New Zealand Employment Relations Authority Decisions

Beatty v Protective Paints Limited (Auckland) [2018] NZERA 236; [2018] NZERA Auckland 236 (27 July 2018)

Last Updated: 1 August 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 236
3017724

BETWEEN ADELLE BEATTY Applicant

AND PROTECTIVE PAINTS LIMITED

Respondent

Member of Authority: Vicki Campbell

Representatives: Alex Kersjes for Applicant

Richard Harrison for Respondent

Investigation Meeting: 24 July 2018

Oral Determination: 24 July 2018

Record of Oral

Determination:

27 July 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

A. One or more conditions of Ms Beatty's employment were affected

to her disadvantage by the unjustified actions of Protective Paints

Limited and Ms Beatty was unjustifiably dismissed.

B. Ms Beatty's application for remedies has been declined.

C. Protective Paints Limited is ordered to reimburse Ms Beatty the sum of $360.00 within 14 days of the date of this determination.

D. Ms Beatty's application for the imposition of penalties is declined.

E. Protective Paints Limited is ordered to pay to Ms Beatty the sum of $2,000 as a contribution to her costs within 14 days

of the date of this determination.

Employment relationship problem

[1] Protective Paints Limited is owned and operated by Mr Bryce Woods the sole director and shareholder. Protective Paints operates retail outlets, manufacturing facilities and conducts research and development into paint and other coating products.

[2] Ms Beatty worked in the Hamilton retail store as a sales assistant. She had worked there since September 2013. At that time she was employed by Paint and Décor Limited. This was a wholly owned subsidiary of Protective Paints. In August

2016 the store came under the direct ownership of Protective Paints. No changes were made to the employment relationship which continued uninterrupted.

[3] On 13 February 2017 Mr Gary Beamsley, the Hamilton store manager suspended Ms Beatty. She was then dismissed.

[4] Ms Beatty claims one or more conditions of her employment were affected to her disadvantage by the unjustified actions of Protective Paints by the way she was suspended and then not paid during her suspension. Ms Beatty also challenges her dismissal which she says was unjustified and claims Protective Paints breached its statutory duty of good faith and has applied for a penalty to be imposed.

[5] Protective Paints does not deny Ms Beatty was dismissed. It says it was justified in dismissing Ms Beatty because she had been misappropriating funds during her employment.

Issues

[6] In order to resolve Ms Beatty's employment relationship problems I must determine the following questions:

a) Were one or more conditions of Ms Beatty's employment affected to her disadvantage by the unjustified actions of Protective Paints and if so, what if any remedies should be awarded?

b) Was Ms Beatty unjustifiably dismissed and if so what if any remedies should be awarded?

c) Did Protective Paints breach its statutory obligations of good faith and if so, should a penalty be imposed?

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Beatty and Protective Paints but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Unjustified disadvantage

[8] Ms Beatty claims one or more conditions of her employment were affected to her disadvantage when she was suspended from her employment on 13 February

2017.

[9] Ms Beatty bears the onus of establishing on the balance of probabilities that she was disadvantaged in her employment. If Ms Beatty discharges that onus then the burden of proof moves to Protective Paint to establish on the balance of probabilities that any disadvantage Ms Beatty may have suffered was justified.

[10] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Protective Paint's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[11] On 8 February Mr Beamsley was in the shop when a customer came in to order more paint to finish his garage floor. Mr Beamsley could not find the colour the customer wanted so looked for a sales docket. He could not find a sales docket so

asked the customer to bring the container back to the store so he could match the paint.

[12] When the customer returned Mr Beamsley noted the colour formula was on the side of the container and was in Ms Beatty's handwriting. Because he could not find any record of the sale Mr Beamsley asked the customer about it. The customer told Mr Beamsley that he had paid cash to Ms Beatty because she had told him the eftpos machine was not working. According to the customer Ms Beatty directed him across the street to the Mobile service station.

[13] The customer recalled this because when he got across the street he discovered the ATM at the service station was also not working. He then drove to a bank in order to withdraw cash. He withdrew $200. He returned to the store and paid for his order using the cash. He told Mr Beamsley he had paid either $170 or $180 for the paint. There was no record of the transaction, no invoice or docket. The customer showed Mr Beamsley the bank receipt for the withdrawal through an app on his phone.

[14] Mr Beamsley was then absent from Hamilton on work related business. On his return he searched the stock records and

the computer system but could find no evidence that Ms Beatty had made a cash sale on 27 January.

[15] Ms Beatty arrived at work as usual on 13 February and went about her duties. Mr Beamsley arrived at work about 8.30 am and left to do the banking. He returned at about 11.40 am. On his arrival he locked the door and turned the "open" sign to "closed".

[16] Mr Beamsley told Ms Beatty that an allegation had been made that she had taken money from the till on 27 January 2017.

[17] Mr Beamsley told Ms Beatty what the customer had told him about paying cash for the product and the lack of any sale showing up in the computer system or elsewhere.

[18] Mr Beamsley advised Ms Beatty that she was suspended from her employment effective immediately and she should return her keys while an investigation was undertaken.

[19] Mr Beamsley had spoken to Mr Woods prior to suspending Ms Beatty. Mr Woods had instructed Mr Beamsley that if Ms Beatty admitted to taking the money she was to be immediately dismissed but if she denied the allegations she was to be suspended pending investigation.

[20] In the afternoon of 13 February Ms Beatty wrote to Mr Woods via email. In her email Ms Beatty goes into some detail about the information Mr Beamsley provided to her regarding the cash sale on 27 January. Ms Beatty sets out her understanding that she had been suspended pending an investigation.

[21] Ms Beatty did not receive her usual payment of wages on 16 February and made contact with Mr Woods. After exchanging a number of emails with Mr Woods, Ms Beatty rang Mr Woods on 21 February. In response to her question about why she had not been paid Mr Woods advised that she should have been paid. Ms Beatty contacted the company accountant and asked about her pay. Ms Beatty says the accountant told her he had been instructed not to pay her.

[22] There is generally no right to suspend an employee absent a statutory or express contractual right to do so. The plaintiff's employment agreement contains no power to suspend. Further, it is well established that an employee is entitled to be heard on a proposal to suspend.1 Suspension from employment is a serious step.2

[23] I find Mr Wood made a decision to suspend Ms Beatty without first providing her with an opportunity to be heard on the matter. Mr Wood decided that if Ms Beatty denied the allegation that she had taken the cash from the customer on 27 January she should be suspended. When he made that decision he had not spoken to Ms Beatty nor had he put the proposition that suspension was appropriate to allow Ms Beatty to give her feedback on the proposition. There was no contractual right to suspend and in that circumstance Mr Wood had a duty to consult over the proposal to suspend before he made a decision.

[24] The other difficulty for Protective Paints is that it failed to pay Ms Beatty during her suspension. Ms Beatty was financially disadvantaged by this action.

[25] I find one or more conditions of Ms Beatty's employment were affected to her

disadvantage by the unjustified actions of Protective Paints when it suspended her without

consulting her on a proposal to suspend and when it failed to pay her throughout her suspension. These were not actions an employer acting fairly and reasonably could take.

The dismissal

[26] Whether a dismissal is justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether Protective Paints' actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[27] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d). These matters include whether, having regard to the resources available, Protective Paints sufficiently investigated allegations, raised the concerns with Ms Beatty, gave her a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal.

[28] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Ms Beatty being treated unfairly.3 A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.

[29] Mr Woods responded to an email from Ms Beatty on 13 February where he advised Ms Beatty that the customer's allegations were serious and there were other instances where cash sales needed to be investigated. Based on a report from Mr Beamsley that Ms Beatty had advised him earlier that day that she intended to resign because she was moving, Mr Woods advised Ms Beatty that her resignation was accepted.

[30] Ms Beatty denied she had resigned. In an email to Mr Woods on 21 February Ms Beatty advised Mr Woods that she assumed her employment was at an end and asked him to arrange her final pay as she was struggling. In response Mr Woods

advised Ms Beatty that he would be in Hamilton either the following day or the day after and would be in touch at that time. I am satisfied that at the time these emails were exchanged the employment relationship remained on track albeit Ms Beatty was on suspension.

[31] Ms Beatty rang Mr Woods on 21 February and recorded the call unbeknown to Mr Woods. I have been provided with a copy of the recording together with a transcript. During this call Mr Woods advised Ms Beatty she was dismissed.

[32] Protective Paints must satisfy me on the balance of probabilities that, as a result of a complete and fairly conducted inquiry, it was justified in believing that serious misconduct had occurred. That decision must be made out not only on the evidence known to the employer at the time but that which would have been available after proper inquiry by it. An employer must base the decision to dismiss on a reasonably founded belief, honestly held, that serious misconduct has occurred.4

[33] While there is no doubt that Mr Woods genuinely believed that Ms Beatty had committed serious misconduct and that dismissal was the only appropriate outcome, his belief was not reasonably founded because of deficiencies in the investigative and decision-making processes. His decision to dismiss Ms Beatty was not the action an employer acting fairly and reasonably could take. The flaws in Protective Paints process were not minor and as a result Ms Beatty was treated unfairly.

[34] Ms Beatty was unjustifiably dismissed.

Remedies

[35] Ms Beatty has been successful in her personal grievance claims. Following the dismissal Mr Woods put the matter in the hands of the Police. Ms Beatty was charged with two counts of theft by a person in a special relationship. One of the charges was withdrawn during her criminal trial. The second charge was reduced to a simple charge of theft under $500. Ms Beatty pleaded guilty to this charge and applied for a discharge without conviction.

[36] On 11 May 2018 Judge Spear declined Ms Beatty's application for a discharge without conviction.5 The Judge was critical of Ms Beatty's actions in denying the offending until trial. His Honour stated that the evidence he had heard was compelling and if the charge that had been dropped had been prepared more carefully it would have been very difficult for Ms Beatty to have escaped conviction on that

charge as well. His Honour was of the view that Ms Beatty's offending should be marked by a conviction. Ms Beatty was sentenced to community work.

[37] On 18 July 2018 Ms Beatty filed a Notice of General Appeal in the District Court at Thames. That Notice appeals the sentence but does not appeal the conviction.

[38] In *Xtreme Dining Ltd t/a Think Steel v Dewar* a full bench of the Employment Court considered circumstances whereby the Authority or the Court might conclude that it should not award any remedies to an applicant notwithstanding a successful finding of a personal grievance.6 The Court said at paragraph [216]:

We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with 'equity and good conscience'. The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[39] Judge Spear was clear in his judgment that the evidence against Ms Beatty was compelling. Based on Ms Beatty's own admission of guilt Ms Beatty was guilty of misappropriating money from cash sales. I have concluded Ms Beatty was the author of her own misfortunes. In these circumstances, whilst not condoning the actions of Protective Paints it would be unconscionable for the Authority to reward Ms Beatty's egregious conduct.

Arrears of Wages

[40] When Ms Beatty received her final pay Protective Paints withheld a total of

$360. Section 4 of the Wages Protection Act 1983 requires employers to pay all wages as they become payable to an employee without deduction. Where deductions are made the employer must have the employee's written consent.

[41] Ms Beatty did not provide written consent for the deduction which I have concluded was unlawful.

[42] Protective Paints Limited is ordered to reimburse Ms Beatty the sum of

$360.00 within 14 days of the date of this determination.

Breach of good faith

[43] Ms Beatty claims Protective Paints breached its statutory obligations of good faith toward her when it suspended her without consulting her about the possibility of suspension and then failed to provide her with relevant information before dismissing her.

[44] Section 4(1A)(c) of the Act requires an employer who is proposing to make a decision which will, or is likely to, have an adverse effect on "the continuation of employment" to provide the affected employee with "access to information, relevant to the continuation of the employee's employment, about the decision" and must provide an opportunity to comment on that information.

[45] Mr Woods failed to consult with Ms Beatty over the possibility that her employment would be suspended. Neither did Mr Woods provide Ms Beatty access to any of the relevant information he had obtained through his discussions with Mr Beamsley, the customer, or his administrators and on which he had formed a view that Ms Beatty was guilty of serious misconduct, before making his decision to dismiss.

[46] I find Protective Paints has breached its obligations in its handling of Ms Beatty's suspension and dismissal. However, I do not find the failures were deliberate and sustained. Nor has Ms Beatty established the breaches were intended to undermine the employment relationship.

[47] Ms Beatty put pressure on Mr Woods during their telephone discussion on 21

February to confirm that she had been dismissed. She knew she had not been dismissed. In her email of 13 February Ms Beatty refers three times to the fact of her suspension including in the subject heading of her email. She was also aware Mr Woods wished to meet with her the following day or the day after.

[48] Ms Beatty had other plans. Her partner had been offered employment in the

Coromandel which he started on 27 February. I find it is more likely than not that by

21 February they were planning and making arrangements for the move and Ms

Beatty was eager for a resolution to her employment relationship so that she could move unencumbered.

[49] In the particular circumstances of this case a penalty is not warranted and the application for a penalty is declined.

Costs

[50] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs. In my Notice of Direction dated 25 May 2018 I reminded the parties that costs awards were $4,500 for the first day of hearing and $3,500 for each subsequent hearing day. 7

[51] As held by the Employment Court, the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.8 As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz9* awards in the Authority will be modest taking into account conduct which increases costs unnecessarily.

[52] An assessment of costs will normally start with the notional daily tariff. The investigation meeting took half a day which equates to $2,250.

[53] The Authority will take into account, when dealing with the issue of costs, any offers made by the parties to settle matters. As stated by the Court of Appeal:10

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.11

[54] The Employment Court in *Mattingly v Strata Title Management Limited*

held:12

7 Practice Note 2, Costs in the Employment Relations Authority.

8 *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

9 [2005] NZEmpC 144; (2006) 7 NZELC 98,128; [2005] ERNZ 808; ([2005] NZEmpC 144; 2005) 3 NZELR 1 (EMC).

10 As cited in *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385.

11 Ibid at [18].

12[2014] NZEmpC 15;[2014] NZEmpC 15; [2014] ERNZ 1 at [27]

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a "steely approach" ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court's observation in Da Cruz that Authority awards will be "modest". What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.

[55] Ms Beatty relies on a Calderbank offer made two weeks prior to the investigation meeting. A Calderbank offer is intended to avoid the costs associated with trial. This is consistent with Regulation 6 of the Employment Court Regulations which states that when exercising its discretion to award costs the Court may have regard to any offer made a reasonable time before the hearing.

[56] The offer sought a payment of $4,000 from Protective Paints. The offer was rejected. The timing of the offer is unfortunate. By the time the offer was made the parties had already incurred costs in preparation for and attendance at the investigation meeting. In these circumstances I am not satisfied an adjustment to the daily tariff is appropriate.

[57] While Ms Beatty has not recovered any remedies for her personal grievances she was successful and the usual principle that costs follow the event means she should have a contribution towards her costs. I am satisfied the costs incurred by Ms Beatty were reasonable at $4,000.

[58] I fix costs at $2,000 as a reasonable contribution to Ms Beatty's costs.

[59] Protective Paints Limited is ordered to pay to Ms Beatty the sum of $2,000 as a contribution to her costs within 14 days of the date of this determination.

Vicki Campbell

Member of the Employment Relations Authority

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