IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 113
ARC 86/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TALENT BEAN LIMITED T/A ROASTED ADDIQTION CAFE Plaintiff
AND	PREMA D'SOUZA Defendant

Hearing: 4-5 June 2013
(Heard at Auckland)

Appearances: Richard Zhao, Veronica Ceponis and Zhen Zhen Chen, counsel for plaintiff
May Moncur, advocate for defendant

Judgment: 20 June 2013

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The defendant, Prema D'Souza, commenced employment at food premises known as Roasted Addiqtion Café (the Café) situated at New North Road, Kingsland, Auckland. She commenced such employment in approximately May 2011, training under the head chef. After training for several months, she was appointed as sous chef.

[2] Ms D'Souza, an Indian citizen, came to New Zealand with her husband and young child in October 2010. She undertook studies in professional cookery and gained experience in a restaurant in Takapuna, Auckland, before commencing at the Café.

[3] In November 2011, the Café was sold to new owners (being the plaintiff in these proceedings). Ms D'Souza remained at the Café. The head chef did not continue with the new owners and Ms D'Souza assumed the role of head chef. She entered into a written employment agreement.

[4] Some time later difficulties arose between the defendant and the proprietors of the new business. On 11 April 2012, Ms D'Souza's employment was terminated. She claimed to have been unjustifiably dismissed. She commenced a personal grievance in the Employment Relations Authority (the Authority).

[5] In a determination issued on 3 December 2012,[1] the Authority held that Ms D'Souza was unjustifiably dismissed. She was awarded reimbursement of wages of $1,848 gross, compensation of $10,000, costs of $3,500, and reimbursement of a filing fee of $71.56. She was not successful in a claim she made for wages as a second issue in the proceedings before the Authority.

[6] The plaintiff (being the unsuccessful party in the determination), filed a challenge to the determination and sought a hearing de novo. The remedies sought are an order quashing the determination, an order in the alternative that Ms D'Souza's actions contributed to the situation giving rise to the grievance and any other relief and costs. The pleadings in this matter consist of an amended statement of claim and an amended statement of defence. Ms D'Souza did not cross challenge against her loss in respect of the wages claim. She has not pleaded for any increase in the remedies awarded to her.

Factual background

[7] There were no difficulties between the parties from the commencement of the employment relationship until about mid-March 2012. Ms D'Souza apparently had raised some issues of the proprietor Mr Vincent Shan and other employees (who were also members of his family) handling food items and equipment in the kitchen and pantry. There was also an incident, undisputed in the plaintiff's evidence, that

[1] [2012] NZERA Auckland 402.

Mr Shan's mother had cut his hair on the premises. Ms D'Souza said in evidence that she asked them not to do it again and was reprimanded by Mr Vincent Shan.

[8] Mr Vincent Shan alleged in evidence that on 10 March 2012 the kitchen had run out of bread and he had to leave the café to purchase more. He alleges this was not a one off incident and in evidence claimed it was an indication of Ms D'Souza's inability to cope with inventory. There was no evidence of this being specifically raised with Ms D'Souza. Nor was it canvassed with her in evidence, either in chief or under cross-examination.

[9] Matters escalated on 17 March 2012 when Mr Vincent Shan entered the kitchen and rebuked Ms D'Souza over items of food or ingredients, which had not been used or had gone past their expiry dates. An altercation ensued. Mr Vincent Shan claimed that Ms D'Souza was apologetic after this incident. The issue of altercation was raised briefly during cross-examination by Mr Zhou, counsel for the plaintiff. He did not put the allegation of an apology to her.

[10] Nothing further appears to have occurred until Easter 2012. On 8 April 2012, which was Easter Sunday, the café was busy. Ms D'Souza had baked some cookies, which she said were still hot. Mr Vincent Shan's father, Mr Jimmy Shan, asked through one of the English speaking staff whether Ms D'Souza could put icing on the cookies. She indicated they were still too hot and she would do it the following day. Ms D'Souza said that Mr Jimmy Shan then got aggressive, shoved the tray towards her and approached her as if he was going to strike her. Other staff intervened. Mr Jimmy Shan conceded in his evidence this was the case but stated his actions in trying to explain what he wanted her to do may have been misinterpreted with the language difficulties existing between them. In any event, the incident was not really tested in evidence. It appears, however, that this incident was the catalyst leading to Ms D'Souza's dismissal.

[11] Mr Vincent Shan claimed that leading up to this incident Ms D'Souza had been unsatisfactory in maintaining health and safety practices, in failing to wear disposable hairnets and in failing to complete duties with food stock, inventory and management. Some of these allegations are corroborated in evidence by Mr Jimmy

Shan and Ms Sunny Yang, Mr Vincent Shan's sister-in-law. Both of these relatives gave evidence. Mr Vincent Shan alleged that he spoke to Ms D'Souza about these things and gave her oral warnings several times. He said he gave her chances to improve but she failed to do so. Ms D'Souza denies these things. She says she did not receive the alleged oral warnings. Nothing is confirmed by way of evidence from contemporary documents.

[12] Following the incident of the icing of the cookies, the proprietors of the business required Ms D'Souza to attend a meeting to discuss matters. This took place on 9 April 2012 after Ms D'Souza had finished her shift for the day. Her husband also attended the meeting to support her. During the meeting she raised issues of concern. She read from a pre-prepared statement. This raised her concerns as an employee. It was not abusive or threatening in any way. It could be described as an attempt to work through problems which had arisen. She said Mr Vincent Shan was not prepared to discuss these issues. She said that he threatened not to renew her contract and left abruptly. By this stage there was an issue over the hourly rate that the plaintiff was paying Ms D'Souza, the hours she was working and arrears of wages. The contractual rate was $16 per hour. However, for the total hours she was required to work she was receiving the equivalent of $14 per hour.

[13] Mr Vincent Shan's version of what took place at this meeting differs from that of Ms D'Souza. He claims that Ms D'Souza commenced by stating that she would resign. She gave them the unsigned letter from which she read. He says that she threatened to lodge a complaint with the Department of Labour about the wage issue. He said he was shocked, that he did not expect these demands and threats he received from Ms D'Souza. He said she hurled harassment at them and blamed everyone else instead of discussing possible solutions. He said that as a result of her "inability to perform her job tasks, disrespectful attitude and brazen and perverse behaviour" he lost trust and confidence in her as an employee. While Ms Sunny Yang corroborates some of Mr Vincent Shan's evidence as to the meeting she does not corroborate his allegation of Ms D'Souza hurling harassment.

[14] There is no dispute as to what then occurred. Ms D'Souza resumed duty the following day, 10 April 2012 at 6.30 am and completed her shift at 2.30 pm. The

next day was her day off. She says that at home on that day she received two warning letters attached to an email from Mr Vincent Shan.

[15] The email which is timed at 3.39 am on Wednesday, 11 April 2012 stated as follows:

> Hi Prema,
>
> After discussion with all business members yesterday, the decisions for you are in the followings:
>
> (1) You are given 2 warning letters, please find attached documents with one happened 27th March and one for yesterday. The original copies of the warnings are located in the kitchen beside the microwa[v]e, be sure to pick and keep it as soon as possible.
>
> (2) This is the LAST chance for you to improve your services and manners, if no improvement appears with[in] a certain period, you will be given a FINAL warning letters and your contract with us will be terminated IMMEDIATELY.
>
> Cheers,
> Vincent

[16] Two attachments to the email are warning letters. One is dated 17 March 2012 (not 27 March) and the other dated 10 April 2012. Apparently the earlier warning on 17 March had been typed up at the time of the altercation in the kitchen of the café on that date. Mr Vincent Shan after discussing it with a co-proprietor decided not to issue that particular written warning to Ms D'Souza. The second warning letter is therefore somewhat curious because it refers to the fact that management had been monitoring Ms D'Souza's performance "since 17 March which your first warning letter was issued". The first warning letter related to issues of food stock control, arguing, shouting in an impolite manner and threatening to stop work immediately, and the fact that insufficient bread had been ordered. The second warning letter referred to the argument with Mr Jimmy Shan, food stock control issues, arguments with management staff, breaching staff rules as to "unrelated chatting" and refusal to follow instructions, and her relationship with suppliers.

[17] Ms D'Souza upon receipt of the email and the two warning letters wrote a reply by email to Mr Vincent Shan in which she responded to the matters raised. The letter again could not be described as abusive but an attempt by her to put her side to the allegations contended in the warning letters. She sought a written apology but also indicated that she would refer matters to the Department of Labour. She stated that Mr Shan was accusing her of "baseless faults". Reference to the Department of Labour obviously related to the alternative dispute resolution procedure contained in the written employment agreement by which if a matter was not resolved either party could seek assistance from the Department of Labour's Mediation Service. From the contents of the final email sent by Mr Vincent Shan it seems he misunderstood what Ms D'Souza was meaning by referring to the Department of Labour. Her letter was a moderate response to the allegations being made against her.

[18] Upon receipt of the letter of response from Ms D'Souza, Mr Vincent Shan, within a matter of hours, replied to her by an email in which he stated:

> Hi Prema,
>
> I am NOT satisfied about this attitude to solve the problem, I have given you a last chance but you. Due to everytime you talk to your employer about this manner, including this time. Your third warning is now issued and employment agreement with us is now TE[R]MINATED. You will receive the confirmation letter shortly.
>
> Also for your attitude, I will write a full and legal truth report to both Department of Labo[u]r and Immigration today, with every evidence here, latest tomorrow. Hope you have a nice future.
>
> Cheers,
> Vincent

[19] This was a summary dismissal of Ms D'Souza. The earlier warning letter of 17 March 2012 of course was not given to her as at the date it had been written. No discussions whatsoever preceded the issuing of the email containing the two warning letters. No attempt was made to discuss matters with Ms D'Souza before the summary dismissal effected by the final email. No opportunity was given to her to take legal advice or have representation. Ms D'Souza was shocked at the action on the part of her employer. She stated in evidence that she could not believe that her employment had been terminated so unfairly and suddenly.

Impact of dismissal

[20] In evidence Ms D'Souza stated that the dismissal had a significant impact on her and her family. Initially she did not receive outstanding pay and holiday pay. She did not have any income until three weeks later when she found another position. She clearly acted to mitigate her loss. There is no submission that she failed to do this. She stated that her family suffered financial hardship as a result. She and her husband struggled to meet day to day expenses. She had to get loans from friends and the bank to support herself and her family. She desperately tried to obtain any job that came her way. She stated that despite repeated requests the holiday pay was not paid until after the mediation meeting at the Department of Labour. She indicated in evidence that Mr Vincent Shan threatened her over her residency. She stated that she and her husband were migrants and that they felt that no one could support them. She stated that she and her family, including her five year old son, were distressed as a result of the pressure imposed by her losing her position in this way. She further stated that the dismissal left her feeling a devastating loss of dignity. She felt that she had been injured and that the hurt remained with her. She indicated feelings of being upset and depressed.

Principles applying and conclusions

[21] The pleadings of the plaintiff primarily concentrate on the two incidents of 17 March 2012 and 8 April 2012. It is difficult to ascertain, in view of the disputed evidence, what performance issues were actually raised with the defendant if at all, prior to the attachment of the two written warnings to the email on 11 April 2012. It is unusual that a written warning dated a month earlier should be attached to the warning of 10 April 2012 in the one email when the earlier warning had not actually been delivered to the employee.

[22] The obligation rests on the plaintiff to persuade the Court that not only was the defendant guilty of the misdemeanours of performance failings alleged but that proper opportunities were given to respond and improve if they were accepted. Allegations of contributory behaviour also pleaded need to be established. The two matters raised under this head in the pleadings were the allegation that the defendant

showed a "staunch unwillingness to resolve the issues in good faith" and that she acted in a "harassing manner" toward the plaintiff, "by making threats in regards to laying a complaint in regards to the oral agreement". This refers to the allegation that the plaintiff and defendant had an oral agreement that she would be paid $14 per hour even though the contract provided for $16 per hour to satisfy the defendant's immigration status. The problem for the plaintiff on this point is that the evidence from the defendant, which the plaintiff was unable to dispute, showed that she did not require employment with the plaintiff to satisfy continued residency status. The evidence is clear that by the time she was employed at the café she had an open visa.

[23] There is some suggestion that at the meeting on 9 April 2012, Ms D'Souza commenced by announcing her resignation. That is disputed in the pleadings and the evidence. It was a point not pursued at all by Mr Zhou in his closing submissions. There is nothing in Ms D'Souza's pre-prepared document to suggest this. Indeed an interpretation quite to the contrary arises from that document.

[24] The plaintiff must establish that the dismissal of Ms D'Souza was justifiable. The statutory test for justification is contained in s 103A of the Employment Relations Act 2000 (the Act). That section states:

> **103A Test of justification**
> (1) 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).
> (2) 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.
> (3) In applying the test in subsection (2), the Authority or the court must consider—
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[25] Those provisions were considered by the full Court in *Angus v Ports of Auckland Limited*.[2] The Court, in analysing the section emphasised that the role of the Court is not to substitute its view for that of the employer. It is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[26] In his discussion in *De Bruin v Canterbury District Health Board*[3] Judge Couch, having considered *Angus* stated:

> [38] The test of justification comprises both the substantive decision made by the employer and how the employer arrived at that decision. It is, however, convenient to discuss the process and the outcome separately. ...
>
> [39] Section 103A(3) sets out considerations which must be taken into account when considering process. Subsection (4) expressly authorises the Court to also take any other appropriate factors into account. Subsection (5) precludes conclusions based on minor or inconsequential defects in process. In applying these provisions, I adopt what the Court in *Angus* said:
>
> > [26] Nor, too, does the new statutory provision alter the approach to what is sometimes referred to as procedural fairness exemplified in a number of decisions of the Court. The legislation (in subss (3), (4) and (5)), although expressing this for the first time, continues the emphasis on substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing, however minor, and to determine that this will not be fatal to justification. A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors

[2] [2011] NZEmpC 160, (2011) 9 NZELR 40.
[3] [2012] NZEmpC 110, (2012) 10 NZELR 93.

> which have to be take into consideration having regard to the particular circumstances of the case.

[27] In *Angus* the Court decided that the four considerations contained in s 103A(3) were to be seen as the legislative successors to the more general guidelines provided by the Court by *NZ (with exceptions) Food Processing IUOW v Unilever New Zealand Ltd*[4] where the Court stated:[5]

> …Where there is no agreed procedure the law implies into the employment relationship a requirement to follow a procedure which is, in the circumstances, fair and reasonable. Again, a good and conscientious employer will follow such a procedure. What that procedure should be in any particular case is a question of fact and degree depending on the circumstance of the case, the kind and length of the employment, its history and the nature of the allegation of misconduct relied on including the gravity of the consequences which may flow from it, if established.
>
> The minimum requirements can be said to be:
>
> (1) notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;
> (2) an opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and
> (3) an unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.
>
> Failure to observe anyone of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not overindulgent person.

[28] Mr Zhao in his closing submissions for the plaintiff, relied upon *Jiang v KVB Kunlun New Zealand Ltd*[6] and *Kendal v A Mark Publishing New Zealand Ltd*[7] to submit that in this particular case the procedural irregularities were minor and while they were accepted by the plaintiff in this case, that did not detract from the serious

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[4] (1990) ERNZ Sel Cas 582, (1990) 3 NZELC 97,567, [1990] 1 NZILR 35 (LC).
[5] At 594-595.
[6] [2011] NZERA Auckland 281.
[7] CEC 19/97, 18 July 1997.

misconduct alleged. He submitted that in the circumstances, in substance, what the plaintiff did in this case is what a fair and reasonable employer "would" have done in the circumstances and that any procedural irregularities were minor as they did not prejudice the employee. On this basis he submitted that the dismissal was justified "bar the incidental procedural errors due to inexperience of the plaintiff without any ill intention".

[29] As Ms Moncur submitted on behalf of the defendant, what the plaintiff did was to summarily dismiss the defendant. She submitted that even if the alleged actions of Ms D'Souza were established and that was denied, they would hardly justify summary dismissal. She referred to the curious way that the day before the dismissal the two separate warning letters dated nearly a month apart were sent to Ms D'Souza. Despite the warning letters in the email advising that she was to be given another opportunity to remedy the situation, the following day and simply in response to Ms D'Souza's reply, she was then summarily dismissed. Ms Moncur submitted that that could hardly comply with the requirements effectively imposed upon an employer in this situation and set out in s 103A(3) and more generally enunciated in *Unilever*.

[30] In the determination the Authority Member concluded that because of the inconsistency between the allegations being made by the witnesses in support of the employer's position, she was not prepared to accept that evidence. She indicated in another context that if Mr D'Souza's performance was as bad as alleged by the plaintiff then there would have been some steps taken to see whether the 90 days trial period applied, which would enable termination of employment. According to the witnesses these deficiencies in Ms D'Souza's performance were apparent over a fairly lengthy period following the commencement of her employment. No steps were taken to put the complaints in writing or discuss them with Ms D'Souza. Mr Vincent Shan's explanation for not giving the written warning relating to the incidents on 17 March 2012 and then annexing it to the penultimate email, as justification for a final warning is totally unconvincing. He alleged that the reason that he did not give the written warning back on 17 March 2012 was because when he discussed the matter with another proprietor he was dissuaded from doing so. No witness was called to verify this.

[31] However, considering those factors contained in s 103A of the Act, even if the allegations were substantiated, and I am not prepared to accept that they were, the treatment of Ms D'Souza fell so far short of the standards required by the legislative provision that the plaintiff in this case could not establish that the dismissal was justified. This means that she was unjustifiably dismissed and had a personal grievance pursuant to s 103(1)(a) of the Act.

[32] During the course of the hearing there was quite a deal of evidence relating to the plaintiff's allegation that prior to its acquiring of the café business there was an arrangement between Ms D'Souza and the then proprietor as to actual hourly rates paid and hours worked as opposed to the formally presented position that she was on a rate of $16 per hour for 38.5 hours. Mr Vincent Shan alleged that the purpose of this was to support Ms D'Souza's position with the Immigration Authorities. The problem for Mr Vincent Shan with this assertion was that the former employer was not called to give evidence. Quite apart from this Ms D'Souza was adamant that she had an open visa and did not require such an arrangement. Further, Mr Vincent Shan then required execution of a formal written contract requiring Ms D'Souza to be paid at the rate of $16 per hour for 38.5 hours per week over six days. The evidence is undisputed that she worked far longer than these hours and was effectively only paid at the rate of $14 per hour. In the determination, the Authority Member rejected the claim for arrears of wages on the basis that it was not raised with the proprietors of the plaintiff business and was only belatedly raised during the investigation as a wages claim.

[33] A problem that I have with dealing with this claim raised in evidence and by Ms Moncur in her final submissions is that no cross-challenge or other pleading was filed by Ms D'Souza against the Authority's determination on this particular point. I took that up with Ms D'Souza in final questions of her and asked her whether she was claiming back wages. She indicated that she just wanted this to be over. I took from that she was not pursuing the matter. In the circumstances despite some urging by Ms Moncur for me to consider this issue, there is really no basis upon which I can consider it. It may still be open for Ms D'Souza to bring a claim for wage arrears in view of the fact that despite the issue being considered by the Authority Member, no

formal application appeared to have been made to the Authority and certainly it was not formally raised in the challenge to this Court.

Contribution

[34] I turn finally to the issue as to whether the actions of Ms D'Souza contributed towards the situation giving rise to the grievance. There is substantial dispute in the evidence as to the allegations made by Mr Vincent Shan against her. I am not prepared to accept that oral warnings were issued. When Ms D'Souza was given the opportunity at the meeting to discuss matters she did so in a forceful but not unreasonable way. When confronted with the two warning letters she responded immediately in writing again, putting her position forcefully, but not offensively. I am sure she would have responded in the same way if oral warnings had been given. She raised issues of concern from time to time such as the handling of food and the hair cutting.

[35] The plaintiff cannot satisfy the obligations upon it to justify the submission that there was contributory conduct on Ms D'Souza's part. Indeed, all her actions appear to have been taken in an attempt to resolve differences and keep her employment. I reject the plaintiff's submission in this regard.

Disposition

[36] In view of my findings the plaintiff is clearly unable to justify the termination of the employment of Ms D'Souza. Not only have the allegations against her not been established to the degree which would be required, the steps taken by the plaintiff to present the allegations to Ms D'Souza were totally inadequate. The plaintiff has simply failed to meet the standards as to justification required by s 103A of the Act. On an objective basis the employer's actions in this case are not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. In reaching that decision I have considered the four matters set out in s 103A(3). It is clear from the evidence that even if the actions of the employer in this case were unjustifiable solely because of defects in the process,

those defects were far from minor and clearly resulted in the employee, Ms D'Souza, being treated unfairly.

[37] Accordingly, the challenge to the determination of the Authority Member is dismissed. Remedies, which the Authority Member granted, being reimbursement of lost wages of $1,848 gross and an award of compensation of $10,000 pursuant to s 123(1)(c) of the Act are confirmed as orders of this Court. In addition to that the award of costs of $3,500 and reimbursement of the filing fee of $71.56 are also confirmed as orders of this Court.

[38] That leaves for consideration by this Court, costs in respect of the challenge. Costs follow the event but costs are reserved. I would hope that the parties could agree on the issue of costs in respect of the challenge but if no agreement can be reached then the defendant shall have 14 days to file any memorandum in respect of costs. The plaintiff shall then have 14 days thereafter to file any memorandum in reply.

[39] The issue of costs on the challenge will then be considered.

M E Perkins
Judge

Judgment signed at 4 pm on 20 June 2013