ms Tiller was aware that her employment had been terminated on 3 January 2007 by means either of the letter dated 3 January 2008 which had been attached by Mr Mules to the door of the house in which she was living, or the letter which had been posted to her as confirmed in the affidavit evidence of Ms Allan.

[57] Mr Chan submitted that although NZ Rental Car had informed Ms Tiller that it would pay: "*your wages up to the 3<sup>rd</sup> January 2008*", Ms Tiller's breach of her duty of fidelity had been so significant as to negate this promise.

[58] I do not accept that argument. Ms Tiller's breach of her duty of fidelity was made known to NZ Rental Car at the date when she was suspended and further by 3 January 2008 when the decision was made to terminate her employment for serious misconduct.

[59] I find that Ms Tiller is also entitled to the two weeks notice period in respect of which the sum of \$1600.00 is applicable.

[60] I determine that NZ Rental Car owes and is to pay to Ms Tiller the following sums:

- The sum of \$1,032.26 gross in respect of unpaid wages up to 18 December 2007
- The sum of \$1,069.94 gross in respect of the total amount of holiday pay owed
- The sum of \$1,600.00 gross in respect of two weeks notice to 3 January 2008

[61] In determining the detail of this matter I am mindful of the District Court decision<sup>2</sup> and the comments made by Judge Malosi in paragraph [28] of that judgment: “*It seems to me that any amount awarded in your favour through that process can then be applied to offset this order for reparation ...*”. Accordingly whilst this is a matter for the parties, I would urge them to address this situation appropriately.

### **Was Ms Tiller unjustifiably dismissed from her employment with NZ Rental Car?**

[62] The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Employment Relations Act 2000 (“the Act”):

*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 considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred”*

[63] The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice.

#### *Substantive Justification*

[64] Mr Chan stated that NZ Rental Car had dismissed Ms Tiller on 3 January 2008 for serious misconduct and on the basis that it had no trust and confidence in her.

[65] The decision was preceded by (i) Ms Tiller’s earlier conviction on 23 charges brought under the Crimes Act 1961, and (ii) the subsequent findings of a private investigator provided

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<sup>2</sup> NZ Police v ML Tiller CRI 2008-092-012049

in a report submitted to NZ Rental Car and dated 30 November 2007, that Ms Tiller had been actively involved in the operation of a competing business to NZ Rental Car. NZ Rental Car considered that Ms Tiller had breached her implied duties of fidelity, and to act in good faith towards her employer.

[66] Ms Tiller has submitted that her actions in the matter which lead to the criminal prosecution were justifiable on the basis that she considered that if her actions had compromised or brought financial damage to NZ Rental Car, this was attributable to NZ Rental Car's failure to have paid her wages.

[67] I have addressed the outstanding wages issue above. The fact that Ms Tiller may have considered herself justified in engaging in actions which had the effect of damaging the business of NZ Rental Car does not in fact make those actions justifiable, and I consider has the effect of undermining NZ Rental Car's trust and confidence in her implied duties of fidelity.

[68] This concern was heightened by the receipt of the private investigators report which was dated 30 November 2007 and which had been received by Mr Chan in December 2007.

[69] Whilst NZ Rental Car continued to employ Ms Tiller following the Police charges against her in August 2007, NZ Rental Car stated that the subsequent events regarding the discovery of the alleged fraudulent activities of Mr Alexander in which Ms Tiller had been complicit had completely destroyed any trust and confidence it could have in Ms Tiller as an employee.

[70] In these circumstances I find that NZ Rental Car had substantive justification for dismissing Ms Tiller on the grounds of serious misconduct.

#### *Procedural Justification*

[71] A decision to dismiss an employee must also be procedurally fair. The then Labour Court in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*<sup>3</sup> stated:

*“That is not to say that the employer's conduct of the disciplinary action is to be put under a microscope and subjected to pedantic scrutiny...”*

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<sup>3</sup> [1990] 1 NZILR 35

However a process fundamentally and palpably unfair will have the effect of rendering a disciplinary action unjustifiable

[72] There are three major principles applicable to the disciplinary process: a duty to inform the employee of the allegations, an informed opportunity for the employee to respond, and a decision that is free from bias and pre-determination. Additionally the fair and reasonable employer will inform an employee of their entitlement to have representation at a meeting of a disciplinary nature.

[73] There is no evidence that Ms Tiller was informed of the nature of, or provided with, an opportunity to have a representative present at the meeting on 18 December 2007 when she was suspended, or that she was provided with an opportunity to comment on the suspension decision prior to it having been made.

[74] The decision to terminate Ms Tiller's employment was made and communicated to her without having provided her with details of the allegations against her, or an opportunity to offer an explanation. Whilst it is clear that this was a stressful time for Mr Chan, this did not negate the responsibilities of NZ Rental Car to have acted in a procedurally fair and reasonable manner towards the employee.

[75] I determine that Ms Tiller has been unjustifiably dismissed from her employment with NZ Rental Car.

### **Remedies**

[76] In respect of the unjustifiable dismissal claim and in considering the question of remedies, the Authority has to consider the extent to which the employee contributed towards the situation which gave rise to the personal grievance pursuant to s 124 of the Act.

[77] I have found that NZ Car Rental had substantive grounds for the decision to terminate Ms Tiller's employment.

[78] Despite the fact that Ms Tiller had been charged by the Police in August 2007 in respect of 23 charges brought under the Crimes Act 1961, which was a breach of her duty of fidelity against it, NZ Rental Car continued to employ Ms Tiller. However the private investigator's report which Mr Chan had commissioned and had received in December 2007 provided NZ Rental Car with grounds for reasonably holding that Ms Tiller had been involved in further breaches of the duty of fidelity.

[79] Taking full account of Ms Tiller's contribution towards the situation in which she found herself at the date of the termination of her employment, I decline to order any remedies in respect of the unjustifiable dismissal claim.

### **Costs**

[80] Costs are reserved. Given the extent to which both parties have been successful, I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions by the Respondent to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

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