

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Robyn Eisenhut (Applicant)
AND Spotless Services Limited (Respondent)
REPRESENTATIVES Garry Pollak, Counsel for Applicant
Richard Harrison, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 9 September 2004
DATE OF DETERMINATION 23 November 2004

DETERMINATION OF THE AUTHORITY

The applicant, Ms Robyn Eisenhut, has brought a personal grievance claiming that she has been unjustifiably dismissed by the respondent, Spotless Services Limited ("Spotless"). Ms Eisenhut had been employed for some eight years to manage the De Salle College tuck shop prior to Spotless' taking over the service provision in April 2003. Ms Eisenhut was employed pursuant to an individual employment agreement and she received a copy of the staff handbook and the cash handling policies and procedures.

Ms Iris McGrath was employed as Spotless' Operations Manager in September 2002 and had responsibility for its Tuck Shop Company since September 2003. The tuck shop was staffed by Ms Eisenhut as manager, and two assistants, Ms Megan Tristram and Ms Jo Burns.

On 29 January the ANZ bank telephoned Ms McGrath to say money received for the tuck shop was \$178.40 less than the amount written in the deposit book. The money had been deposited via the fast cash deposit and the bank asked that deposit slips be properly filled out in future. Ms McGrath arranged for Spotless' Management Accountant to telephone the bank. The procedures were checked by the ANZ and found to be correct and there was a video of the money being counted. Ms McGrath also learned that the banking had been done not on Wednesday afternoon as Ms Eisenhut had told her it had been but on the Thursday. Ms McGrath was of the view that Ms Eisenhut had lied to her about this but I find there was simply a misunderstanding.

On Friday 30 Ms McGrath telephoned the tuck shop to find out what had happened. She said Ms Burns answered the phone and told her the cash had been a few cents short of the till reading, that she had forgotten to put some money in the banking bag and that she had given it to Ms Eisenhut. Ms Burns said she had cashed up alone. The procedures require two people. Ms Burns was a former Spotless employee and she was bound by the same procedures as other staff.

Ms Eisenhut said Ms Burns burst into tears after the phone call and told her Ms McGrath had said her cash bag was out. She and Ms Tristram comforted her.

Later that day, Ms McGrath couriered a letter to Ms Eisenhut asking her to come to a disciplinary meeting on 4 February. She also advised her of her right to representation and said it could result in dismissal. Three issues to be discussed were itemised; these related to cash handling procedures. Curiously, the letter also instructed Ms Eisenhut to delegate banking duties to Ms Burns, who had counted up the till money alone and had made errors in doing so.

Ms Eisenhut was shocked when she received the letter. Her husband contacted a friend, Ms Angela Hill, who was a community mental health nurse who advised Ms Eisenhut to see her GP. She contacted Spotless to say Ms Eisenhut was sick and left her contact details for Ms McGrath.

On the afternoon of Monday 2 February Ms Burns telephoned Ms McGrath and said that she was upset about comments Ms Eisenhut had made to her. Ms Burns said Ms Eisenhut had blamed her for the loss of the money, had called her a spy and had threatened her with Black Power, asserting that her brother was a member.

Later that day Ms McGrath received a phone call from Ms Karen Gorthorpe, the relieving manager, who said that both Ms Eisenhut and Ms Tristram, who had resigned, were at the school and that Ms Eisenhut was telling students to boycott the tuck shop. She said Ms Burns then advised her separately of the boycott threat. She said Ms Burns wrote a note about this. The note reads:

This letter is confirmation that what has been said at De La Salle between certain parties.

I overheard that the boys (snr) will boycott the tuckshop if a certain person had 2 leave. And during the discussion the name Black Power came up although this had nothing to do with the school or tuckshop. A few seniors stayed away during morning tea but they decided that they were hungry at lunch. A selected few (snr's) have been in the tuckshop during lunch and have been seen by certain staff members of De La Salle and nothing was mentioned.

This note quite clearly does not convey the same message Ms McGrath said she had received from Ms Burns earlier. Most pertinently, it does not say that the boycott threat was made by Ms Eisenhut. Ms Gorthorpe was not called to give evidence. During the Investigation Meeting Ms Burns' evidence was very quickly revealed to be uncertain, confused and contradictory. She accepted that Ms Eisenhut had not threatened her with anyone in Black Power and that Ms Eisenhut had not said that a member of Black Power would either go to Ms Burns' home or come to work. Ms Eisenhut said she did not even have a brother. Ms Burns for some reason assumed that she was being threatened. Her note in fact states that the Black Power matter was raised during a conversation in the tuck shop about a boycott. The note does not say that Ms Eisenhut made any such remark. Ms Burns also said that she felt threatened when she called in to collect keys from Ms Eisenhut but it emerged that apart from an underlying feeling of vulnerability there was no factual basis for this. Ms Burns had a propensity to make connections between events and draw conclusions that were not based on anything factual.

A proper investigation by Ms McGrath of the allegations being made by Ms Burns, which would have included speaking to Ms Tristram, would easily have revealed this confusion. The details of what Ms Burns had alleged were not properly put to Ms Eisenhut. It may well have been that there was talk of a boycott. If there was, clearly a possible explanation is that it emanated from the pupils in support of Ms Eisenhut after they had queried why she was not working.

The disciplinary meeting was attended by Ms Eisenhut, Mr Frank Fenton, a support person, Mr Gerald Wagg as her solicitor, Ms McGrath and Mr David Harris, the Senior Operations Manger.

Mr Harris was said to be present to take notes but evidently played an active part in the discussion and participated in making the decision to dismiss.

In addition to the issues notified to Ms Eisenhut, three other matters were raised at the meeting. These were that she had been present at the school when she was sick and that she had told the pupils to boycott the tuck shop; that she had breached confidentiality by discussing the disciplinary issue and that she had harassed and intimidated Ms Burns. Ms McGrath was of the view that Ms Eisenhut had denied being at the school but that was a misapprehension on her part; Ms Eisenhut did not deny being at the school. She explained that she had brought in the security keys and had told the Principal that she would not be working the next day because she had an employment matter to discuss with Spotless.

The meeting was evidently a difficult one. Mr Harris and Ms McGrath claimed that Mr Wagg was aggressive and kept interrupting. Having read the notes taken at the meeting and listened to the evidence from the participants I am of the view that Mr Wagg was simply trying to clarify matters, and pointing out that no breach of confidentiality had taken place, and that exception was taken to his efforts, including his request to be supplied with details of the harassment allegation.

After an adjournment, Mr Harris said that at the end of the interview a decision would be made, effectively precluding the possibility of any further investigation, yet this was clearly a situation where further information should have been sought. No attempt had been made to interview Ms Tristram; adequate details of the banking were not provided and despite Ms Eisenhut's denials about the boycott and the harassment no further discussion with Ms Burns or anyone else took place. Instead, Ms Eisenhut she was being dismissed for serious misconduct and that a written explanation would follow.

Ms McGrath told me the dismissal was for inciting a boycott, intimidating Ms Burns and breaching procedure. However, it was readily apparent to me that the real reason for the dismissal was that Ms McGrath and Mr Harris believed, as Mr Harris stated in his affidavit (at the time of the hearing he had left New Zealand to take up a position in Bahrain) that Ms Eisenhut had been dishonest. Mr Harris said at the end of his affidavit:

Subsequently the monthly financial reports for that site have shown a dramatic improvement in profit. The improved financial state vindicates our belief that Robyn had not been honest with us during her employment.

The fact that Spotless was of the view that she had been dishonest was not put to her. Ms McGrath did not at any stage bother to interview Ms Tristram who may well have been able to shed light on the allegations. Ms Tristram was with Ms Eisenhut during the period in question and gave her a ride to the bank and waited while she put the money in the quick deposit box. She was also present during the times Ms Eisenhut was alleged to have intimidated Ms Burns and made boycott threats. Ms McGrath said she had formed the view that there was no point in interviewing Ms Tristram because she had resigned and was angry. Those are not good reasons for a failure to carry out a proper investigation.

Spotless did not conduct an investigation sufficient to allow the employer to conclude on reasonable grounds that Ms Eisenhut has threatened a boycott or intimidated Ms Burns. Ms Eisenhut did accept that she had breached procedure but by the same token Ms Burns also breached procedure and no form of disciplinary action was taken against her. The real reason for the dismissal was not put to Ms Eisenhut and the procedure was flawed. The dismissal was unjustified.

Ms Eisenhut has suffered significant hurt and humiliation as a result of her dismissal, particularly given that it was in effect a dismissal for dishonesty. Her husband gave telling evidence about the effect of the dismissal. Ms Eisenhut suffered from depression and was unable to look for another position immediately after being dismissed. She obtained other employment on 10 May in a lunchbar. The respondent is to pay the applicant the sum of \$10,000 pursuant to s.40(1)(c)(i) and to pay her lost remuneration for the period from the date of dismissal to 10 May.

I am required to consider whether there was any contribution by the applicant to the circumstances leading to the personal grievance. Given that I have found that the real reason for the dismissal was an allegation of dishonesty nothing that Ms Eisenhut did contributed to the personal grievance.

Costs were reserved. The parties should try to resolve this matter themselves. Should that not be possible and should the parties be unable to agree on a timetable for the filing of memoranda leave is reserved for the parties to contact the Authority and I will then set a timetable.

Dzintra King
Member of Employment Relations Authority