

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 532
3083253

BETWEEN SHIRLEY BRUNNING
 Applicant

A N D RICCARTON FLORIST LTD
 Respondent

Member of Authority: Peter van Keulen

Representatives: Paul Mathews, advocate for the Applicant
 Kelly Rushton, representative for the Respondent

Investigation Meeting: 13 August 2020

Submissions Received: 25 August 2020 from the Applicant
 4 and 10 September 2020 from the Respondent

Date of Determination: 22 December 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Shirley Brunning worked as a florist for Riccarton Florist Ltd at The Palms shopping mall in Christchurch.

[2] In the course of her employment Ms Brunning did not get on with a colleague, Leanne Moke. The relationship between Ms Brunning and Ms Moke became more strained

and escalated over time, culminating in incidences in July 2019. As a result of one incident Ms Brunning raised a complaint with Riccarton Florist Ltd alleging bullying and harassment by Ms Moke.

[3] Carolyn Rushton, the owner of Riccarton Florist Ltd, says she had been aware of the ongoing problems between the two for some time and had been working on trying to resolve the difficulties, which included dealing with Ms Brunning's complaint. And then, independently from this complaint, Ms Rushton decided to take disciplinary action against Ms Brunning in July 2019, ending with Riccarton Florist Ltd dismissing Ms Brunning.

[4] Ms Brunning says this dismissal was unjustified. She also complains about two warnings that were issued to her in July 2019 and she says Riccarton Florist Ltd failed to investigate and deal with the complaints of bullying and harassment she raised. These complaints formed the basis of Ms Brunning's claim against Riccarton Florist Ltd, which I have investigated.

[5] In response to Ms Brunning's claim, Riccarton Florist Ltd says its dismissal of Ms Brunning was justified as Ms Brunning was the one who was bullying and harassing others at work and this was serious misconduct. Riccarton Florist Ltd also says it had issues with Ms Brunning's work, particularly taking breaks and not following instructions. It was for this conduct that it intended to issue two warnings and these were justified in the circumstances.

[6] I held a two day investigation meeting, in which I heard evidence about the working relationship between Ms Brunning and Ms Moke, the steps Riccarton Florist Ltd took to try and resolve any difficulties between them including: dealing with Ms Brunning's complaint, the concerns and issues Riccarton Florist Ltd had about Ms Brunning's conduct at work, the process conducted by Riccarton Florist Ltd in respect of the concerns and issues it had and then the events that led to Ms Brunning's dismissal.

[7] This determination resolves Ms Brunning's claim, having reflected on that evidence and considered the legal obligations.

[8] I also note that this determination has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s 174C(4) of the Employment Relations Act 2000 (the Act) to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s 174C(3)(b) of the Act.

Issues

[9] I will set out my analysis of Ms Brunning's claim in two parts:

- (a) An unjustified disadvantage grievance for failing to investigate complaints of bullying and harassment and failing to provide a safe work environment; and
- (b) An unjustified disadvantage grievance in relation to the two warnings issued in July 2019 and the unjustified dismissal grievance; this is because Riccarton Florist Ltd's attempt to issue the two warnings developed into a bigger situation which ended in Ms Brunning's dismissal.

Unjustified disadvantage relating to allegations of bullying and harassment

[10] Section 103(1)(b) the Act 2000 provides that an employee may have a personal grievance against their employer where that employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.

[11] Ms Brunning claims Riccarton Florist Ltd acted in an unjustified manner causing disadvantage to her employment by failing to investigate her complaints of bullying and harassment by Ms Moke and by failing to provide a safe work environment.

[12] In order to resolve this grievance I must consider:

- (a) Did Riccarton Florist Ltd act as alleged;

(b) If so, did the actions cause any disadvantage to Ms Brunning's employment or a condition of her employment; and

(c) If so, were the Riccarton Florist Ltd's actions justifiable?

Did Riccarton Florist Ltd fail to investigate Ms Brunning's complaints of bullying and harassment?

[13] The two incidents that occurred in July 2019 that Ms Brunning says she complained about were:

(a) On 4 July 2019, Ms Moke said to Ms Brunning "see ya in Court". Ms Brunning says this was a taunt in relation to an upcoming (unrelated) claim she had in the Authority.

(b) On 11 July 2019, Ms Moke called out to Ms Brunning as she was leaving work and said "what have you got in your bags", implying that Ms Brunning had stolen something from work.

[14] It was after the 11 July 2019 incident that Ms Brunning sent a text message to Ms Rushton. This text stated:

Carolyn, I am filing an official complaint with you as my employer of work place harassment and bullying from Leanne Moke. Her behaviour today was once again completely unprovoked extremely unprofessional. While I expect again nothing will be done, I am obligated to file this with you as the first step with the labour department and employment tribunal. I have absolutely had enough and nobody should have to accept this!

[15] Ms Rushton said she received the text message from Ms Brunning and she knew what it was about as she had already been told about the incidents. In response to the text and because of what she had been told, Ms Rushton spoke to Ms Moke to find out what had happened. Ms Rushton concluded that the incident was similar to the friction she knew was occurring between Ms Brunning and Ms Moke and was similar behaviour to the type of

conduct she had been trying to manage and control for some time. Ms Rushton spoke to Ms Moke and told her to stop interacting with Ms Brunning in this way and to simply focus on her work.

[16] It appears that Ms Rushton saw this incident as another incident one of a few incidences that had occurred between the two employees over a period of about 10 months. Ms Rushton had been managing the tension and friction between the two by ensuring they did not work together and only had limited interaction in hand overs between shifts, by speaking to each of them about what behaviour was expected, giving them warnings for one incident and telling them to focus on their work and not each other.

[17] Based on the evidence I heard and my conclusions above I am satisfied that in the circumstances Ms Rushton did enough to investigate and respond to the email complaint from Ms Brunning. So for this reason, the unjustified disadvantage grievance based on this allegation does not succeed.

Did Riccarton Florist Ltd fail to provide a safe work environment for Ms Brunning?

[18] There were very serious allegations of bullying and harassment levelled at both Ms Moke and Ms Brunning during the investigation of Ms Brunning's claim. My conclusion after assessing the evidence was that this was a difficult working relationship between the two employees with both employees being to blame for that but it did not, in my view, amount to bullying and harassment by either employee.

[19] There were in fact only four incidences between Ms Moke and Ms Brunning that I was satisfied had occurred, from the evidence I heard.

[20] First, there was a confrontation on 13 October 2018 when Ms Moke objected to something she believed Ms Brunning had said to someone about her not being a florist. This culminated in a stand-off at the flower kiosk at The Palms when Ms Brunning came in to speak to Ms Moke about it. This was the most serious incident of the four. There were raised

voices and both employees felt threatened to some extent. But ultimately the confrontation was diffused and Ms Brunning left.

[21] Ms Rushton followed up on the incident by speaking to both employees and issuing them both with a warning. The relationship between Ms Moke and Ms Brunning never improved from this point but the three other incidences between them that I was made aware of were not significant.

[22] The second incident occurred on 14 February 2019 when Ms Brunning and another colleague dropped flowers off at The Palms kiosk. There was a minor confrontation between Ms Moke and Ms Brunning about the flower display.

[23] Then the third and fourth incidents were the two July 2019 incidents described above.

[24] So, reflecting on these four events I am not satisfied that Ms Moke bullied or harassed Ms Brunning and therefore the unjustified disadvantage grievances in relation to this behaviour does not succeed.

Unjustified disadvantage relating to two written warnings and unjustified dismissal

[25] On 14 July 2019 Ms Rushton attempted to give Ms Brunning two written warnings relating to Ms Brunning taking unauthorised breaks to have a smoke. In deciding to give the warnings Ms Rushton had simply assessed what she knew about Ms Brunning taking breaks and decided this warranted warnings being given. However when she attempted to give the written warnings to Ms Brunning, Ms Brunning told her she could not do that and she needed to convene a meeting to discuss the warnings.

[26] After Ms Brunning refused to accept the warnings Ms Rushton tried to organise a meeting with Ms Brunning for 18 July 2019. Ms Brunning advised Ms Rushton she would not attend a meeting on 18 July as her representative was not available to attend with her.

[27] Despite being told this Ms Rushton still turned up at The Palms kiosk on 18 July 2019 and asked Ms Brunning if her representative was there for the meeting. When Ms Brunning told her he was not there Ms Rushton dismissed Ms Brunning.

[28] When answering questions about this Ms Rushton was quite open about why she dismissed Ms Brunning on the spot as she did. Ms Rushton had already decided that two written warnings were appropriate, she had been irritated by the further issues between Ms Moke and Ms Brunning, she had reflected on Ms Brunning's conduct at work generally and had decided that Ms Brunning's behaviour at work was unacceptable amounting to bullying of others, including herself, and she was frustrated that Ms Brunning appeared to be avoiding any meetings. In that moment when she was told by Ms Brunning that her representative was not there for the meeting she decided she had had enough and was not going to put up with things anymore; and she dismissed Ms Brunning.

[29] Whether any dismissal is justified is assessed in two parts. First, whether the employer carried out a fair process in coming to the decision to dismiss and second, whether the decision to dismiss was substantively justified

[30] Turning to process first, this is assessed by applying s 4(1A) and s 103A of the Act. In order to carry out a fair process based on these sections, Riccarton Florist Ltd needed to:

- (a) investigate the concerns it had about Ms Brunning's conduct and behaviour at work sufficiently;
- (b) outline the allegations and explain its concerns to Ms Brunning so she could consider and respond;
- (c) give Ms Brunning a reasonable opportunity to respond to the information and the allegations before it made its decision on whether the behaviour amounted misconduct and that this justified written warnings and/or dismissal; and

(d) consider any explanations given by Ms Brunning before it made its decision to impose written warnings and then dismiss Ms Brunning.

[31] It is clear from the events that I have determined occurred, Riccarton Florist Ltd did not carry out a fair process – in fact, it failed in every aspect of its obligations.

[32] And it follows that as the process was so flawed there was no basis to conclude that the behaviour complained of occurred and/or was sufficiently serious to warrant dismissal. Therefore the dismissal was also unjustified from a substantive perspective.

[33] Therefore Ms Brunning has a personal grievance for unjustified dismissal.

Remedies

[34] As Ms Brunning has been successful with her unjustified dismissal grievance I can award any of the remedies provided for under s 123 of the Act. Ms Brunning seeks compensation and reimbursement.

Compensation

[35] Compensation is an award for the humiliation, loss of dignity and injury to feelings suffered and is made pursuant to s 123(1)(c)(i) of the Act. Ms Brunning seeks \$23,000.00 in compensation for unjustified dismissal.

[36] As I have set out before when dealing with compensation, I must first identify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of Riccarton Florist Ltd's unjustified a dismissal. Recent decisions of the Employment Court provide guidance on this exercise of quantification.¹

[37] The evidence in my investigation showed that the harm and loss suffered by Ms Brunning included:

¹ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

- (a) Being humiliated and embarrassed not just by being dismissed, but because of the way it was publicly carried out – Ms Brunning described this event as “continuing to haunt her”.
- (b) Suffering from anxiety for which Ms Brunning was prescribed medication, having high blood pressure, and being depressed – although there was no clinical diagnosis or medication for this.
- (c) A complete lost confidence in herself and in particular in her ability as a florist, believing she would be unable to work as a florist anymore.

[38] Having identified the harm or loss suffered by Ms Brunning I must now quantify that harm and loss, having regard to where the loss sits on the spectrum of loss and quantum of compensation, particularly with regard other awards of compensation.²

[39] Reflecting on this I assess the level of harm and loss described to be below the middle of the spectrum, and consider that the compensation should reflect this. Therefore I award Ms Brunning \$20,000.00.

Reimbursement

[40] Ms Brunning also seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal. I am satisfied that Ms Brunning is entitled to be reimbursed for lost remuneration. Therefore, I must calculate and award the appropriate sum for reimbursement pursuant to s 123(1)(b) and s 128 of the Act, that is the lesser of Ms Brunning’s actual loss or three months’ ordinary time remuneration.

[41] Ms Brunning was able to find other full time work, four weeks after her dismissal and she says her loss is just four weeks of remuneration. Having reviewed Ms Brunning’s IRD records and the wage and time records from Ms Brunning’s new employer, I am satisfied that

² *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

four weeks remuneration is her actual loss; this is \$2,280.00 which is less than three months' ordinary time remuneration. Therefore, I award Ms Brunning \$2,280.00.

Contribution

[42] As I have awarded remedies to Ms Brunning, I must consider whether she contributed to the situation that gave rise to her dismissal.³ This assessment requires me to determine if Ms Brunning behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievances.⁴

[43] I am satisfied that in the course of her employment Ms Brunning did act in a blameworthy or culpable manner which contributed to her grievance. This includes her poor working relationship with Ms Moke – whilst this did not amount to bullying and harassment, it was below an acceptable standard in the workplace. Ms Brunning was responsible for that in her interactions with Ms Moke. Ms Brunning's behaviour also includes her abrupt and confrontational manner and attitude toward Ms Rushton, including defying direct instructions about taking breaks and inappropriate communication, particularly the email exchanges in July 2019 relating to Ms Brunning's request for annual leave and Ms Rushton's attempts to organise the disciplinary meeting. This behaviour justifies a 35% reduction in the remedies I have awarded.

Conclusion

[44] Riccarton Florist Ltd unjustifiably dismissed Ms Brunning. In settlement of this grievance Riccarton Florist Ltd must pay Ms Brunning the following sums which have been reduced for contribution:

- (a) \$13,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and

³ Section 124 of the Employment Relations Act 2000.

⁴ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

(b) \$1,482.00 pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000.

Costs

[45] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[46] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority