

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 36
5362458

BETWEEN ALICE CAWTHORNE
Applicant
AND ALLWAZE DESIGNS LIMITED
Respondent

Member of Authority: P R Stapp
Representatives: David Oliver, Counsel for the Applicant
Bryan Forbes, Support person for the Respondent
Investigation Meeting: 6 March 2014 at Napier
Determination: 16 April 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Alice Cawthorne was employed by ALLWAZE Designs Limited (ALLWAZE) as a salesperson in October 2010. She reported to Diana Mill, the owner of the business. Ms Cawthorne signed an employment agreement on 3 February 2011. She was paid \$14 per hour to work six hours per day, Monday to Friday (30 hours per week). The hours became variable later, but there is a history of 30 hours per week being worked as per the agreement.

[2] In June there was a meeting between Mrs Mill and Ms Cawthorne and Leeann Nelson, a work broker from the Ministry of Social Development (MSD) about Ms Cawthorne's work. A work subsidy scheme applied to Ms Cawthorne's employment, and after the meeting the subsidy was extended. Subsequently issues emerged between Ms Cawthorne and Mrs Mill involving allegations from Mrs Mill about Ms Cawthorne's use of sick leave on two days and her alleged abusive behaviour and the use of profanities in the workplace at Mrs Mill. The employment

relationship problem is about the clash of personalities between Ms Cawthorne and Mrs Mill and about three warnings and Ms Cawthorne's dismissal, the reasons for the warnings and the dismissal and the procedure followed in regard to each of them.

[3] Ms Cawthorne has claimed lost wages and compensation and costs. She is legally aided. ALLWAZE denies all Ms Cawthorne's claims.

Issues

[4] The issues for the Authority to determine are:

- (a) Was there a first oral warning given to Ms Cawthorne;
- (b) What was Ms Cawthorne's behaviour and did she use profanities in the workplace;
- (c) What has the employer relied on at the time to prove the allegations against Ms Cawthorne
- (d) Was Ms Cawthorne's behaviour related to the reasons to justify warnings and dismissal;
- (e) Was Ms Cawthorne asked to provide a medical certificate? Is she entitled to pay for two days sick leave instead of being paid annual leave?
- (f) What was the process followed by the employer to issue the formal written warning and the final written warning and the decision to dismiss Ms Cawthorne?

The law

[5] The law that applies in this matter is s.103A (2) and s.103A (3) of the Employment Relations Act 2000 (the Act) which provides the test and procedure that the employer needed to follow to be considered by the Authority. These sections read as follows:

- (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 considers 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.*

[6] In addition, the Holidays Act 2003 provides for sick leave as follows:

Entitlement to sick leave and bereavement leave

63. *Entitlement to Sick Leave and Bereavement Leave*

- (1) *An employee is entitled to sick leave and bereavement leave in accordance with this sub-part –*
- (a) *After the employee has completed six months' current continuous employment with the employer; or*
 - (b) *If, in the case an employee to whom sub-section (1)(a) does not apply, the employee has, over a period of six months, worked for the employer for –*
 - (i) *At least an average of ten hours a week during that period; and*

- (ii) *No less than one hour in every week during that period or no less than 40 hours in every month during that period.*

(2) *Sick leave and bereavement leave must be provided –*

- (a) *To an employee to whom sub-section (1)(a) applies, for –*

- (i) *The 12 month period of continuous employment beginning at the end of the 6-month period specified in that sub-section; and*

- (ii) *Each subsequent 12 months of current continuous employment:*

- (b) *To an employee to whom sub-section (1)(b) applies, for –*

- (i) *The 12-month period of employment beginning at the end of the 6-month period specified in that sub-section; and*

- (ii) *Each subsequent 12-month period of employment as long as the circumstances referred to in sub-para.(i) and (ii) of that sub-section continue to apply.*

(3) *However, an employer and employee may agree that –*

- (a) *The employee may take sick leave or bereavement leave in advance; and*

- (b) *In the case of sick leave taken in advance, the amount of sick leave taken is to be deducted from the employee's entitlement under this section.*

64. *Employee must notify employer of intention to take sick leave.*

An employee who intends to take sick leave or bereavement leave must notify the employer of that intention –

- (a) *As early as possible before the employee is due to start work on the day that is intended to be taken as sick leave or bereavement leave; or*

- (b) *If that is not practicable, as early as possible after that time.*

65. *Sick Leave*

- (1) *An employee may take sick leave if –*

- (a) *The employee is sick or injured; or*

(b) *The employee's spouse or partner is sick or injured; or*

(c) *A person who depends on the employee for care is sick or injured.*

(2) *An employee is entitled to five days' sick leave for each of the 12 month periods specified in s.63(2).*

66. *Sick leave may be carried over*

(1) *An employee may carry over, to any subsequent 12-month period of employment, any sick leave that has not been taken by the end of the period to which the leave relates;*

(2) *For the purposes of sub-section (1), an employee may carry over up to 15 days, sick leave to a maximum to 20 days' current entitlement in any year.*

(3) *To avoid doubt, sub-section (2) does not prevent an employer from allowing an employee to carry over any enhanced or additional sick leave entitlement.*

67. *Sick leave need not be paid out*

An employee is not entitled to be paid for any sick leave that has not been taken before the date on which his or her employment ends.

68. *Proof of sickness or injury*

(1) *An employer may require an employee to produce proof of sickness or injury for sick leave taken under s.65 if the sickness or injury that gave rise to the leave is for a period of three or more consecutive calendar days, whether or not the days would otherwise be working days for the employee.*

Despite sub-section (1), the employer may require proof of sickness or injury within three consecutive calendar days if the employer –

(a) *Informs the employee as early as possible that the proof is required; and*

(b) *Agrees to meet the employee's reasonable expenses in obtaining a proof.*

(2) *Sub-section (1) does not prevent an employer and employee from agreeing that the employee will produce proof of sickness or injury for sick leave provided to the employee in addition to the entitlement set out in s.65.*

(3) *For the purposes of this section, proof of sickness or injury may include a certificate from a medical practitioner that –*

- (a) *The employee is not fit to attend work because of sickness or injury; or*
 - (b) *The employee cannot attend work –*
 - (i) *Because the employee’s spouse or partner is sick or injured;*
 - (ii) *Because a person who depends on the employee for care is sick or injured.*
- (4) *To avoid doubt, -*
- (a) *This section does not prevent an employer who is otherwise legally authorised to so require, from requiring an employee to establish that there are no relevant health and safety reasons or hygiene reasons that would prevent from the employee from working;*
 - (b) *Sub-section (1) or sub-section (1A) does not give the employer the right to require the employee to obtain the proof from a person specified by the employer.*
 - (c) *In this section, medical practitioner means a health practitioner who is, or is deemed to be, registered with the Medical Council of New Zealand continued by s.114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine.*

The facts

[7] On or about 4 August 2011 Ms Cawthorne and Mrs Mill had a disagreement over the telephone about Ms Cawthorne’s sick leave and the reasons for the leave in regard to stress. During this telephone call, Mrs Mill informed Ms Cawthorne that she would be giving Ms Cawthorne a warning. On 8 August 2011, Ms Cawthorne alleges she was given a written warning that had been pre-prepared by Mrs Mill. The reasons for the warning related to taking breaks at the start of work, losing her temper, refusing to follow instructions and her dishonesty in regard to the use of sick leave. Mrs Mill says the letter she prepared for this purpose was a draft for discussion although it is not referred to as being a draft document.

[8] Mrs Mill paid Ms Cawthorne her two days, but paid them as annual leave instead of sick leave. Mrs Mill says she has relied upon a circular from the Ministry

of Business, Innovation and Employment (MBIE)¹ and that she interpreted it to say that sick leave was not for personal stress, but had to be work related stress.

[9] Ms Cawthorne disputed each of the matters. On 8 August there was a meeting, although it is not clear who arranged it. Ms Cawthorne says that the support person she took to the meeting was her support person and not an independent mediator as Mrs Mill claimed. At this meeting, there were more issues raised by Mrs Mill. Mrs Mill says that Ms Cawthorne was abusive and that Ms Cawthorne had to be calmed by the independent mediator during the meeting. Mrs Mill says it is the same behaviour that she had experienced with Ms Cawthorne in the past at work and on the telephone. This was contradicted by Ms Cawthorne's support person, although they all agree the meeting was tense and difficult.

[10] Ms Cawthorne says she agreed to the first three points contained in the letter and signed the letter in order to move on. She crossed out point 4 in the letter. Mrs Mill also signed the letter. Mrs Mill left the meeting and it was continued by the co-worker on her behalf. It appears to be common ground that the co-worker was assigned to act as a go-between for communications.

[11] On 10 August 2011, Ms Cawthorne and Mrs Mill got into a disagreement about a request from Ms Cawthorne to write a letter; an initiative apparently taken by the co-worker, about what Ms Cawthorne wanted out of the relationship with Mrs Mill at work. Ms Cawthorne did not complete such a letter at the time, but her typed and handwritten draft subsequently has been included in the documents in the employment relationship problem. Mrs Mill had not seen it before the Authority's process commenced. The letter is not directly relevant or even helpful given the events at the time, I hold.

[12] There was allegedly an altercation that followed that Ms Cawthorne had not followed a lawful instruction to complete the letter and that this also involved another person, who sometimes was at the workplace and helped out. During the altercation and during a telephone call being made to the MBIE (formerly the Department of Labour) by Ms Cawthorne, Mrs Mill handed her a final written warning (11 August 2011).

¹ MBIE 9 July 2013 Paid Stress Leave <http://www.dol.govt.nz/workplace/knowledgebase/item/1323>

[13] Mrs Mill and Ms Cawthorne dispute each other's version of the facts of what they were telling the call centre at MBIE. Subsequently Mrs Mill obtained a transcript of the call centre telephone calls to assist her in the Authority's investigation. I will refer to this later.

[14] On 11 August 2011, Ms Cawthorne says that she was handed a dismissal letter by Mrs Mill. The reasons for the dismissal in that letter were for serious misconduct based on Ms Cawthorne changing her story in regard to sick leave, harassment, yelling and abusive behaviour and the repeated failure to follow a lawful order.

[15] The parties have not been able to settle the employment relationship problem and it falls on the Authority to make a determination.

Determination

[16] It is unclear that there was a verbal warning in June. Mrs Mill and Ms Cawthorne have different views about this. There was no written record to prove the warning existed. It is not critical in the scheme of things, I hold.

[17] Next there is the argument that arose in regard to the sick leave and reasons for it. Mrs Mill paid Ms Cawthorne, but paid the leave as holiday pay for the two days. Mrs Mill has relied upon the stress leave document from MBIE about stress in the work place and taking sick leave that left her with the impression the stress had to be work related for it to be paid as sick leave. Ms Cawthorne was eligible for sick leave under the Holidays Act, and as she was sick she was entitled to be paid two days sick leave and did not have to take it as paid holiday pay. It is enough for an employee to be sick, and on the basis of Mrs Mill's evidence that she did not ask for a medical certificate and at the time Ms Cawthorne was entitled to be paid for her sick leave. Any scrutiny about whether or not an employee is telling the truth about being sick is an entirely separate matter that requires a proper investigation first. Once findings have been reached disciplinary action may follow. There is no legal requirement to distinguish between personal stress caused for non-work related reasons and workplace stress for an employee to be entitled to take sick leave if the leave is due. I also point out that MBIE's guide cannot be a substitute for the law and the guide does contain a disclaimer. Unfortunately Mrs Mill has interpreted the circular incorrectly and maybe has not read it in its proper context, and if she has any issue about the circular she needs to take that up with MBIE. However if Mrs Mill did not believe

that Ms Cawthorne was sick that is an entirely different matter that would have to involve requesting a medical certificate and following it up with an investigation. Any allegations would need to be put to Ms Cawthorne to comment. Then Mrs Mill would have to take Ms Cawthorne's comments into account before making a decision. That did not happen. I am supported in my conclusion that Mrs Mill did not request a medical certificate, but suggested to Ms Cawthorne that she might want to go to the doctor for any medical problems. Ms Cawthorne is entitled to two extra days that should have been paid as sick leave and this sum amounts to \$168 gross total.

[18] I now turn to the two written warnings and the dismissal. Mrs Mill's and Ms Cawthorne's discussion about sick leave in part led to their argument. It is clear from the evidence that Mrs Mill thought she could issue warnings and to terminate Ms Cawthorne's employment immediately, meaning on the spot, because Mrs Mill concluded that there had been serious misconduct. She instantly dismissed Ms Cawthorne because of Ms Cawthorne's alleged offensive language and her explanation about sick leave. I hold that Mrs Mill more likely than not misunderstood the information she was given by the MBIE call centre, and she jumped to a conclusion that unfortunately ignored the requirement to follow a proper process as required by the law before taking appropriate action. In other words Mrs Mill warned and dismissed Ms Cawthorne immediately on the spot because of what she says she heard Ms Cawthorne say. This has led to Mrs Mill's decisions being predetermined. First the warning on 8 August was predetermined because Mrs Mill informed Ms Cawthorne that she was going to be given a warning first and the warning was then typed up in advance, albeit Mrs Mill refers to it as a draft document. I hold Mrs Mill had made a decision to issue a warning although she may have wanted to discuss the terms and arrangements in regard to applying the warning. At least Ms Cawthorne had an opportunity to change the outcome in regard to the warning and the details in the written letter. Also Ms Cawthorne had a representative to support her when they met on 8 August about the letter. Second the 11 August warning occurred without Ms Cawthorne having any opportunity to know what the allegations were and was not able to provide a proper explanation before a decision was made by Mrs Mill. A fair and reasonable employer could not issue a warning in advance when Ms Cawthorne was on the telephone with the MBIE call centre, as happened. Ms Cawthorne should have been allowed to be represented and/or supported in the final meeting because she

previously had a support person at the earlier meeting. The failure to follow a proper process is enough to give rise to a personal grievance.

[19] A fair and reasonable employer is required to investigate any allegations. The difficulty is that Mrs Mill was directly involved with Ms Cawthorne. I hold that ALLWAZE is a small employer with limited resources and that Mrs Mill was the only person conducting the business's process, with a little bit of help from another person and relying on MBIE's information services, such as the call line and a circular. This has proved fatal because: first; there is the matter about how Mrs Mill has interpreted the information she sought from the various sources. Second; Mrs Mill was directly involved herself in the matter and made no allowance for this, to at least get some independent input of her own for a process and any action if required. Indeed she failed to consider initiating going to mediation first on the ongoing employment relationship, and/or to get some independent professional help (not MBIE because it does not provide the assistance required), which was another option open to her to ensure that there was a fair process. I conclude that the failure was not minor and meant that Ms Cawthorne was treated unfairly.

[20] Mrs Mill and Ms Cawthorne dispute each other's version of what they said to each other. Mrs Mill purports to have witnesses. She was not able to call the co-worker involved to give evidence. One of her witnesses gave evidence (Mr Campagnolo), but I have decided to treat his evidence with caution because he could not remember one of the documents produced under his name. Also he had difficulty in remembering much of the detail of what he heard and saw at the time. In addition, an independent witness from the Ministry of Social Development (MSD) could not recall all the detail of the complaints from Mrs Mill and Ms Cawthorne and could not remember any reference to an oral warning in June. It was enough though that the MSD witness could recall and comment on a clash between Mrs Mill and Ms Cawthorne, for her to meet with them, and to try and find a solution to the interpersonal problems. I am satisfied that Ms Cawthorne did lose her temper, because she accepted she did lose her temper, and that there appears to have been broad acceptance that there was swearing in the workplace at least during breaks and lunch time (Mr Campagnolo's evidence). The reason relied upon by Mrs Mill for dismissal does not fit in the range of considerations for serious misconduct involving instant dismissal under clause 11.2 of the employment agreement. My reasons are:

- a. That there was no independent investigation and process set up.
- b. That Mrs Mill and Ms Cawthorne challenged each other's recollection about who said what at the time. This conflict was not resolved.
- c. That Mrs Mill and Ms Cawthorne were too emotionally involved for Mrs Mill to have made a genuine conclusion based on any explanation from Ms Cawthorne at the time.
- d. That Mrs Mill did not properly put her allegations to Ms Cawthorne to comment on before any decision was made and to get a proper explanation; and any apology etc.
- e. That Mrs Mill reacted under emotional strain about the situation.
- f. That Mrs Mill more likely than not has misunderstood information given to her and/or interpreted it in a way that she wanted for the outcome. For example: the ability to instantly dismiss Ms Cawthorne, the way Mrs Mill decided to treat the payment of sick leave, and that Mrs Mill called Ms Cawthorne's support person an "independent mediator" without properly checking the person's credentials beforehand. In any event the meeting was the responsibility of the employer to arrange and organise and to set the agenda, along with who was attending and their roles.
- g. That Ms Cawthorne was consistent about the involvement of her support person in all the documents and her evidence. The support person's evidence was that he was Ms Cawthorne's support person and not an independent mediator. It is likely that Mrs Mill has misunderstood the support person's role.
- h. That the support person was also consistent in his evidence about his role, and I hold that it was more likely than not that he was a support person and not an independent mediator as Mrs Mill liked to think.
- i. That Mrs Mill's allegation that Ms Cawthorne changed her story in regard to sick leave, the allegation of harassment, yelling and abusive behaviour and the repeated failure by Ms Cawthorne to follow a lawful order are not consistent with one of the examples cited in the dismissal email being "*refusing to send*

wine glass display to customer and yelling at me when I said it was needed”.

First the sick leave issue was an argument and Mrs Mill used the information incorrectly about how to apply sick leave. Second there were no actual details of the harassment and abusive behaviour properly put to Ms Cawthorne for her to respond to, especially the allegation that it involved other employees (when there was only one other employee and a helper present). I accept that the documents and the transcripts indicate what may have been said. However, Mrs Mill and Ms Cawthorne dispute what they say they said to each other. The issues and personality clash indicate alternative reasons of performance and incompatibility. Ms Cawthorne’s failure to provide the performance letter in the time that Mrs Mill said that she had to prepare it at work is another matter that underpinned Mrs Mill’s reaction and decision. This was also contrary to Mrs Mill agreeing to extend a work subsidy arrangement for more time, if she had problems with Ms Cawthorne.

[21] Mrs Mill has relied on the transcript of the call centre telephone conversation that she was taking the right action. I hold that the transcript does not assist and indicates what she was told was qualified in regard to the information that was conveyed. In any case a telephone operator from MBIE is in no position to provide advice on the action and decision an employer should take. MBIE’s call centre is primarily an information service.

[22] Ms Cawthorne has a personal grievance for unjustified dismissal and an unjustified warning on 11 August. The two are entwined, and global remedies have been claimed (relying on the statement of problem). It emerged during the Authority’s investigation that Ms Cawthorne only attempted to mitigate her loss and looked for alternative work for 4 weeks after her dismissal. After this she was not reliably available for work due to ill health that relates to independent reasons. She is only entitled to \$1,680 being the 4 week’s lost earnings. This calculation is on the basis of \$14 per hour for 30 hours per week.

[23] Also, I hold that Ms Cawthorne is entitled to compensation, but that the compensation can only relate to the impact of the employer’s actions on her. I have made careful consideration to the existence of other influences and factors in Ms Cawthorne’s life that may be contributory factors causing stress and any other health related factors. This related to the impact on Ms Cawthorne more than her dismissal,

I hold. Her evidence otherwise was not able to match her claim for \$9,000. I assess the compensation at \$2,000 for hurt feelings only. There were no other witnesses providing evidence on the claim.

[24] Also I hold that Ms Cawthorne contributed to the substantive issues underpinning Mrs Mill's reaction to her and that have given rise to the personal grievance. I assess that Ms Cawthorne did lose her temper in the work place and that it was more likely than not that she also swore and reacted adversely to some of the matters Mrs Mill took exception to in their employment and was in part responsible for the deterioration in their inter personal relationship. I have deducted twenty-five percent (25%) from the above remedies for contribution.

[25] ALLWAZE Design Limited is to pay Alice Cawthorne:

- a. \$1,260 gross lost wages.
- b. \$1,500 nett compensation for hurt feelings under s 123 (1) (c) (i) of the Employment Relations Act.
- c. \$168 gross for the two days that should have been sick leave.

Costs

[26] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority