**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2012] NZERA Auckland 45
5352075

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| | BETWEEN | RHONDA CONNOLLY<br>Applicant |
| | AND | JOSHUA AND NATHALIE BRINKMAN<br>Respondent |

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| Member of Authority: | James Crichton |
| Representatives: | Applicant in Person<br>Respondent in Person |
| Investigation Meeting: | 9 January 2012 at Wellsford |
| Determination: | 3 February 2012 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Ms Connolly) alleges that she was unjustifiably dismissed and subjected to bullying by management. It follows that she alleges two grievances, one of unjustified dismissal and another of disadvantage by unjustified actions of the respondent (the Brinkmans) or Mr or Mrs Brinkman. The Brinkmans deny any wrongdoing and allege that Ms Connolly was dismissed for serious misconduct preceded by a period when the Brinkmans endeavoured to manage Ms Connolly's performance.

[2] Ms Connolly commenced her employment with the Brinkmans in 2007 on a part-time basis and commenced full time duties during 2008. According to Ms Connolly, the employment relationship was untroubled until an exchange which she initiated in the winter of 2011. On 19 June 2011, Ms Connolly wrote to the Brinkmans in what is effectively a letter of complaint.

[3] That letter catalogues an exchange which began with Ms Connolly seeking time off from the work day to attend at the local doctor for treatment for sinus pain. Despite some apparent equivocation from Mr Brinkman as to whether permission was granted for Ms Connolly to attend at the doctor or not, Ms Connolly went to the doctor, was examined, was given antibiotics, and told that she should take some time off work so the antibiotics would work better. Two days leave was taken by Ms Connolly and she alleges in her letter that, in effect, she was penalised for this.

[4] Amongst other things, the letter maintains that Ms Connolly did not receive payment of wages on time, was given the *"cold shoulder"* by the employer and was then made to do the lion's share of the unpleasant tasks in the workplace such as peeling and chopping onions and doing the cleaning. The significance of the onion work is that this is what caused Ms Connolly's sinus irritation in the first place.

[5] Ms Connolly's evidence is that she wrote her letter of 19 June 2011 to reinforce a conversation that she had had with Mr Brinkman. However, Mr Brinkman, in his evidence to the Authority, does not remember that conversation.

[6] Ms Connolly maintained that from the moment she sent that letter, *"the atmosphere in the shop changed"*. She said that *"they kept trying to talk to me in the shop and I refused and said make a time with me after work"*. Interestingly, Mrs Brinkman told the Authority that she and her husband had tried to talk to Ms Connolly after work but that she had refused.

[7] It is common ground that immediately after the 19 June 2011 letter was sent by Ms Connolly, the first warning letter from the Brinkmans was received by Ms Connolly. This letter, headed *"first warning letter"*, is dated 20 June 2011 and has, as a subheading, *"regarding your letter dated 19/06/2011"*. That written warning from the Brinkmans sets out to respond to each of the points made by Ms Connolly in her letter. The Authority thinks it fair to say that the tone of this letter is very similar to the tone in Ms Connolly's letter; each could be characterised as exhibiting exasperation.

[8] In the first warning letter, Mrs Brinkman emphasises the regularity with which the Brinkmans have to warn Ms Connolly to do things in a particular way and she summarises her concern in this observation:

> *You just don't listen.*

[9] And:

> *I have asked you many times to share the tasks more, but you are stuck in your own routine and have to do the same every day otherwise you get confused.*

[10] And finally:

> *You will have to start changing your attitude towards all of us. … Try working together more because I won't help you if you won't help me. Show some more initiative. Don't ignore customers while doing a task. They shouldn't have to wait. … Thanks to them you have a job. Also more respect for me and Josh* [Mr Brinkman]. *We are not your colleagues but your bosses.*

[11] Interestingly, Ms Connolly thought it important that she received that first warning letter from the Brinkmans immediately after she had sent them her letter of 19 June 2011. She alleged that the Brinkmans simply retaliated on receipt of her letter of complaint and did not reflect on it in a measured way. The Brinkmans, however, satisfied the Authority that the warning letter was already in draft when the Brinkmans received Ms Connolly's letter and so they simply added to the draft warning the aspects that were particularly required to respond to Ms Connolly's letter.

[12] A second written warning issued on 8 July 2011. This second warning letter (headed rather ominously *"second and last written warning"*) begins with an analysis of Ms Connolly's apparent misunderstanding of her entitlement to annual holiday leave. The thrust of the Brinkmans' complaint in the second warning letter is that Ms Connolly was *"hostile and aggressive"* and *"out of order"* when Mrs Brinkman tried to explain the position to her. It is apparent to the Authority on the evidence that Ms Connolly was in the habit of taking annual leave in advance and whether she understood the legal position or not, the Brinkmans' complaint was that she spoke disrespectfully to Mrs Brinkman when the latter was trying to explain matters to her.

[13] The letter goes on to warn again about Ms Connolly's attitude to sharing tasks in the shop and concludes with the clearest expression that unless Ms Connolly deliberately sets about changing her approach to the employment, it is in jeopardy. One of the concluding paragraphs of the letter reads as follows:

> *We have come to a point that working with you is stressful for all of us. I feel personally attacked and very uncomfortable around you. I cannot talk to you without being yelled at. This has to stop immediately or your employment is going to be cancelled. You have two weeks to prove yourself that you can listen to us. Change your*

> *attitude towards me and be able to help and share tasks. Stop blaming others for the mistakes you make. Admitting you are wrong isn't going to hurt you.*

[14] In the penultimate paragraph of that second warning letter, Mrs Brinkman makes clear that Ms Connolly will not be allowed to continue taking holiday leave in advance on pay, because the law does not require the employer to agree to that and if the employment relationship were to come to an end, the Brinkmans were anxious about recovering the money that they were owed. The letter provides an estimate of holiday pay due and owing at that time and attached copies of the wages book showing the holiday leave taken or paid out.

[15] The final paragraph reads as follows:

> *We are willing to have a meeting with you only if you can promise there will be no yelling. We* [do] *not have to put up with that any longer.*

[16] That letter from the Brinkmans was responded to by Ms Connolly in what she called a letter of reply dated 15 July 2011. That letter recites the history of the written exchanges between the parties and then complains about the standard of the warning letters issued by the employer, effectively saying they are too general in tone and thus not capable of being acted on. Ms Connolly suggests that because the employer has failed to convene a meeting with her to discuss matters, the warnings are unfair.

[17] Then, by letter dated 30 July 2011, Mr Brinkman produced a letter headed *"general termination"*. That letter starts with the broad proposition:

> *I can't work with you any longer due to repeated failure of reasonable instruction.*

[18] And again:

> *Your attitude is a real problem and you really need to work on that for your future employment elsewhere.*

[19] And:

> *You are walking around like you are the employer.'*

[20] And:

> *We do not enjoy working in our own bakery any more, that is not correct is it? Even customers can feel the different tension.*

[21] It is apparent from this letter from Mr Brinkman that it is a confirmation of a conversation that he and Ms Connolly had on 29 July 2011, the day before the letter was written. In that verbal discussion, it is common ground that Ms Connolly was dismissed from her employment on the grounds of serious misconduct, with Mr Brinkman alleging reliance on a serious or repeated failure to follow a reasonable instruction and dishonesty. These are two specific grounds in the relevant clause of the operative employment agreement. In fact there had been a succession of employment agreements between the parties, the last of which was not signed by Ms Connolly but nothing turns on that for present purposes. The previous employment agreement was signed by Ms Connolly and it had precisely the same clause in it relating to serious misconduct as the unsigned version of the later agreement, but with a different number.

[22] The thrust of the "*general termination"* letter from Mr Brinkman was to give Ms Connolly two weeks' notice but by letter dated 3 August 2011, that intention was varied by another letter from Mrs Brinkman which indicated it would be "*too stressful"* for all three parties if Ms Connolly continued to work out her notice. Mrs Brinkman indicates that she had wanted to try to talk to Ms Connolly but that the latter had always refused that.

[23] A personal grievance was promptly raised after the dismissal and the parties were directed to mediation by the Authority. Before mediation could take place, however, the Authority offered the parties the opportunity of proceeding directly to an investigation.

**Issues**

[24] The Authority needs to determine:

(a) Whether Ms Connolly was unjustifiably dismissed from her employment; and

(b) Whether Ms Connolly was bullied in her employment.

**Was Ms Connolly unjustifiably dismissed?**

[25] The Authority is satisfied Ms Connolly was not unjustifiably dismissed from her employment. The appropriate test is the one set out in s.103A of the Employment

Relations Act 2000. The dismissal took place on 29 July 2011, that is after the law change effective 1 April 2011. As a consequence, the Authority has had recourse to the recent decision of the Full Court in *Angus v. Ports of Auckland Ltd* and *McKean v. Ports of Auckland Ltd*, reported at [2011] NZEMPC 160. That judgment helpfully comments on the changes in the interpretation of s.103A of the Act before the statutory amendment on 1 April 2011 and afterwards. In particular, the Court says at para.[22] and following:

> *[22] The change from "would" in former s.103A to "could" in new s.103A is not dramatic but … it is neither ineffectual nor even insignificant. The Authority and the Court must continue to make an assessment of the conduct of a fair and reasonable employer in the circumstances of the parties and judge the employer's response to the situation that gave rise to the grievance against that standard. What new s.103A ("could") contemplates is that the Authority or the Court is no longer to determine justification (what the employer did and how the employer did it) by a single standard of what a notional fair and reasonable employer in the circumstances would have done.*
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> *[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. So to use the present tense of "would" and "could", it is no longer what a fair and reasonable employer will do in all the circumstances but what can be done.*

[26] And again at para.[37} of the judgment:

> *The effect of s.103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified.*

[27] The Authority is satisfied in the present case that what the Brinkmans did and how they did it is one of the outcomes that a fair and reasonable employer could have decided upon and therefore that the decision to dismiss Ms Connolly was justified. That said, it is fair to observe that there were other possible outcomes which a fair and reasonable employer could have arrived at in the present case, but the law requires only that the Authority satisfy itself that the outcome reached is one of a range of possible outcomes which a fair and reasonable employer could have arrived at, and that is enough.

[28] The Authority is particularly drawn to that conclusion by the application of subsection (3) of s.103A. That subsection requires the Authority to consider four elements. The first is whether there has been a proper investigation, the second is whether the concerns have been raised with the employee, the third is whether the employee has been given a reasonable opportunity to respond, and the fourth is whether the employer has considered the explanation on a proper basis. While this is no means a perfect example of the application of a measured and reflective process for managing performance deficits, it is fair to say that this employer, using the resources common to a small business, sufficiently inquired into the allegations (which in effect were allegations they themselves had observed). Then, the Authority is satisfied that the problems that the employer identified were adequately conveyed to Ms Connolly in the first warning letter. The Brinkmans were effectively put on notice as to Ms Connolly's response in her correspondence with them. The only hesitation the Authority has is in respect of the fourth question, whether the Brinkmans *"genuinely considered the employee's explanation"* before taking action.

[29] The flavour of this employment relationship problem from both sides is one of exasperation. This was not an employment relationship made in heaven. This very fact made the process of sitting down and trying to resolve the employment relationship problem themselves extraordinarily difficult. Each blames the other for the failure to meet and resolve matters. The Brinkmans say in effect that, whenever they sought to discuss matters, Ms Connolly shouted at them. Ironically, Ms Connolly said that Mrs Brinkman was moody and difficult to work with; Mrs Brinkman told the Authority exactly the same thing about Ms Connolly. Mrs Brinkman also told the Authority that *"customers would be affected by her* [Ms Connolly's] *grumpy face"*.

[30] But the essence of the employer's complaint in this matter is the failure to persuade Ms Connolly to follow lawful and reasonable instructions. The allegation of dishonesty which the Authority has referred to earlier as forming part of the decision to dismiss cannot be made out and is a misunderstanding, in the Authority's view, of the concept of dishonesty. Mr Brinkman refers to Ms Connolly as being dishonest in promising not to text during work hours and then proceeding to do so. Really, that complaint ought to form part of the wider complaint about Ms Connolly's failure to follow lawful and reasonable instructions. And that is the essence of the Brinkmans' complaint. They say that they tried everything they could think of to get Ms Connolly

to do as they asked rather than as she wanted, and they pointed out to the Authority (somewhat plaintively) that it was their business and they were entitled to have some sense of control over it. The Authority agrees. The Authority was also troubled by the Brinkmans' evidence that they had become discouraged about attending at work even although it was their business. They said they no longer enjoyed it because Ms Connolly would be there and would effectively do as she pleased rather than as they wanted.

[31] In the end, the Authority considers that it must consider the right of the owner of a small business to enjoy their business and to want to attend at the workplace to further the enterprise. If an employee is making that process more difficult, then in the Authority's considered view, it is appropriate for that fact to be taken into account pursuant to subsection (4) of s.103A as one of the factors the Authority thinks appropriate.

[32] Further and finally, the Authority is satisfied that, in the present case, the failure of the parties to meet with each other to try to resolve matters face-to-face was a function of the sudden and perhaps unexpected deterioration in their personal relationship which made such a meeting, in a productive sense, impossible. It is plain on the evidence that there were meetings (albeit informally arranged and in the workplace) but none of those meetings achieved any positive outcome because of the rapid deterioration in the interpersonal relationship between the parties. That fact is evidenced by the deteriorating tone of the correspondence between the parties which the Authority has already referred to. In the Authority's opinion, the only criticism of substance that could be levied at the procedure adopted by the employer in the present case, is the failure to convene a productive meeting and if that failing is seen as a major deficit in terms of the process adopted by this employer, then the Authority, in evaluating the matter, places weight on subsection (5) of s.103A by concluding that, in the present circumstances of this case, the defect was a minor one and did not result in unfairness to Ms Connolly. A particular reason for the Authority to reach the conclusions it does about subsection (5) and its application to the present case is Ms Connolly's obvious ability to articulate her point of view in writing. Had Ms Connolly chosen to engage with the employer in a more sympathetic and constructive fashion, she might well have got better results from her contact. But in the result, Ms Connolly must take some responsibility for the way in which she engaged with her employer and in the absence of any evidence that Ms Connolly was

unable to look out for her own interests, the Authority thinks it appropriate to conclude that a procedural deficit of the sort referred to cannot be held to undermine the whole process.

[33] In the result, this small employer identified concerns with this employee around the employee doing what she was told, raised those issues time and again in interpersonal exchanges which, on the evidence of both parties, became increasingly intemperate, then reduced this to writing in two warning letters and then, having received fundamentally unhelpful responses from Ms Connolly, decided to dismiss because Ms Connolly was effectively making the employers miserable in their own business. For the reasons advanced, the Authority concludes that this was a justified dismissal.

**Was Ms Connolly bullied?**

[34] The Authority has not been able to discern any evidence of bullying in this factual matrix. As previously discussed, the Brinkmans were endeavouring to manage the performance of Ms Connolly who, the Authority is satisfied, was *"set in her ways"*. An example will suffice to highlight the point already made earlier in the determination. Ms Connolly told the Authority that there was a table which determined who was responsible for cleaning which parts of the shop each day. Ms Connolly produced such a handwritten table and gave it to the Authority. When the Authority showed this handwritten table to the Brinkmans, their response was to say there was no such instruction to deal with shop cleaning in such a regimented fashion. What was supposed to happen in accordance with their regular instruction was that the work was to be shared by the people who were then on duty so as the share of work was fair. Ms Connolly's complaint that she was getting more unpleasant work than anybody else was, according to the Brinkmans, a function of Ms Connolly's inflexibility and refusal to share all tasks (good and bad) which would have resulted in her doing less of the unpleasant jobs.

[35] The Authority is not persuaded that there is any evidence in this case of bullying and therefore the claim for a grievance on the ground of disadvantage by reason of unjustified actions of the Brinkmans, is not made out.

**Determination**

[36] Neither of Ms Connolly's claims for personal grievance are made out to the satisfaction of the Authority and her claims fail as a consequence.

**Costs**

[37] Neither party was advised professionally and accordingly any costs incurred are to lie where they fall.

James Crichton
Member of the Employment Relations Authority