Determination Number: AA 228/05
File Number: AEA 949/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Shannon-Renee Dizac (Applicant)
AND	Marvel Distributors Ltd (Respondent)
REPRESENTATIVES	Effie Lokeni, Counsel for Applicant Colin Bekesi, Advocate for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	1 March 2005
DATE OF DETERMINATION	21 June 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Ms Dizac submits she was unjustifiably disadvantaged and then dismissed from her employment with the respondent. To remedy her alleged grievance she seeks lost remuneration and compensation under s.123(c) (i) of the Act.

The respondent denies the applicant was unjustifiably dismissed.

Background

The applicant, Ms Dizac, was 15 years old at the time of the events in question.

On 26 November 2003 Ms Dizac applied for an office person position with the respondent. The respondent was seeking someone competent in keyboard skills and general office duties. Ms Dizac was interviewed for the position and offered the job. She commenced employment on 15 December 2003 at an agreed salary of $24,000 per annum.

Within days of Ms Dizac commencing her employment the respondent began to have concerns about her qualifications/competency for the role. The respondent developed a firm belief that Ms Dizac had misrepresented her experience and qualifications at the job interviews it held with her. It was also the respondent's evidence that its concerns were taken up with Ms Dizac at first informally and then formally. The respondent submits it proposed to adjust Ms Dizac's salary to $20,000 for a period of approximately three months while she was trained and supported to the required level of competency for the position. The respondent's evidence was that Ms Dizac agreed to this in principle. Ms Dizac's evidence on the other hand was that no-one raised performance issues with her until she received a written warning on 5 January 2004. She is adamant she did not misrepresent her skills and experience at the job interviews with the respondent.

The respondent also developed a concern relating to Ms Dizac's punctuality and attendance – Ms Dizac was late for work on 23 December and did not come to work at all on the 24th[1]. I accept that punctuality and attendance were important to the managers of this small business.

On 5 January the respondent decided to issue Ms Dizac with a written warning. That warning addressed the respondent's concerns relating to Ms Dizac's punctuality and attendance and stated *"This is your first written warning as you have not acted responsibly with regards to these two cases mentioned above"*.

The letter went on *"It is also evident from observing your work that your (sic) have presented yourself was (sic) being a lot more experienced in the areas of word processing and general office duties than you in fact have. Your starting rate was calculated on the experience and qualifications that you presented yourself to us and this now needs readdressing as you yourself have also agreed"*.

On 6 January Ms Dizac gave the respondent's office manager, Mrs MacDonald, a written response to the warning she had received. That written response is recorded below:

1. *"With regard to my late arrival on 23 December, I admit I was 30 min late, and did apologize at the time. This was the first time I have been late since starting work for you. I do not believe that arriving late once warrants a written warning as there is no pattern of lateness.*

2. *I phoned on several occasions prior to 8am on the 24th December and received no answer. I did inform you that day that I would not be able to attend work.*

3. *I have not sited (sic) any house rules regarding the expectations for time frames for calling in when absent, nor had them verbally explained to me.*

4. *I have not been supplied with an employment contract, or job description defining my duties and responsibilities. This is a legal requirement (Employment Relations Act).*

5. *At no time have I agreed to readdress my salary as mentioned in the last paragraph of your letter. The agreed salary is $24,000 per annum.*

6. *At no time during the interview process did I overstate my qualifications or experience. I supplied verbal reference for you to check. I have not been made aware of any performance issues prior to your letter of the 5th January, but would welcome any training that the company may supply if so required"*.

In the afternoon of the same day Mr Bekesi (General Manager) approached Ms Dizac. His evidence is that he only had time to utter the words (in reference to Ms Dizac's letter) "Shannon, what is all this about?" when Ms Dizac erupted with a stream of angry abuse in front of other staff and a customer. Mr Bekesi's evidence was that he had no choice but to ask Ms Dizac to *"leave the premises until further notice."*

It was the respondent's position that reflecting on Ms Dizac's lack of reliability, lack of skills and her insulting attitude that it would be a waste of time to continue the relationship so it wrote to Ms Dizac *"withdrawing our job offer to her."*

[1] There was evidence from Ms Dizac this date was 31 December. However, both parties refer to 24 December in the contemporaneous documentation and I am treating the date as the 24th.

That letter dated January 7 2004 crossed by post or fax with a letter dated 8 January from Ms Dizac requesting clarification of her position.

The dismissal letter read:

"Since we were unable to come to an amicable arrangement the decision has been made to terminate your employment with Marvel Distributors Ltd. We have come to this decision due to your response to the warning letter that we have given you. We find your letter both insulting and threatening and find this sort of approach totally unacceptable and this has given us no option but to respond in this way".

…..…

Issues to Be Decided

By way of general findings, I find that the problem that has arisen between these parties has it origins in the exceptionally poor selection process followed by the respondent in hiring Ms Dizac for its office person. This business needed a person competent in range of office duties. It was not looking for a learner. It is clear on the evidence that Ms Dizac presented her age, background and qualifications accurately but that the employer, blinded by her appearance, confident presentation and ability to commence employment at short notice, overlooked the fundamentals of competency and reference checking. For example, employer was surprised and shocked to hear at the Investigation Meeting that the secretarial course undertaken by Ms Dizac was an eight module course undertaken by correspondence. Basic inquiries at or following the interview with Ms Dizac would have revealed this. Neither did the respondent carry out any competency checks on Ms Dizac's skill in typing dictation or Microsoft Word. No reference checking was undertaken.

For her part Ms Dizac did nothing more than represent her skills and qualifications as they were expressed on her CV. I find none of her representations were untrue. It is no crime that she presented herself in the best light possible at the job interview. That is what people do (or should do) when applying for positions. It is for the potential employer to satisfy themselves that the representations made regarding skills and qualifications are accurate and that the person to be employed is capable of meeting the requirements of the position. Ms Dizac's age should have raised a flag with the respondent and led it to pay particular attention to the requirements of the role and Ms Dizac's qualifications to fill it. In fact, this was pointed out to Mrs MacDonald to no avail by Mr Bekesi's daughter, Katherine, who had had personal experience in the business.

One other matter requires addressing by way of a general finding. It relates to the respondent's reason(s) for dismissing Ms Dizac and what it is now permitted to defend as the grounds for dismissal.

The respondent was unrepresented and I have allowed it leeway to present its case as it saw fit. The employer wishes me to take into account in making findings relating to this matter its concerns that:

- Ms Dizac misrepresented her qualifications and experience for the position of Office Person.
- That Ms Dizac was incompetent.
- That Ms Dizac was not punctual or reliable in her attendance.
- That Ms Dizac's attitude deteriorated and that her outburst of anger in front of staff and a customer on 6 December was the final straw in deciding the relationship was unsalvageable.

However, the employer is required to give reasons for dismissal at the time of the dismissal and is permitted, in defending this claim, only to justify the dismissal for the reasons given at the time. *Northern Hotel etc IUOW v Tokaanu-Turangi RSA Club (Inc)* [198] 2 NZILR 955. The reason the

employer gave for dismissing Ms Dizac was that set out in the letter to her of 7 January (see p.3 above). Ms Dizac was dismissed because the employer *"was unable to come to an amicable arrangement"* with her. This I take to be a reference to the respondent's proposal to renegotiate the employment contract to employ Ms Dizac as a junior at a lower rate of pay and to provide training to bring her up to the competency level required. Ms Dizac's written refusal to accept the proposal and her *"response to the warning letter"* given to her, led the respondent to *"come to this decision"*.

It is the reasons for the dismissal which were given at the time that I will examine in determining this matter and having made these general findings I will address the specific issues to be determined in resolving the problem presented.

1. Did the respondent follow a fair process in addressing the concerns it had regarding Ms Dizac's attitude and performance?

2. Were the decisions to at first suspend Ms Dizac and then dismiss her decisions that a fair and reasonable employer could have taken in the circumstances?

3. If Ms Dizac has a personal grievance against her former employer did she contribute to the situation that gave rise to the personal grievance such that any remedies awarded to her should be reduced?

Did the respondent follow a fair process in addressing the concerns it had regarding Ms Dizac's attitude and performance?

The procedural failings in this matter were so serious that I have included for the information of the parties a summary of the basic rules of procedural fairness. There are four elements to a fair process required to be followed by an employer in approaching poor performance or misconduct by a worker. These steps (included here as Appendix A) presume the worker has been put on clear notice of the problem in question.

Applying the relevant case law to the matter before me, I find that shortly after Ms Dizac commenced employment the respondent's managers became concerned about her competency for the position. Instead of correctly putting the blame for the problem it faced at its own doorstep (as lying with the selection process followed) those managers determined the blame rested with Ms Dizac for misrepresenting her skills, qualifications and previous experience.

I find that Ms MacDonald did take up the respondent's concerns with Ms Dizac – I do not find credible Ms Dizac's evidence that she was not advised of the employer's concerns prior to receiving the warning letter on 5 January 2004.

However, the respondent did not approach the issue in a manner that was fair to Ms Dizac. It should have recognised that the problem rested predominately in its poor selection process. That being the case the parties both had a problem to resolve. Because the problem had consequences for the ongoing employment relationship the respondent, in all fairness, had a responsibility to identify the problem in a formal sense and to ensure that Ms Dizac was offered the opportunity to obtain representation prior to engaging in formal discussions with a view to resolving the problem. In that setting the employer could have formally proposed a solution to renegotiate the contract – redesignating Ms Dizac as a junior office worker with a consequent (and negotiated reduction in salary). Alternatively, if Ms Dizac refused to renegotiate her position (following a formal and fair discussion of this proposal unaccompanied by threats of dismissal) the employer needed to implement objective standards and provide the training and support required to lift Ms Dizac's performance. Only then, and after a failure by Ms Dizac to lift her performance, could the employer

turn its mind to the possibility of terminating her employment after following a fair process (see Appendix A confirmed in *Trotter v Telecom Corporation of New Zealand Ltd* [1993 2 ERNZ 659- see Appendix B).

However, the employer took no careful or structured approach to the problem and the approach it did take was based on the mistaken perspective that Ms Dizac was to blame for misrepresenting her skills. It did, I find, through Mrs MacDonald, take up with Ms Dizac the concerns it had relating to her performance and did propose a reduction in salary (albeit the amount of the reduction was not initially identified). I also find that in all probability that Ms Dizac did not demure and Mrs MacDonald took this as an acceptance from Ms Dizac. However, given Ms Dizac's age and the seriousness of the proposal it was unfair and unreasonable to put this to Ms Dizac in an informal setting without a clear and structured approach to detailing the precise concerns the respondent had with her performance and giving her the opportunity to address the issues at a formal meeting accompanied by a representative.

Instead of taking a formal and fair approach to the emerging performance issues the employer, when it saw the performance concerns compounded by failings in punctuality and attendance, decided (again without appropriately putting its concerns to her and allowing an opportunity for representation and explanation) to issue Ms Dizac with a formal written warning (5 January warning letter).

The employer also failed to implement a fair process when it at first suspended and then dismissed Ms Dizac. When considering suspension an employer is (in most circumstances) required to follow a fair process and at the very minimum the worker should be advised of the proposal and given the opportunity to comment. The employer did not follow a fair process in arriving at its decision to suspend Ms Dizac. Neither did it put its concerns to Ms Dizac and allow her representation and an opportunity to address the respondent's concerns before it made a decision to dismiss her.

In all then, I must find that the respondent, in its dealings with Ms Dizac over the concerns it had relating to her performance and conduct failed, at each and every step in relation to its concerns, to adopt and follow a fair process in its dealings with her.

Was the decision to suspend and then dismiss one that a fair and reasonable employer could have taken?

I accept the respondent's evidence that Ms Dizac responded in an angry abusive manner when questioned about her written response to the warning letter she received from the respondent. I also accept Ms Dizac's evidence that Mr Bekesi did not approach her that day in the calm manner he claims he did – the employer's statement of its reaction to Ms Dizac's response (that it was insulting, threatening and totally unacceptable) militates against a finding that Mr Bekesi was in a calm and measured frame of mind when he approached Ms Dizac on the afternoon of 6 January.

It is possible that Ms Dizac's conduct on the 6th of January had the potential to harm the employer's business which may have provided justifiable grounds for suspending her to allow a cooling off period. However, the employer was required to adopt a fair process in doing so and it did not do so.

Turning to the reasons that Ms Dizac was dismissed I find she was entitled to decline to renegotiate her contractual arrangements and her refusal to accept a reduction in salary did not provide justification for dismissing her.

On the matter of Ms Dizac's written response (6 January) to the warning letter given to her on 5 January that the respondent found *'insulting, threatening'* and *'totally unacceptable'* there was little

in it that was inherently wrong albeit it was written from the more stringent perspective of HR management practices followed in larger companies. Nevertheless it did not provide any substantive justification for her dismissal.

I find in relation to this letter that the real problem with it was the fact that it was patently not the work of Ms Dizac. Its terms came as a shock to the respondent's managers who responded in a knee jerk fashion. This outcome should have been entirely foreseeable to those advising Ms Dizac behind the scenes (in all probability her father). The respondent's written warning given to Ms Dizac (unaccompanied by any semblance of a fair process) was responded to in 'tit for tat' fashion in an equally inappropriate written response detailing in large part a statement of 'her rights'. Arming a very young person with such a statement and leaving her to deliver it alone and manage the aftermath was beyond her. It is a pity that those advising Ms Dizac did not take a problem solving approach to the emerging issues – an approach which current employment legislation fosters strongly.

Determination

Ms Dizac was unjustifiably disadvantaged when she was suspended from her employment and she has a personal grievance against her former employer Marvel Distributors Ltd.

Ms Dizac's dismissal was unjustified both substantively and procedurally and she also has a personal grievance in this respect.

Note: Least the employer is disappointed I have not had regard to all the concerns it raised regarding Ms Dizac's performance and conduct I must note that I have found that she did not misrepresent her skills, qualifications and experience. Neither, could the matter of her lateness on 23rd December or absence on 24th (separately or in conjunction with any of the other concerns held by the employer) provide justification for Ms Dizac's dismissal. The matter of Ms Dizac's outburst on 6 January is also addressed by me under the heading of Remedies below.

Remedies

Section 124 of the Act requires that where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly. This leads me to the third matter postulated as an issue to be determined in resolving the problem before me.

Did Ms Dizac contribute to the situation that gave rise to the personal grievance such that any remedies awarded to her should be reduced?

The reality of the situation is that Ms Dizac's angry outburst on being questioned about her written response to the warning letter she received did weigh in the employer's mind when it decided to dismiss her albeit it was not referred to in the letter of dismissal.

In weighing the above question I have considered Ms Dizac's conduct on the 6th in light of her age and the overall failure of the employer to treat her fairly in a difficult situation that was, in the main, not of her making. She had also been left alone to manage the warning given to her in a manner that was inappropriate in all the circumstances. I find she was intimidated by Mr Bekesi's approach on 6

January. Her reaction was inappropriate but hardly surprising. In all the circumstances of this case I am not reducing remedies for contribution on her part.

Lost Remuneration

Ms Dizac seeks three months lost remuneration offset by earnings received by her during that period.

The starting point is 12 weeks pay $5,538.46 gross.[2] Ms Dizac obtained part time employment from 20 February 2004 and earned approximately $1921.50 gross in that job for the remainder of the 12-week period.

I therefore direct the respondent to pay to the worker the sum of $3,616.96 gross to compensate her for lost remuneration as a result of the unjustified dismissal.

Compensation under s.123 (c)(i)

The employment period was extremely short. Nevertheless the applicant has suffered as a result of her suspension and dismissal. In all the circumstances of this case I direct the respondent to pay to the applicant the sum of $2,500 under this head.

Costs

The applicant is entitled to costs in the matter. Costs are reserved. The parties are to file and serve submissions on the subject and the matter will be determined.

Janet Scott
Member Employment Relations Authority

[2] Ms Dizac was paid one weeks notice.

Appendix A
Fair Procedure- Guidelines

(See Butterworths Employment Law 1-1510).

Warning: The employer must warn the employee of the misconduct (unless it is serious misconduct warranting summary dismissal) and request an improvement in conduct and/or performance. The employee must also be advised at the warning stage that his or her job is "on the line".

Investigation: the employer must carry out a full investigation of all the relevant facts before actually terminating the employee and the result of such an investigation should be communicated to the employee.

The investigation carried out by the employer must be fair and thorough and sufficient to allow the employer to arrive at a reasonable belief that misconduct or poor performance exists such that dismissal is warranted. *Airline Stewards and Hostesses (NZ) IUOW v Air New Zealand Ltd* [1990] 3 NZILR 797. No investigation will be thorough and complete without inquiry of the worker.

Reasons: Reasons for the dismissal must be given to the employee before the dismissal is effected.

Opportunity to be heard: Before the dismissal is effected the employee must be provided with a real opportunity to be heard and to offer an explanation to the allegations made. Notice to the employee should also advise how seriously the allegations are viewed and if the worker's employment could be in jeopardy. An opportunity to be heard also implies that serious consideration will be given to the worker's explanations.

Appendix B

Trotter v Telecom Corporation of New Zealand Ltd [1993] 2 ERNZ 659.

"(1) the test for any justified dismissal is the same, "what was it open to a fair and reasonable employer to do?" A dismissal for poor performance is fundamentally no different from one for misconduct. In both cases the question is whether the employee's behaviour was a breach of the contract and was so serious that the employer was entitled to accept the repudiation of the contract.

(2) The same requirements of fair and reasonable treatment apply in both situations. These requirements mean that the employee, who may potentially be dismissed for poor performance, must be given specific reasons for the dissatisfaction and a reasonably specific and measurable improvement should then be demanded by the employer, giving a reasonable period to establish whether the employee is able to achieve the improvement. The trial of the employee's work must be fair and the results at the end of the trial period considered dispassionately. The employer should take into account an employee's previous good record and the possibility of redeployment.

(3) Without a fair trial of the employee's capacity the employer has no reasonable basis for reaching a conclusion adverse to the employee and must be treated as if it had not in fact reached such a conclusion. Airline Stewards & Hostesses of NZIUOW v Air New Zealand Ltd [1990] 3 NZILR 584 (CA).

(4) If poor performance is established by a fair trial/investigation, the employer must still consider whether the employee is so deficient as to entitle a fair and reasonable employer to dismiss.

(5) Warnings for poor work performance should be explicit and fair. They should describe how an employee's behaviour is deemed to be unsatisfactory, give clear information about what improvement will meet the employer's requirements, and how improvement will be measured. Their purpose is to give an employee an opportunity to improve, and to enable dismissal to be averted. They may not be used to create a pretext for dismissal.

(6) The following list (not necessarily exhaustive) of questions should be asked when considering dismissal for poor performance:

(a) Did the employer in fact become dissatisfied with the employee's performance?

(b) Did the employer inform the employee of the dissatisfaction and set out the expected standard?

(c) Were the criticisms and future requirements objective and readily comprehensible by the employee?

(d) Was reasonable time allowed for the attainment of the required standards?

(e) After the above had been done, did the employer turn its mind fairly to the question whether the employee had achieved what was expected, including:

- *(i) Using an objective assessment of measurable targets;*
- *(ii) Giving the employee an opportunity to answer the conclusions arising from the trial period;*

(iii) Listening to the employee's explanation with an open mind;

(iv) Considering the explanation and all favourable aspects of the employee's service record and any fault on the part of the employer in terms of poor training, management, or promotion;

(v) Exhausting all possible remedial steps such as training, counselling, and redeployment?"