

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Karen Baker

AND Clendon Services Limited

REPRESENTATIVES Jenni-Maree Trotman, counsel for Karen Baker
Peter Elder, advocate for Clendon Services Limited

MEMBER OF AUTHORITY R A Monaghan

INVESTIGATION MEETING 21 August 2006

SUBMISSIONS RECEIVED 5 and 8 September 2006

ADDITIONAL INFORMATION RECEIVED 25 October 2006

DATE OF DETERMINATION 9 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Clendon Services Limited ("CSL") operates the New World supermarket at Clendon. It employed Ms Baker initially as checkout manager, then as joint checkout manager, then as checkout supervisor. It dismissed her following an argument with another employee, which occurred in the public area of the supermarket.

[2] Ms Baker says the dismissal was unjustified. She also says she was demoted to checkout supervisor in circumstances amounting to an unjustifiable action by her employer, affecting her employment to her disadvantage.

Ms Baker's employment history

[3] Ms Baker's employment as checkout manager began on 2 February 2004. She was responsible for rostering checkout staff, training checkout staff, various health and safety matters relevant to checkout operation, controlling change for the tills, and other activities not relevant to the present problem. Her obligations regarding rostering were to ensure that sufficient checkout staff were rostered over the course of the working week to facilitate a smooth flow of customers through the checkout lanes. Obviously peak times required more staff and more lanes open, while quiet times required fewer staff and fewer lanes open.

[4] An employee performance report for Ms Baker, dated 29 July 2004, recorded below acceptable performance in staff management activities such as training, teambuilding and traffic flow through the checkouts. Security near the checkouts was also marked as below acceptable.

[5] The poor report led to disciplinary action and a verbal warning on 3 August 2004. Ms Baker was placed on weekly performance reports for the next four weeks.

[6] It seems only one of these reports was completed. The relevant written report is dated 11 August 2004. Training and adherence to certain company policies was still noted as below acceptable standard.

[7] However instead of proceeding further down the disciplinary process, there was an agreement between the parties under which, on 21 September 2004, Ms Baker became joint checkout manager with Vivienne Allen. Ms Allen had been a checkout supervisor and was also the union delegate. She took over primary responsibility for rostering. Her hourly rate of pay increased, and Ms Baker's decreased, to \$15.

[8] On 12 April 2005 Ms Baker received a verbal warning for 'failure to execute company policy'. That is an overly vague way of identifying the conduct leading to the warning, although the associated evidence indicates the problem was with inadequate staffing of checkouts, and Ms Baker's failure to attend a training course for its full duration. I was told the problems with checkout staffing did not occur when the responsibility was Ms Allen's, but they continued to arise when Ms Allen was not available and Ms Baker had charge.

[9] On 29 April 2005 Ms Baker received another warning, documented cryptically as 'house rules Part A section 6'. An associated file note shed little light on precisely what was to be addressed in terms of the warning, although it listed a number of concerns with the checkout operation.

The demotion

[10] By mid-2005 Rex Morgan, the general manager, had become increasingly concerned about the supermarket's poor performance record within the New World group, and his observations of poor traffic flow and unreliable staffing at the checkouts. Another staff member advised him of a conversation with a former checkout manager, Jan Taylor, during which Ms Taylor had indicated she had left her existing position and was looking for a new career. Mr Morgan contacted her to ask whether she would help the Clendon supermarket improve its performance. She agreed to do so for a six-month period, after which she already had employment arranged in a new field.

[11] Mr Morgan sought to discuss this with Ms Baker and Ms Allen on 7 June 2005. He spoke to both women separately. In his meeting with Ms Baker he explained the plan to employ Ms Taylor to take over the running of the checkout, that the arrangement would be for a short term, and that the hope was an existing staff member would be capable of taking over from Ms Taylor at the end of the term.

[12] It was common ground that Ms Baker said she thought that was a good idea. She said in evidence she felt bullied and intimidated, but when I asked about the nature of the bullying it became apparent that nothing Mr Morgan said or did can reasonably be interpreted as bullying. He did nothing more than explain what he sought to do and why, and seek a response from Ms Baker. That he did so against the background of Ms Baker's poor work performance record does not, without more, render his conduct intimidating or bullying.

[13] Mr Morgan then met with Ms Allen, who also indicated she thought the idea was a good one.

[14] Mr Morgan wanted both women to discuss and consider their position before finalising any arrangement. They did so, and did not change their positions. Mr Morgan met again separately with both at the end of the day.

[15] It was common ground that, during the meeting with Ms Baker, Mr Morgan asked if Ms Baker wanted to discuss the matter with anyone at home. Ms Baker said she was happy to come to a negotiated arrangement that day.

[16] She told Mr Morgan she had a concern about the effect on her family of any resulting reduction in her wages, as her husband was currently unemployed. Mr Morgan offered to allow her to remain on her current rate of \$15 per hour for 8 weeks, before her rate reduced to \$14 per hour. She would take the position of checkout supervisor. Ms Baker agreed. She also asked if she could have a further four weeks at \$15 per hour in case her husband had not found work by then. Her husband's presence placed her in a difficult position as far as that

aspect of her evidence was concerned, so I say only that I accept the company's evidence on the matter.

[17] The agreement was reduced to writing, and Ms Baker signed it. She said again that she felt pressured to sign, but there was no evidence Mr Morgan placed any inappropriate pressure on her.

The dismissal

[18] On 22 June 2005 Ms Baker was relieving in the Lotto outlet at the front of the supermarket. A checkout operator, P, wanted to take her smoko break and another supervisor gave her permission. Ms Baker over-rode this as other operators were on their breaks and there would not be adequate coverage on the checkouts.

[19] P took umbrage, and went over to Ms Baker to challenge the decision. Ms Baker explained her reasons, and told P she would have to wait. In the hearing-range of customers, P expressed the view that Ms Baker had been stood down from her manager's position because she did not 'give a shit'. Ms Baker was becoming angry and replied 'that's right, I don't give a shit.' Further abuse from P followed. Ms Baker sent P home, and went to report the matter to the human resources manager, Raewyn Maaka.

[20] Ms Maaka reported the incident to Mr Morgan.

[21] On 23 June Mr Morgan spoke separately to P and Ms Baker, to obtain their accounts of what had happened. Both gave generally similar accounts of the altercation, with P alleging in general terms that the two had sworn at each other and Ms Baker describing the exchange as I have set out above.

[22] Mr Morgan reminded Ms Baker she had two recent warnings, and said 'this was a dismissible offence'. At the end of the meeting Mr Morgan advised that he would be reviewing the matter and no decision would be made that day as to whether disciplinary action would follow.

[23] Mr Morgan met again with P on 24 June. P provided a little more detail of the exchange, although again it was similar to Ms Baker's account. This time P expressly referred to Ms Baker having said 'I don't give a shit', adding that Ms Baker then told her she could 'piss off home.'

[24] According to a medical certificate she provided, Ms Baker was unfit for work for 7 days from 27 June. Thus her evidence that she continued to report for work until she was dismissed is not accurate, and I do not accept the suggestion that CSL delayed unduly in addressing her role in the incident. By letter of 4 July she was advised a disciplinary meeting would be held on 5 July to discuss the comments she had made to P. She was warned the matter could lead to her dismissal, and offered the opportunity to have a representative present.

[25] The disciplinary meeting went ahead on 7 July. The account Ms Baker gave of the relevant exchange was, according to Ms Maaka's meeting note:

"P: Hey bro' what's your problem
 KB: I have no problem
 P: that's why you were stood down as manager
 KB: I couldn't give a shit what you think
 P: [KB cannot recall exactly but that the language included B's and F's.]
 KB: [asked P to take her drawer out and go home]"

[26] Ms Baker did not dispute that account in evidence, other than to say she explained that she pronounced the word 'shit' as 'shite'. Mr Morgan denied that explanation was given, and said no issue was taken during his investigation as to how the word had been pronounced. For my part I found Ms Baker's explanation unconvincing, and accept Mr Morgan's evidence.

[27] There was a difference between Ms Baker's accounts of 23 June and 7 July concerning what she said she did not 'give a shit' about. However I have taken that matter no further since the employer is relying primarily on the use of the word and the overall handling of the incident.

[28] Mr Morgan and Ms Maaka concluded Ms Baker had breached company policy in her poor response to P's challenge in front of other employees and customers. In addition they considered Ms Baker had breached policy by failing to notify the duty manager of the incident at the time, and failing to give notice that a staff member had been sent home. They decided dismissal was appropriate.

[29] The concerns about failure to notify struck me as too minor to attract weight in a decision to dismiss, and if a diary entry attributed to Ms Taylor is accurate they may not even be correctly founded in fact. Moreover, at least Ms Maaka had been informed of the incident. However since the concerns have not subsequently been relied on, I take that matter no further.

[30] Mr Morgan advised Ms Baker that her actions amounted to serious misconduct under the house rules, Part B, section 16, which read:

"using abusive or foul language which may cause offence towards another employee, a customer or client on company premises or when attending company functions."

[31] Although P was dismissed for similar reasons, Ms Baker believed the dismissal occurred several days after her own and felt unfairly treated as a result. Ms Allen asserted that P had been at work from the date of the incident to the date of her own dismissal, being a date after Ms Baker's dismissal. However payroll records indicate P became entitled to only 7 hours' pay after 19 June, and a note on her record indicates she was dismissed on 4 July. In short, the company was probably correct when it said P was not at work during the period in question. Ms Allen was mistaken.

Justification for the demotion

[32] On the face of the matter Ms Baker agreed to the variation in her terms and conditions of employment which has been characterised as (and was) a demotion. The question of the justification for the employer's action does not arise unless the agreement is, for an appropriate legal reason, set aside.

[33] Ms Baker's assertions that she felt bullied and intimidated went some way towards suggesting grounds on which the agreement might be set aside, but I do not find those grounds to be made out on the facts. I do not accept there was any bullying or intimidation.

[34] The existence of the agreement means I do not accept Ms Baker's employment was affected to her disadvantage by an unjustified act of her employer's

Justification for the dismissal

[35] The dismissal was challenged on the basis that there was no substantive justification for it, and the procedure was unfair.

[36] A principal submission about the lack of substantive justification rested on Ms Baker's evidence that she did not say 'shit', rather she said 'shite'. As I have said, I do not accept that evidence and I do not accept that explanation was given to Mr Morgan.

[37] It was also submitted that, in any event, the word 'shit' is not abusive or foul language that may cause offence.

[38] I accept the word is not at the foul end of the scale of foul language, although nor is it a word that should be used by a customer service employee in the hearing of customers. Indeed the circumstances in which it was used are relevant. Most importantly the word was used in a

public part of the supermarket and in the hearing of customers, by someone who had recently been in a management position and remained a supervisor. It was not acceptable.

[39] It might, nevertheless, have called for some lesser sanction than dismissal if there were mitigating circumstances, or some other reason to say imposing a dismissal was not what an employer acting fairly and reasonably would have done. However there was no provocation capable of justifying Ms Baker's response, rather she reacted inappropriately to P's challenge. In addition she was not a model employee, at least in a managerial or supervisory role, rather she had a history of performance problems. Overall I conclude there were substantive grounds to dismiss.

[40] The procedure used in implementing the dismissal was said to be flawed in that:

- (a) Ms Baker was dismissed before P had been spoken to;
- (b) The 23 June meeting went ahead with Ms Baker having no support person; and
- (c) Ms Baker did not have an opportunity to respond to P's allegations.

[41] Point (a) was not supported by the evidence. It is not what happened.

[42] Regarding point (b), the 23 June meeting was not a disciplinary meeting. It was preliminary in nature. The meeting of 7 July was clearly identified as the disciplinary meeting. Ms Baker had supporters at that meeting.

[43] Regarding point (c), Ms Baker should have been shown the note of, or at least have been given the opportunity to comment on, P's account of the incident. However I do not consider the failure to do so to be a flaw capable of vitiating the dismissal because, although there were some differences in detail, the differences were not material and did not affect the conclusion Mr Morgan reached about Ms Baker's conduct during the exchange. In particular – subject to Ms Baker's variation on 7 July - the accounts of P and Ms Baker regarding the use of the word 'shit' were essentially the same.

[44] Accordingly I do not accept the dismissal procedure was so flawed as to render the dismissal unjustified.

[45] For these reasons I conclude that the dismissal was justified.

Costs

[46] Costs are reserved.

[47] The parties are invited to agree on the matter. If they seek a determination of it from the Authority they shall have 28 days from the date of this determination in which to file and exchange memoranda setting out their positions on the matter.

R A Monaghan
Member of Employment Relations Authority