



New Zealand Employment Relations Authority Decisions

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Barlow v Waikato Sheds Ltd (Auckland) [2016] NZERA 731 (18 February 2016)

Last Updated: 17 December 2021

ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION (REFER PARAGRAPHS 4 & 5)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND		
		[2016] NZERA Auckland 48 5556692
	BETWEEN	JOSEPHINE BARLOW Applicant
	AND	WAIKATO SHEDS LIMITED Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Danny Gelb, Advocate for Applicant Susan-Jane Davies, Counsel for Respondent	
Investigation Meeting:	2 & 3 February 2016 at Hamilton	
Submissions Received:	3 February 2016 from the Applicant and from the Respondent	
Determination:	18 February 2016	
DETERMINATION OF THE AUTHORITY		

Employment relationship problem

[1] The Applicant, Ms Josephine Barlow, claims that she has been unjustifiably disadvantaged and unjustifiably dismissed as a result of her employment being terminated for serious misconduct by the Respondent, Waikato Sheds Limited (WSL), on 19 March 2015.

[2] WSL denies that Ms Barlow was unjustifiably dismissed and claims that she was justifiably dismissed on the grounds of serious misconduct.

[3] WSL does not accept that Ms Barlow has a separate unjustifiable disadvantage claim as that claim arises from the dismissal decision rather than being an independent claim.

Prohibition on publication

[4] I order that the evidence given in this matter relating to the confidential sales and financial data of the Respondent (which includes customer names, dates of sales, values of sheds sold and sales margins) is prohibited from publication until this order is revoked or varied by further orders of the Authority.

[5] This order is made under Schedule 2 clause 10(1) of the [Employment Relations Act 2000](#).

Issues

[6] The issues for determination by the Authority are whether or not :

- Ms Barlow was unjustifiably dismissed by WSL
- Ms Barlow was unjustifiably disadvantaged by WSL

Background facts

[7] WSL designs, builds and delivers farm, lifestyle and industrial commercial sheds within the Greater Waikato region. Mr Brian Insoll, sole director and shareholder of WSL, started WSL in 2005 and gradually employed employees as the business grew.

[8] Just prior to Ms Barlow's employment, WSL had three employees, including Mr Garth Derbyshire, Sales Manager. Mr Insoll explained that the rationale for employing Ms Barlow had been to ease his own involvement in selling products and enable him to spend more time managing the business.

[9] Ms Barlow commenced employment with WSL as a Salesperson on 3 March 2014. She was provided with an offer letter (The Offer Letter) and an individual employment agreement (the Employment Agreement).

[10] The Employment Agreement outlined that Ms Barlow was entitled to a commission payment, the details of which were outlined in the Offer Letter which stated:

The commission structure is discussed below.

1. *The Waikato Shed Company (WS) structure remuneration package which comprises a base salary (\$25,000) plus commissions being 7.5% of the operating profit of each shed sale you originate from the date of commencement of employment.*
2. *An interim agreement will ensure the commissions be "topped up" to the equivalent of \$50,000 per annum for the first 12 months of your employment with WS.*
3. *The top up arrangement may continue for up to a further three months provided you have demonstrated sales success by being largely or totally responsible for less than 25% of all sales achieved by WS.*
4. *From 12 months onwards WS may agree to an income smoothing arrangement whereby WS pay commission in advance on contracted sales achieved by WS where the final calculation of operating profile has yet to be determined due to normal delays between the sales agreement and job completion.*

Performance expectations are as follows:

(a) By months 6 to 9 from commencement you will be wholly or largely responsible for 25% of all WS sales.

(b) After 12 months (from commencement) you will achieve an average of more than 35% of all sales through your sales effort.

The objectives of the appointment are twofold:

(i) Grow total shed sales of all WS products, including both custom build and no bull sheds.

(ii) Reduce both reliance on and workload of the owner of WS.

[11] Mr Brian Insoll, sole director and shareholder of WSL, explained that he had appreciated that it was difficult

for a new salesperson to immediately develop customer 'leads' and that the "top-up" arrangement was a means of assisting Ms Barlow to have a degree of salary security whilst she established customer knowledge and contacts.

[12] He had been very satisfied with Ms Barlow's progress during the first three months of her employment when she had sold five sheds. However, in the next eight months she had sold only two sheds. The number and value of her sales was such that her achievement of 7.5% of the operating profit on her sales was considerably below the \$25,000 "top-up" amount.

[13] During this time, Mr Insoll said Ms Barlow had been provided with coaching received from WSL's external commercial consultant, Mr Nick Harvey, who provided bi-weekly sales coaching for the employees of WSL. Additional coaching was provided for Ms Barlow, which included her having a one-on-one breakfast coaching meeting with Mr Harvey.

Changes were made to the way incoming inquiries were shared among Mr Garth Derbyshire, Sales Manager, Ms Barlow, and Mr Insoll, and ongoing informal meetings which were held to discuss Ms Barlow's sales results and ways to improve her performance.

[14] Ms Barlow confirmed that she had been provided sales information on a regular basis at the weekly office meetings at which potential customer leads had been discussed, and sales progress and client progress examined.

[15] Mr Insoll said that information about WSL sales and profitability was treated on a confidential basis and was not to leave the office, and this was well known and understood by the employees. Ms Barlow confirmed that was the case.

Meeting held on 26 November 2014

[16] An informal meeting was held between Mr Insoll, Dr Steven Saunders and Ms Barlow on 26 November 2014. Dr Saunders was a Human Resources Consultant who provided HR services to WSL through the company, Steven Saunders & Associates Limited, which he ran with his wife

[17] The purpose of the meeting was to discuss the reason for the decline in Ms Barlow's sales performance which had dropped to concerningly low levels, and ways in which Ms Barlow could be provided with assistance in order to rectify the situation.

[18] Mr Insoll had prepared sales data for the meeting which was discussed and examined with Ms Barlow.

[19] Dr Saunders said that because Ms Barlow had said she had potential sales that were looking promising, he and Mr Insoll decided to await sales developments over the Christmas period and hold another sales meeting in February 2015. Ms Barlow was also asked to consider what might assist her to improve her sales performance.

Meeting held on 3 February 2015

[20] There was a further informal meeting held on 3 February 2015 which was a follow-up meeting to discuss what progress Ms Barlow had made since the meeting on 26 November 2014.

[21] During the intervening period Ms Barlow had sold only one shed.

[22] Dr Saunders said that at that meeting Ms Barlow disputed the sales position saying that she felt she was not supported, that Mr Derbyshire received the best sales leads and should share them with her, and that there was insufficient marketing being carried out.

[23] Mr Insoll said that WSL was enjoying considerable sales growth in terms of enquiries, leads and sales, and he considered marketing was not an issue.

[24] However it had been agreed to provide Ms Barlow with first contact with incoming leads other than those which were Mr Derbyshire's referrals, and to allow her to decide how to allocate these leads between herself and Mr Derbyshire.

Meeting held on 25 February 2015

[25] On 21 February 2015, Dr Saunders emailed Ms Barlow and asked her to confirm her availability to meet with him and Mr Insoll to discuss her sales results for the year 2014 to 2015 on Wednesday, 25 February 2015. The email stated:

One item of discussion will be the consideration of the top up on commissions which has been in force since your commencement.

[26] The email also advised Ms Barlow that she had the right to bring a support person to the meeting.

[27] The meeting, which was held on 25 February 2015, took place in the WSL meeting room which was closed off from the rest of the open plan office. There were two doors in the room, a set of doors which led into the main office where Ms Barlow's desk was located, and French doors which led directly into the car park.

[28] The meeting was attended by Ms Barlow accompanied by her friend, Ms Michelle O'Callaghan (who had refused to provide her surname during the meeting), Mr Insoll and Dr Saunders.

[29] Ms Barlow said Ms O'Callaghan had a pen and paper and took some notes during the meeting.

[30] Dr Saunders said he took handwritten notes during the meeting which were later typed up, but he had not seen either Ms Barlow or Ms O'Callaghan take notes during the meeting. In the Investigation Meeting Ms O'Callaghan confirmed that she had only written a one line note during the meeting.

The Information provided

[31] Mr Insoll said he had prepared a detailed pack of sales and financial data for the 2014/2015 year for discussion at the meeting. It gave a picture of all the company's sales over the 12 month period and was very detailed. He said it was seven pages in total and contained detailed information about sales including customer names, dates of sales, value of

sheds sold and margins. The data was taken directly from the WSL system. He explained that he had tried to present the sales information in various formats including graphs, to make it more easily understandable to Ms Barlow.

[32] Mr Insoll had made four copies of the pack of data for use in the meeting. Each copy was distinctive, being stapled in the top left hand corner and had orange highlighter marking on it. Each copy was clearly numbered at the top, one to four. The four copies were not clipped together.

[33] Mr Insoll said that at the commencement of the meeting he had emphasised that the information was sensitive commercial sales information and was not to leave the table and that he would be collecting the packs up after the meeting had concluded. He had repeated this instruction repeatedly during the meeting because he was very sensitive about the nature of the information the pack contained, and such information being seen by non-employees and/or customers.

[34] Ms Barlow confirmed at the Investigation Meeting that Mr Insoll had said at least three times during the meeting that the information was not to be taken away.

[35] During the meeting Ms Barlow said she had requested a copy of the sales information to take away with her. Mr Insoll had explained that she could not have one of the information packs; however he would provide the information in a different format which she could take away and peruse as she wished.

[36] Dr Saunders said at the very beginning of the meeting Mr Insoll had put four sets of data on the meeting table. They were stapled and not clipped together. He said as he did so, Mr Insoll had put his hand down on the top of them and said firmly that they were to stay on the table and not to leave the room.

[37] Ms Barlow said that during the meeting she had been provided with sales data which was on A4 paper and held together at the top with a clip. She also said she had taken some papers into the meeting which consisted of three sheets of paper in total, including a one page suggestions list, clipped with a bulldog clip.

[38] Ms O'Callaghan confirmed that the main concern expressed by Mr Insoll and Dr Saunders during the meeting

was Ms Barlow's lack of sales.

[39] Mr Insoll said as he was going through the sales figures with Ms Barlow, she became angry and rude and would not accept the figures as set out, describing them as manipulated. He said she repeatedly asked him for a copy of the data to analyse it in her own time, to which he had responded that she could not take away the information from the meeting table but that

he was happy to give her the same data in a form that was not confidential, however, that would take time to prepare. He said he told her this several times in the meeting.

[40] Dr Saunders said that Ms O'Callaghan had commented during the meeting that she considered the reason for the meeting was intended to make Ms Barlow offer her resignation. He said this had been immediately refuted and it was explained that the purpose of the meeting had been to discuss Ms Barlow's sales figures and how they needed to improve.

[41] Mr Insoll said the meeting finished abruptly when Ms Barlow stood up and said words to the effect "*I'm not having this and I'm going home*". He said Ms Barlow got up and walked back into the open plan office and went to her desk. At the same time Ms O'Callaghan walked out through the French doors leading to the carpark area. He said she did not follow Ms Barlow out of the door leading into the main office.

[42] Ms Barlow said that she had felt the meeting was intense and had been agitated so that she had been fiddling with her notes in the bulldog clip and must have accidentally clipped the sales data to the back of her notes. When she left the meeting, she had gathered up her notes and inadvertently picked up the sales data as the documents were attached at the back of her own notes.

[43] Ms O'Callaghan, who had also left the meeting upon Ms Barlow's departure, said she followed Ms Barlow to her desk, however Dr Saunders said that she exited via the French doors. At the Investigation Meeting Ms O'Callaghan confirmed that she had left the building and was not party to the subsequent exchange between Mr Insoll and Ms Barlow.

[44] Mr Insoll said that after the meeting concluded, he was tidying up the meeting room table when he noticed that there were only three packs of the sales and financial data left on the table. One pack was missing.

[45] He said that Ms Barlow had protested loudly during the meeting about not being able to have a copy of the data and had said that she should be able to take it home.

[46] He had approached Ms Barlow as she was at her desk, it was approximately 5.35 p.m. and no one else was left in the office, although Dr Saunders was still in the meeting room.

[47] He had said to her that the information pack data was not to leave the meeting room. Ms Barlow had expressed no surprise but had immediately put her hand in her computer bag and retrieved the information pack data. He said she had shown no element of surprise that the information pack was there, and had reluctantly given it back to him, protesting loudly that she should be entitled to have a copy to peruse in her own time.

[48] Ms Barlow said she had been at her desk to collect her belongings following the conclusion of the meeting when Mr Insoll had approached her and asked her for the sales data. She said she did not know she had this data, found it with her notes and had given it to him without protest. She said she had no intention of taking the sales data from the meeting.

[49] Ms Barlow also stated that the sales data was not removed from the office, but agreed at the Investigation Meeting when questioned that had Mr Insoll not retrieved the information pack, she would have taken it home with her in the laptop bag.

[50] Dr Saunders said he had stayed in the meeting room when Mr Insoll had realised that one set of the data was missing. He was still in the meeting room when Mr Insoll went to speak to Ms Barlow, whilst he could not distinguish words, he could hear raised voices and what he described as a: "*commotion*". He said when Mr Insoll came back into the meeting room, he told him that Ms Barlow had the confidential data in her computer bag and that he had retrieved it from her.

[51] Mr Insoll said he went home after the incident with Ms Barlow and reflected upon it. He had been very concerned at the thought of what had occurred and that the confidential information could have been removed

from the WSL offices.

[52] Mr Insoll said he phoned Dr Saunders for his advice. Dr Saunders said he had suggested that they consider the matter.

Top up arrangement

[53] Dr Saunders said that on or about this time he and Mr Insoll were considering whether or not WSL should exercise its discretion regarding the salary 'top-up' arrangement. The decision was confirmed in a letter dated 26 February 2015 in which Mr Insoll wrote:

I wish to advise that the guaranteed advance on commissions which we have provided for the first 12 months of your employment with Waikato Shed Company will cease on 6th March 2015.

Accordingly, your weekly payments after 6th March 2015 will be based on the agreed retainer amount of \$25,000 per annum.

Disciplinary Issue

[54] Mr Insoll and Dr Saunders decided after due consideration that Ms Barlow's act of removing the sales information data from the table in the meeting room was expressly contrary to Mr Insoll's repeated instruction not to remove the sales information data, and was sufficiently serious to warrant the holding of a disciplinary meeting. Mr Insoll said he

instructed Dr Saunders to assist him in the disciplinary process and to prepare all the documentation.

Disciplinary Meeting

[55] On 9 March 2015, Ms Barlow said she received an email from WSL asking her to attend a disciplinary meeting on Friday, 13 March 2015. The email said:

The purpose of this meeting is to investigate the reasons why you attempted to remove highly confidential company data from the office after your meeting with Brian Insoll, Steven Saunders and Michelle

?(sic) on February 25 at approximately 5.30pm. You are advised of your right to bring a support person to this meeting.

[56] Ms Barlow said that she had not been prepared to attend a further meeting with WSL without legal advice and support and consulted Mr Kevin Booth, her family solicitor.

[57] She was unable to attend the disciplinary meeting proposed for 13 March 2015 as she went on sick leave that day.

Letter dated 15 March 2015

[58] As a result of Ms Barlow's unavailability, Dr Saunders wrote a letter dated 15 March 2015 rescheduling the meeting for Tuesday 17 March 2015, stating that the meeting was to investigate: "*the reasons you attempted to remove highly confidential and sensitive information from the office after repeatedly being told that this is not to happen. Your action is being treated as serious misconduct*".

[59] The letter further advised that: "*... as a result of our investigation and after consideration of your explanation, your employment with Waikato Shed Company may be terminated*".

[60] The letter also stated that in the event that Ms Barlow was unable to attend the meeting scheduled to be held on 17 March 2015, she was requested to provide an explanation for her actions in writing by 10.00 a.m. on 17 March 2015.

[61] Ms Barlow commenced a period of sick leave on 13 March 2015, remaining absent on sick leave until 17 March 2015, and then commenced a period of annual leave from 18 March to 20 March 2015.

[62] Neither Ms Barlow nor Mr Booth on her behalf requested more time to respond in writing or a face to face meeting. When questioned about this at the Investigation Meeting, Ms Barlow explained that she thought that if she 'told the truth', WSL would believe her.

[63] On 16 March 2015, Mr Insoll received an email from Mr Booth on behalf of Ms Barlow. Referring to the email of 15 March 2015, Mr Booth commented that the disciplinary hearing was totally unwarranted and referred to Ms Barlow's feelings of harassment. In the email, Mr Booth said he had sent Ms Barlow to a doctor for assessment and she would be unavailable for any hearing unless he was in attendance. He requested that WSL arrange mediation as soon as possible.

[64] Mr Insoll said he considered the contents of the email from Mr Booth and instructed Dr Saunders who wrote to Ms Barlow on 17 March 2015. In the letter to Ms Barlow which referred to the letter sent by Mr Booth on her behalf, it was stated:

We have considered your explanation and find your account of events to be flawed on a number of counts.

- 1. For you to assert that "you inadvertently put them in a stack of paper she left a meeting in your office" ... is untrue. In fact you arrived with your support person Michelle ... for the meeting ... You had not been in the Boardroom prior to the meeting and you had not left any papers on the table.*
- 2. The only papers on the Boardroom table were four stapled copies of the confidential information. Three times during the meeting Brian Insoll said "these papers are confidential and contain sensitive company information and MUST NOT be removed from the office".*
- 3. Neither you nor your support person took any notes nor recorded the meeting. There were no notepapers in front of you on the table other than the confidential papers. Dr Steven Saunders was the only person recording the meeting and he had his notepad in front of him. His papers could not have been mixed up with any other papers.*
- 4. At the conclusion of the meeting, Brian Insoll noticed that one set of papers was missing. There were three sets of papers on the desk. Brian approached you at your desk away from the boardroom where the meeting took place and asked if you had them. He repeated that you were not able to take the papers with you. You protested verbally, and told Brian that you should be able to take the data and then you removed the papers from your computer bag and reluctantly gave them back to Brian.*
- 5. For you to assert that "you thought they were merely the weekly sales data" is completely incorrect and contrary to previous statements ...*

Accordingly we do not accept your explanation on this matter.

We find that you failed to follow a lawful and reasonable instruction and are considering dismissal for serious misconduct.

We invite you to respond by 3pm Monday 23 March.

[65] Ms Barlow responded by email dated 18 March 2015. In response to the various issues raised, she commented as follows:

- 1. I had arrived with Ms O'Callaghan. I had not put any papers on the table.*
- 2. Brian Insoll had stated the confidential information must not leave the office. I had asked if these could be given to me in some other form.*
- 3. Michelle did take notes during the meeting. I took into the meeting two pages of paper with issues and one page of paper with suggestions she wanted to discuss at the meeting. I gave Steve the piece of paper with the suggestions on it. Steve asked for my piece of paper with my notes on them as I was referring, looking at and reading from them throughout the meeting, I replied they were my notes for the meeting.*
- 4. Brian asked me for the confidential paper I had inadvertently picked up with my notes as I hurried out of the meeting. I NEVER protested, in fact I said NO WORDS to him at all. Michelle was witness to this. I gave him the papers upon his request without reluctance.*

[66] Ms Barlow concluded the email by stating:

In conclusion:

I picked up the data with my notes as I left the meeting.

I did not know I had this data, I found it with my notes when Brian Insoll asked me for it. It was not my intention to take the data from the meeting. I did not leave the office with this data.

[67] Mr Insoll said he had considered Ms Barlow's response and consulted Dr Saunders. He decided he did not accept Ms Barlow's explanation and he proceeded to dismiss her on 19 March 2015. The letter dated 19 March 2015 stated:

Having given further consideration to your explanation of the events described in previous correspondence, we regret to inform you that your employment with Waikato Shed Company is terminated effective at midday today, 19 March 2015, for the following reason:

- *Serious misconduct.*

[68] The letter requested that Ms Barlow return WSL property with which she had been issued on the commencement of her employment, including phone, laptop, vehicle and any client files and/or paperwork to the WSL office.

[69] Ms Barlow said she had been notified of the termination of her employment whilst on annual leave on 19 March 2015 and had not been given the opportunity to discuss the matter face to face. She alleges that she was not sure why her employment was terminated.

Return of company property

[70] Mr Insoll said Ms Barlow did not return the company property herself as requested so he went to collect it. He said Ms Barlow had wiped all the logged calls and contacts from her mobile phone. She had deleted her Outlook file off her laptop which contained all her emails to and from customers and prospective customers.

[71] The information was essential because WSL needed to follow up on the customers with whom she had been dealing to make sure they had had good service. He said Ms Barlow had left very little paper information and a copy of original files was missing.

[72] As a result, WSL instructed a forensic IT specialist to recover the Outlook from the computer hard drive, but he was unable to do anything about recovering the data from her mobile phone. The cost to WSL of this necessary action was \$350 plus GST.

Determination

Was Ms Barlow unjustifiably dismissed by WSL?

[73] Ms Barlow was dismissed on 19 March 2015. The test of justification in s103A [Employment Relations Act 2000](#) (the Act) states:

S103A Test of Justification

- 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).*
- 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.*

[74] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. WSL must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[75] The implication of the test of justification in [s 103A](#) was considered by the Employment Court in *Angus v Ports of Auckland Limited*¹. The Employment Court stated:²

¹ [\[2011\] NZEmpC 160](#)

² *Angus at para [23]*

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.

[76] In *Ministry of Maori Development v Travers-Jones*³ the Employment Court observed:

A personal grievance is not an appeal to the Employment Relations Authority from the employer's findings of fact but is an inquiry into the question whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal.

[77] The test for serious misconduct is set out in *Northern Distribution Union v BP Oil New Zealand Ltd*⁴. In that case the Court of Appeal in defining what constituted conduct justifying summary dismissal stated:⁵

Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

[78] Mr Insoll said he believed Ms Barlow had been guilty of serious misconduct based upon:

- His having expressed, on several occasions, that the confidential sales information was not to leave the meeting on 25 February 2015;
- Ms Barlow having asked to take the information away from the meeting, and this having been refused;
 - Ms Barlow having expressed a view during the meeting that she was entitled to the information; and
 - Ms Barlow having protested loudly to this effect when he had asked her to return the information following the meeting.

³ [\[2003\] NZEmpC 52](#); [\[2003\] 1 ERNZ 174](#)

⁴ [\[1992\] NZCA 228](#); [\[1992\] 3 ERNZ 483](#)

⁵ *Ibid* at p.487

[79] Whilst Ms Barlow said she had taken the information pack inadvertently, and had returned it without protest when Mr Insoll asked her if she had taken it, Dr Saunders' evidence was that he had heard a "commotion" between Mr Insoll and Ms Barlow immediately following the meeting.

[80] Mr Insoll had not accepted Ms Barlow's explanation that she had removed the information inadvertently. He had made it clear that the information was not to be removed and he was adamant, not only in that meeting but in general as confirmed by Ms Barlow, that sales information was not to be removed from the WSL offices.

[81] The Employment Agreement states:

(i) Clause 4.2:

The Employee shall: comply with all reasonable and lawful instructions provided to them by the Employer.

(ii) Clause 13.3:

...the employer may terminate this agreement summarily and without notice for serious misconduct on the part of the employee. Serious misconduct includes but is not limited to... (iv) serious or repeated failure to follow a reasonable instruction.

[82] Mr Insoll believed that Ms Barlow had been guilty of misconduct so serious that it had destroyed his trust and confidence in her.

[83] I find that this had been a conclusion that a fair and reasonable employer could have reached in all the circumstances at the relevant time.

[84] In accordance with s 103A (3) of the Act the Authority must also consider whether:

- (a) ... the employer sufficiently investigated the allegations against the employee ...
- (b) ... the employer raised the concerns that the employer had with the employee ...
- (c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...
- (d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[85] WSL had raised its concerns in the letter to Ms Barlow dated 9 March 2015, requesting a meeting on 13 March 2015 at which she could provide her reasons for having removed the: "*highly confidential data from the office*".

[86] That meeting was rescheduled due to Ms Barlow's being on sick leave and in a letter dated 15 March 2015 a new date was set for 17 March 2015, but by that date, Ms Barlow had been on sick leave and had a period of annual leave arranged subsequently. The letter provided Ms Barlow with the option of providing a written explanation should she be unable to attend the scheduled meeting.

[87] By that stage Ms Barlow was legally represented by Mr Booth. The letter dated 15 March 2015 stated clearly that a possible outcome of the process, after consideration of Ms Barlow's explanation, was the termination of her employment, however neither she, nor Mr Booth on her behalf, requested more time to respond or for a face to face meeting to be rescheduled.

[88] Mr Insoll said he had considered the response provided by Mr Booth on Ms Barlow's behalf received on 16 March 2015, but he had not accepted her explanation, and advised of the termination of her employment in the letter dated 17 March 2015.

[89] I do not accept Ms Barlow's stated evidence that as at 6 November 2015 she was not sure why her employment had been terminated. WSL's letter 17 March 2015 stated that "*We find that you failed to follow a lawful and reasonable instruction and are considering dismissal for serious misconduct.*" and their letter dated 19 March 2015 gave the reason for dismissal as "*Serious Misconduct.*"

[90] I find that Ms Barlow was provided with a reasonable opportunity to provide an explanation to WSL which she did on 16 March 2015.

[91] I find no evidence that WSL pre-determined the outcome. Whilst it is clear that Ms Barlow's sales performance was not at the expected level, the evidence supports Mr Insoll having taken time to prepare sales information for the meeting on 25 February 2015 that would assist Ms Barlow to understand the concern WSL had with her sales performance. In addition no formal performance improvement plan had been commenced at that stage.

[92] The decision to dismiss Ms Barlow was not based upon her sales performance, but upon WSL's belief that (i) she had deliberately disobeyed a reasonable instruction not to remove confidential sales information from the meeting room and (ii) had Mr Insoll not recovered the confidential sales information from Ms Barlow she would have taken this from the offices of WSL.

Mediation

[93] Ms Barlow requested mediation initially in early March 2015. On 4 March 2015 Dr Saunders requested Ms Barlow to confirm the topic for mediation, to which Ms Barlow responded: "*Good Faith & Fair Process*". Dr Saunders said WSL had been unable to obtain any further clarification from Ms Barlow.

[94] Mr Booth requested mediation in the letter dated 16 March 2015. Mr Insoll's view had been that mediation would not assist in circumstances in which WSL did not agree with the explanation provided by Ms Barlow.

[95] I do not find that WSL's not agreeing to attend mediation in such circumstances was procedurally unfair.

Was the decision to stop the "top-up" salary payment motivated by a desire to have Ms Barlow resign?

[96] The Offer Letter set out at clause 3 that the "top-up" may continue for up to a further three month period. The decision to continue the "top-up" arrangement was discretionary as indicated by the word "*may*", the decision about whether or not to exercise the discretion was subject to the proviso: "*provided you have demonstrated sales success by being largely or totally responsible for \geq of all sales achieved by WS*".

[97] The discussion about Ms Barlow's sales performance to that date clearly established that it was not at the

anticipated level which WSL expected, and that was the reason for not continuing the salary “top-up” arrangement.

[98] I find that the decision to cease the salary “top-up” was motivated by a commercial consideration rather than by the intention to force Ms Barlow to resign.

[99] I find that Waikato Sheds Limited carried out a fair process.

[100] I determine that Ms Barlow was not unjustifiably dismissed by Waikato Sheds Limited.

Was Ms Barlow unjustifiably disadvantaged by WSL?

[101] I find no separate unjustifiable disadvantage arising from the dismissal decision.

Costs

[102] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs

within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[103] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson

Member of the Employment Relations Authority

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