

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 281
3150504

BETWEEN SHARLENE EDWARDS
Applicant

AND JS EWERS LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Paul Mathews, advocate for the Applicant
Linda Ryder and Jeff Goldstein, advocates for the
Respondent

Investigation Meeting: 17 October 2022

Submissions Received: 17 October 2022 from the Applicant
17 October 2022 from the Respondent

Date of Determination: 6 June 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sharlene Edwards was employed by J. S. Ewers Limited (JSE) as a farm worker. This role entailed working in JSE's glasshouses picking tomatoes, capsicums and egg plants (in season) and pruning and tending to plants.

[2] In early 2021 Ms Edwards took exception to wearing a newly introduced work uniform because she believed she would experience an adverse skin reaction to the material. Ms Edwards chose not to wear the uniform despite instruction to do so and her stance escalated into confrontations with her supervisor.

[3] Ms Edwards's supervisor complained about how she had behaved and JSE investigated this complaint. JSE concluded that Ms Edwards's behaviour might amount to misconduct so it commenced a disciplinary process with her. At the end of that process Ms Edwards's employment was terminated by JSE.

[4] In response to the disciplinary process and the termination of her employment Ms Edwards raised two personal grievances:

(a) Unjustified disadvantage arising out of an alleged suspension during the process; and

(b) Unjustifiable dismissal.

[5] Ms Edwards was unable to resolve her personal grievances with JSE so she lodged an application in the Authority with two claims based on her grievances.

The Authority's investigation

[6] I investigated Ms Edwards's claims by receiving written evidence and documents, holding an investigation meeting on 17 October 2022 and assessing the oral and written submissions of the parties' representatives.

[7] In my investigation meeting, under oath or affirmation, the witnesses who had provided statements gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my

findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

[9] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief of the Authority this would occur he decided, as he is permitted by s174D(3) of 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 s174D(2) of the Act.

Ms Edward's claim for unjustifiable dismissal

[10] The issues for the unjustifiable dismissal grievance are:

(a) Was the employee dismissed; and

(a) If so, were the actions of the employer in deciding to dismiss the employee, justifiable?

[11] In this case there is no dispute over the fact that Ms Edwards was dismissed. JSE gave her notice of termination on 19 April 2021, after completing a disciplinary process.

[12] The question I must answer in order to determine the unjustifiable dismissal claim is, was the dismissal justifiable.

[13] The test for justification is set out in s 103A of the Act. Applying this to Ms Edwards's claim the question is whether JSE's actions in coming to the conclusion to dismiss her were what a fair and reasonable employer could have done in all of the circumstances at the time.

[14] This question applies to both the steps taken to reach the decision and the justification for the decision.

[15] Whether JSE acted as a fair and reasonable employer could, in the steps it took to come to the decision to dismiss, is informed by s 4(1A) and s 103A(3) of the Act. I must be satisfied that JSE acted as a fair and reasonable employer could whilst meeting the requirements of the Act. This breaks down specifically as:

- (a) Did JSE investigate what occurred in terms of the concerns it had about Ms Edwards's conduct?
- (b) Did JSE set out these concerns, provide relevant information and explain the possible implications of an adverse finding, for Ms Edwards so that she could consider all of this and respond?
- (c) Did JSE give Ms Edwards a reasonable opportunity to respond to its concerns, before it made its decision on what had occurred and what sanction should be imposed?
- (d) Did JSE consider the explanations given by Ms Edwards before it made its decision on what sanction should be imposed?

[16] The justification for JSE's decision to dismiss Ms Edwards is assessed by considering:

- (a) Were JSE's conclusions as to what Ms Edwards did, conclusions that a fair and reasonable employer could come to in all of the circumstances?
- (b) Based on JSE's conclusions about what Ms Edwards did, was the conclusion to dismiss Ms Edwards one that a fair and reasonable employer could come to in all of the circumstances?

What happened?

[17] In mid-2020 JSE decided to introduce a staff uniform. This was for health and safety reasons and because JSE thought it would reflect a professional image and help with the culture of employees being "one team".

[18] In September 2020 employees were asked to provide their clothing sizes and the new uniform was then ordered for all staff.

[19] In October 2020 JSE introduced a formal Dress Code and Uniform Policy.

[20] The new uniform was received by JSE in February 2021 and subsequently handed out to employees with the requirement that each employee would then wear the uniform whilst at work.

[21] Ms Edwards received her uniform on 5 February 2021.

[22] Ms Edwards says that when she was first told about the introduction of the uniform in September 2020, she told her supervisor that she would not be able to wear the uniform as it was polyester, which reacted with her skin. Ms Edwards says she also repeated this advice to her supervisor in October 2020 when she signed a form in connection with the uniform. And she says she told her supervisor she could not wear polyester, for a third time on 5 February 2021 when he gave her the uniform to wear.

[23] JSE disputes this; it says Ms Edwards objected to wearing the uniform as she said it would be too hot for her to wear in the glasshouses. And it says as a result it agreed a compromise with Ms Edwards by which she would wear a singlet when working in the glasshouses but wear the shirt, which was part of the uniform, when she was outside the glasshouses. JSE told Ms Edwards about the compromise on 9 February 2021 and recorded this in a file note.

[24] Ms Edwards accepts she was offered the compromise but from her perspective it did not work as she was unable to wear the shirt at all because of the reaction she would have to the polyester fabric. So, Ms Edwards returned the file note, she had received, and wrote on the returned note that she was prepared to wear a vest instead of the shirt as she cannot wear polyester. This was some time after 9 February 2021.

[25] After receiving the returned note, Ms Edwards's supervisor met with her on 16 February 2021. His file note of that meeting records that he explained to Ms Edwards that wearing a vest rather than the shirt was not a solution as the vests were also made of polyester. From JSE's perspective then the compromise remained that she could wear a singlet in the glass house but was required to wear the shirt outside, which would only be 15 minutes for her smoko break and 30 minutes for her lunch break, and if it helped with any skin reaction, her manger advised Ms Edwards that she could wear a shirt of her choice under the JSE shirt.

[26] Despite this meeting Ms Edwards chose not to wear the JSE shirt outside the glasshouses as instructed. This led to two confrontations with her supervisor on 19 February 2021.

[27] Two things arose out of the confrontations:

- (a) Ms Edwards requested a meeting with Pierre Gargiulo, the General Manager of JSE, to discuss the issue she had with the uniform.
- (b) Ms Edwards's supervisor made a formal complaint about Ms Edwards's behaviour on 19 February 2021, to Mr Gargiulo. In that complaint he expressed that Ms Edward's had not been wearing her uniform and on the two occasions he raised this with her and told her to wear her uniform, she yelled at him and on one occasion she told him she was recording the conversation and despite being told to wear her uniform Ms Edwards did not do so.

[28] Mr Gargiulo investigated the complaint. As part of his investigation he invited Ms Edwards to a meeting to discuss the confrontations on 19 February 2021, these being the subject of the complaint.

[29] Mr Gargiulo and Ms Edwards met on 1 March 2021 to discuss both the complaint raised by the supervisor and the uniform issue. They reached a further compromise on the

uniform issue, which meant a cotton tee shirt would be provided for Ms Edwards to wear and pending that arriving she would wear a safety vest.

[30] Mr Gargiulo and Ms Edwards did not have enough time to discuss the matters raised by the supervisor's complaint so a further meeting was set for 9 March 2021. In this meeting Ms Edwards accepted that she yelled at her supervisor and told him she was recording the conversation. She went on to explain that the uniform issue had been ongoing for some time and her frustration caused her to respond as she did. She also said she felt her supervisor should be present at the meeting to answer questions about his conduct. In the end Ms Edwards left the meeting stating it was not going anywhere and she was not going to explain anymore.

[31] Mr Gargiulo then completed his investigation by meeting with Ms Edwards's supervisor and discussing aspects of the complaint and Ms Edward's response.

[32] After considering the information he received Mr Gargiulo decided to escalate the incidents that were the subject of the complaint to a disciplinary matter; he wrote to Ms Edwards setting out the concerns – these were expressed in two parts: her behaviour toward her supervisor and a potential breach of the JSE policy on recording conversations at work.

[33] Mr Gargiulo and Ms Edwards then met on 22 March 2021. In the meeting on 22 March Ms Edwards denied yelling at her supervisor and denied telling him she was recording their conversation; she did however concede that she spoke abruptly to her supervisor.

[34] On 25 March 2021 Mr Gargiulo met with Ms Edwards and gave her his preliminary decision on the misconduct matter. He advised her that he had concluded that the events occurred as described by her supervisor and her actions amounted to serious misconduct. And he had concluded that the appropriate sanction was dismissal. This was a preliminary decision and he invited Ms Edwards to meet with him again the following day so that she could provide any response before a final decision was made. All of this was confirmed in writing in a letter to Ms Edwards dated 25 March 2021.

[35] Ms Edwards asked for the meeting on 26 March 2021 to be postponed. A new meeting was set for 1 April 2021.

[36] The meeting on 1 April 2021 was not particularly helpful. Ms Edwards had not received the notes of the 9 March 2021 meeting so she was provided a copy and took some time to review them. She then took up a large amount of time expressing her view that her supervisor knew about her issue with the uniform – that she could not wear polyester – and had ignored that. It is clear that she became increasingly frustrated with the meeting and the fact she was subject to a disciplinary process when she believed her supervisor was at fault for not dealing with her concern about the uniform. In the end Ms Edwards left the meeting as she had a pre-arranged personal commitment to attend to.

[37] Mr Gargiulo decided to consider the issues with Ms Edwards's conduct based on the information he had received. Mr Gargiulo wrote to Ms Edwards on 6 April 2021 advising her that he had concluded that the following had occurred:

- (a) In the first confrontation with her supervisor on 19 February 2021 she had yelled at him and told him she was recording the conversation. This behaviour was disrespectful and insubordinate and the threat was confrontational and undermined trust and confidence.
- (b) In the second confrontation with her supervisor on 19 February 2021 she had acted as her supervisor had alleged, i.e., she had yelled at him and ignored his direction to her by saying on numerous occasions that she could not hear him.
- (c) That, on 19 February 2021, her supervisor had told her at least three times to wear her uniform and she responded with angry outbursts and defiantly. And despite the clear instruction she did not wear her uniform as directed.
- (d) In the investigation meetings she continued to act in a disrespectful and combative manner and showed no remorse or insight into the effect of her

behaviour. Both meetings ended with her walking out before all issues were discussed.

[38] In the letter of 6 April 2021 Mr Gargiulo then went on to advise that he had concluded that:

- (a) Ms Edwards's actions on 19 February 2021 had breached JSE's code of conduct and the company's mission and value statement as she had failed to treat her supervisor with respect and dignity.
- (b) Her actions had shown a pattern of insubordination and deliberate refusal to follow a reasonable and lawful instruction.
- (c) Her conduct had destroyed the trust and confidence required in their relationship and amounted to serious misconduct.
- (d) And in these circumstances JSE was considering dismissal without notice as the potential outcome.

[39] The letter concluded by inviting Ms Edwards to make any comments on the proposed outcome by 9 April 2021, before JSE made a final decision.

[40] On 8 April 2021 Ms Edward's advocate advised JSE that he had been instructed by Ms Edwards, he sought various information and stated he would not be in position to provide Ms Edwards's comments on the 6 April letter by 9 April 2021 as requested.

[41] JSE provided the requested information and extended the time for Ms Edwards to provide her comments until 14 April 2021. This deadline was then extended further until 4:00pm on 19 April 2021.

[42] Ms Edwards did not provide any comments on the proposed dismissal directly or through her advocate so JSE concluded the process by confirming her dismissal at 5:28 pm on 19 April 2021.

Analysis

[43] In terms of the process adopted by JSE I am satisfied that JSE acted as a fair and reasonable employer could in the circumstances. Specifically:

- (a) Mr Gargiulo investigated the complaint and the concerns raised by it.
- (b) Mr Gargiulo then provided relevant information about the complaint and JSE's concerns to Ms Edwards. It is clear to me from the evidence I heard that Ms Edwards knew what the complaint was and the concerns raised by JSE, i.e., that she had refused to wear the uniform despite instruction to do so, that she had yelled at her supervisor, that she had threatened her supervisor by telling him she was recording their first conversation and that she deliberately ignored her supervisor on the second occasion by telling him she could not hear him. This is particularly so given the comprehensive summary in the second preliminary decision letter.
- (c) Ms Edwards had four opportunities to respond to the issues raised in the complaint and JSE's concerns, i.e., the investigation meeting, the disciplinary meeting, the meeting following the first preliminary decision and the opportunity to provide any responses to the second preliminary decision.
- (d) I am satisfied that Mr Gargiulo did consider Ms Edwards's responses throughout the process, before he came to the final decision to dismiss Ms Edwards. This included her frustration expressed to him about her supervisor and the way the process itself had been conducted.

[44] In terms of justification for the dismissal I accept that a fair and reasonable employer could conclude in all of the circumstances that on 19 February 2021:

- (a) Ms Edwards had refused to wear her uniform despite specific repeated and reasonable instructions from her supervisor to do so and that this occurred despite the compromise which dealt with her concerns.
- (b) Ms Edwards had repeatedly yelled at her supervisor.
- (c) Ms Edwards had behaved in a manner that was threatening to her supervisor by telling him she was recording their conversation.
- (d) Ms Edwards had been disrespectful and ignored her supervisor by repeatedly telling him she could not hear him, when she could.

[45] I am also satisfied that a fair and reasonable employer could conclude, as JSE did, that the four actions:

- (a) Amounted to a breach of JSE's code of conduct and were acts of serious misconduct pursuant to the JSE employee handbook, as the employee had failed to treat her supervisor with respect and dignity and as she had both ignored and threatened her manager.
- (b) Evidenced behaviour at work that was insubordinate and a deliberate refusal to follow repeated management instructions. These actions were also acts of serious misconduct under the JSE employee handbook, particularly in the context of a compromise being put in place so the employee had no valid reason for not obeying the instruction and employees were expected to follow instructions.
- (c) Showed that the employee had no insight of her behaviour, blamed her supervisor believing he was in the wrong and had no remorse.

[46] It follows that a fair and reasonable employer could conclude, as JSE did, that based on various and repeated acts of serious misconduct and a lack of insight shown by the

employee, that it had lost trust and confidence in the employee and therefore dismissal was a reasonable sanction and within the range of responses available to a fair and reasonable employer in all of the circumstances.

Conclusion

[47] I am satisfied that JSE's actions in investigating the complaint and carrying out a disciplinary process were justifiable. And I am satisfied that JSE's decision to dismiss Ms Edwards was substantively justified. Ms Edwards's claim for unjustifiable dismissal does not succeed.

Ms Edward's claim for unjustifiable action causing disadvantage

[48] An unjustifiable disadvantage personal grievance is set out in section 103(1)(b) of the Act. This section provides that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[49] The questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

- (a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?
- (b) If so, did the actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions justifiable?

[50] In this case Ms Edwards complains that she was suspended during the disciplinary process. JSE says Ms Edwards was not suspended rather she agreed to go on paid special leave in order to take time to consider aspects of the process and neither it nor Ms Edwards turned their minds to her returning to work as the process continued.

What happened?

[51] At the end of the meeting on 25 March 2021 – where Mr Gargiulo set out his first preliminary decision – Mr Gargiulo “placed [Ms Edwards] on paid special leave until 10 am the next day.”¹

[52] Mr Gargiulo said he did this because he wished to meet with Ms Edwards again the next day to discuss the preliminary decision and this time off work would allow her to focus on the issues and because he was concerned about the impact the process was having on her.

[53] Ms Edwards described this as Mr Gargiulo standing her down and it was completely unexpected and she did not agree to it.

[54] The next meeting, following up on the preliminary decision, did not take place the following morning on 26 March 2021; it was postponed until 1 April 2021. Ms Edwards remained away from work pending that meeting.

Analysis

[55] Whilst JSE describes Ms Edwards’s time off work as agreed special leave, it was a suspension. It is clear to me that it was a unilateral decision by JSE that Ms Edwards remain away from work pending the outcome of the follow up meeting.

[56] Suspending an employee does cause disadvantage to that employee’s employment, so the action is the basis for a personal grievance.²

[57] With these two steps resolved the issue is, was the suspension justifiable?

¹ Paragraph [43] of Pierre Gargiulo’s witness statement.

² *Virginia Henry v South Waikato Achievement Trust* [2023] NZEmpC 20.

[58] The answer here is that JSE's actions in suspending Ms Edwards were not justifiable. JSE did not follow a fair process – Ms Edwards was not given an opportunity to consider the proposed suspension and respond to it before a decision was made. And it was not substantively justified – giving Ms Edwards time to consider the issues was an insufficient reason, particularly as the time was extended and there was no evidence to show that she needed time off for health reasons.

Conclusion

[59] In suspending Ms Edwards JSE acted in an unjustifiable manner and this caused her a disadvantage. Ms Edwards personal grievance is established and her claim is for unjustifiable action causing disadvantage is successful.

Remedies

[60] As Ms Edwards has been successful with her unjustified disadvantage grievance, I must turn to consider what remedies she may be entitled to. In this regard, I may award any of the remedies provided for under s 123 of the Act. The only remedy that follows for this claim is compensation.

Compensation

[61] Compensation is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and an award is made pursuant to s 123(1)(c)(i) of the Act.

[62] My task is to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of his dismissal and recent decisions of the Employment Court provide guidance on this exercise of quantification.³

³ *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.

[63] I must consider the effects of the dismissal and the unjustified behaviour on Ms Edwards; identifying the harm caused to her and the loss she suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed. Then I must consider where that corresponds to the spectrum of quantum awarded as compensation.⁴

[64] Reflecting on Ms Edwards's evidence about the impact all of these matters have had on her I assess the compensation level for the unjustifiable suspension to be \$6,500.00.

Contribution

[65] As I have awarded remedies to Ms Edwards, I must now consider whether she contributed to the situation that gave rise to her grievance.⁵ This assessment requires me to determine if Ms Edwards behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievance.⁶

[66] I am satisfied that Ms Edwards did not contribute in any way to the unjustifiable suspension and therefore no reduction is required for contribution.

Summary

[67] Ms Edwards claim for unjustifiable dismissal does not succeed.

[68] In suspending Ms Edwards, JSE acted unjustifiably. In settlement of this grievance JSE must pay Ms Edwards \$6,500.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

Costs

⁴ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁵ Section 124 of the Act.

⁶ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

[69] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Edwards may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum JSE will have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[70] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁷

Peter van Keulen
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.