

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 391/10
5166556

BETWEEN NANUMA FOTOFILI
 Applicant

AND NEW ZEALAND HEALTH
 ASSOCIATION LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Sione Fonua, counsel for Applicant
 Shan Wilson, counsel for Respondent

Investigation Meeting: 10 and 12 March 2010

Further Information Received 23 March 2010

Determination: 27 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the dismissal of the applicant Mrs Nanuma Fotofili by the respondent company New Zealand Health Association Limited. The company will be referred to in this determination as Sanitarium, taken from its trading name Sanitarium Health Food Company.

[2] At the conclusion of an enquiry carried out in February and March 2009, Mrs Fotofili was told by Sanitarium on 5 March that it had been decided to dismiss her with immediate effect. Mr Hayden Wall, Production Manager of the Sanitarium plant in which Mrs Fotofili had been employed as a Packing Operator, confirmed the decision in writing on 6 March. In his letter he referred to allegations that had been put to Mrs Fotofili and enquired into, as follows:

- *That on Wednesday 18 February you damaged the property of another employee (being the marking of Asheem's car) or at the very least were complicit in another employee (namely Frederick Kei) damaging the car;*
- *That during the investigation into this incident you have provided false information;*
- *That on the same day you stuck your tongue out at your supervisor – which raises issues of insubordination.*

[3] Mr Wall summarised Sanitarium's conclusions reached from its enquiry as follows:

We consider the first two allegations to each on their own, constitute serious misconduct and we consider all three allegations, read together, to be serious misconduct. Your serious misconduct has led to a breakdown in the trust and confidence we can have in you as an employee.

[4] In response to her dismissal Mrs Fotofili raised a personal grievance, claiming that Sanitarium's action was unjustified.

[5] Mediation was undertaken by the parties but did not resolve the employment relationship problem. Subsequently, about six months after the dismissal, Mrs Fotofili applied to the Authority by lodging a statement of problem.

[6] At the investigation meeting held in March 2010 the Authority took evidence from Mrs Fotofili and Mr Wall, as well as other witnesses who had been involved in the employer's enquiry into alleged misconduct. Submissions were made by counsel, Mr Fonua and Ms Wilson, the former in support of Mrs Fotofili's claim that her dismissal was unjustifiable and that, accordingly, she was entitled to remedies under the Employment Relations Act 2000. Ms Wilson for Sanitarium submitted that the dismissal was justified and that accordingly there was no basis for awarding remedies to Mrs Fotofili.

[7] The remedies sought for Mrs Fotofili are reimbursement of lost wages and compensation for hurt feelings, humiliation and loss of dignity. Reinstatement requested earlier was no longer sought.

Test of justification

[8] When the Authority is required to resolve an employment relationship problem in the nature of a claim that a dismissal has been unjustified, it must assess

justification against the test provided at s 103A of the Employment Relations Act 2000, which is as follows:

... the question of whether a dismissal ... was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[9] The following in summary are the circumstances in which Sanitarium commenced its enquiry into Mrs Fotofili's conduct and reached from that enquiry its conclusion that her conduct amounted to serious misconduct. On Wednesday 18 February 2009, a complaint was made by Mr Asheem Ahamad, a Process Operator and co-worker of Mrs Fotofili, that the paintwork of his car had been scratched. The car had been parked in the secure staff car parking area while Asheem worked as usual in the plant nearby on the night shift from midnight to 8am. Mrs Fotofili worked the same shift on 18 February.

[10] As the photographs taken on 18 February show, the scratch is a highly visible scoring of the paintwork in an irregular line across the middle of the front and rear doors and going towards the back of the car. The car appears to have a lustrous finish in dark paint that has been scratched through to an undercoat of light coloured paint, making the damage quite obvious and detracting from the display-like condition of the car, something apparently Asheem had strived to achieve and had expressed his pride in.

[11] A few days earlier there had been a verbal exchange between Asheem and Mrs Fotofili, leading her to formally complain on Monday 16 February about his behaviour. At the beginning of the 18 February night shift during which Asheem complained his car had been scratched, there was a confrontation, partly physical, between Asheem and Mr Frederick Kei. He is Mrs Fotofili's son and was also employed by Sanitarium.

[12] In the course of its enquiry Sanitarium interviewed 18 employees who had been present during the shift, but the company was unable to obtain any eye witness accounts of how Asheem's car came to be scratched. Closed circuit cameras had only recorded the movement of cars in and out of the car park gate and not any activity taking place around them while parked.

[13] The employer's conclusions that Mrs Fotofili had been involved in the action of deliberately damaging the property of an employee, Asheem, whether by scratching the car herself or by being the accomplice of another person who did that, was based on its evaluation of the circumstances revealed by its enquiry into how the car was damaged.

[14] Sanitarium management who carried out that enquiry said in evidence that at the beginning of their enquiry no suspicion had fallen on Mrs Fotofili as being involved in damaging Asheem's car. Initially she along with a number of workers had been questioned as a possible witness to the movement and activity of others, including her son, around the time it was thought the car had been damaged. The enquiry was upgraded to a disciplinary investigation into Mrs Fotofili's conduct after it appeared she had attempted to give false information, which had been shown by her changing the answers to questions asked about her movement and activities.

[15] As an outcome of the enquiry Mrs Fotofili's son Frederick Kei was dismissed for damaging Asheem's car or for complicity in the damaging of it by another person, his mother. Sanitarium concluded that they had both been together in the car park when the vehicle was scratched, as they had been seen and heard there.

[16] A third employee was dismissed as a consequence of Sanitarium's enquiry. Mr Pone Sefo was considered to have given false and misleading information about his knowledge of the movements and activities of Mrs Fotofili and Mr Kei at the time Asheem's car was damaged. Sanitarium found that he had admitted giving false evidence in statements he made to a supervisor. The decision to dismiss Mr Sefo was announced to him on 4 March 2009, the day before Mrs Fotofili was dismissed.

[17] The complaint Mrs Fotofili had formally made on 16 February against Asheem of bullying or intimidatory behaviour was investigated and Asheem was issued with a First Offence written warning on 4 March, the day before Mrs Fotofili's dismissal. She was advised on 5 March that disciplinary action had been taken as the outcome of her complaint.

Issues

[18] For Mrs Fotofili it was submitted by counsel, Mr Fonua, that the issues for the Authority to determine from its investigation are:

1. *Whether or not [Sanitarium], under mere suspicion, was justified in holding that it was [Mrs Fotofili] that damaged Asheem's car or at the very least was complicit in another employee damaging the car;*
2. *Whether or not [Sanitarium], under the circumstances and very confusing interviews, was justified in holding that [Mrs Fotofili] provided false information; and*
3. *Whether or not [Sanitarium] was justified in finding that sticking out her tongue to her supervisor is sufficient to justify dismissal.*

[19] In relation to the third issue, I do not consider that Sanitarium has ever expressly or impliedly determined or concluded that Mrs Fotofili's gesture of sticking out her tongue was sufficient to justify her dismissal. In Sanitarium's dismissal letter of 6 March the company referred to the allegation about that particular conduct as being serious misconduct when "read together" with the two other allegations, which were about being involved in damaging Asheem's car and providing false information during the disciplinary investigation.

[20] The first issue as submitted by Mr Fonua points to the statutory test of justification set out at s 103A of the Act. Broadly, the issue is whether Sanitarium's actions, and how Sanitarium acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. A feeling or thought by an employer amounting only to "mere suspicion" is unlikely by itself to be sufficient to satisfy the test of what a fair and reasonable employer would have done.

[21] The second issue as submitted by Mr Fonua also draws in s 103A, requiring the Authority to look in particular at the employer's actions in relation to the conduct of its enquiry and the interviews carried out as part of that.

Asheem's subsequent dismissal

[22] The dismissal for serious misconduct of Asheem on 19 March was argued by Mr Fonua to be relevant in determining this grievance claim. I disagree. The requirements of s 103A, the test of whether a dismissal was justifiable, must exclude from the Authority's consideration the possibility with hindsight that Asheem had been an unreliable witness at the time Sanitarium was enquiring into how his car was damaged.

[23] Sanitarium found that on 19 March, two weeks after Mrs Fotofili had been dismissed, Asheem had taken possession of its property, a box of cereal product, without authorisation. Because of the time at which it occurred Asheem's dismissal was not a circumstance that as required under s 103A existed at the time Sanitarium decided to dismiss Mrs Fotofili.

[24] To the extent that Asheem's later serious misconduct raised doubt about his honesty earlier, no reasonable criticism can be made of Sanitarium that it had regarded him as truthful in the account he gave of events surrounding the scratching of his car. The company had to exercise its judgment about Asheem's honesty from the knowledge it had up to 6 March, not from what it subsequently learned about him. Sanitarium had judged Asheem to be reliable because of consistency in the account he had given of relevant events and also the corroboration of much of that by other witnesses.

[25] In my view therefore the subsequent dismissal of Asheem has no relevance to the application of s103A in the circumstances of Mrs Fotofili's dismissal.

Actions of the employer

[26] In relation to the way Sanitarium enquired into the allegations of misconduct made against Mrs Fotofili, the employer's investigation was planned, efficient and thorough. I reject the criticism that because Mrs Fotofili at a certain stage began to give inconsistent answers about her movements and activities early on the morning of 18 February, that must have been because she was questioned in some unfair way designed to trap her or make her stumble over her answers. I am satisfied that the focus of the Authority's investigation is not to be shifted from the way Mrs Fotofili responded to that investigation to the way Sanitarium conducted it.

[27] Sanitarium I find discharged its good faith obligation under s 4(1A) of the Act to give Mrs Fotofili an opportunity to comment on the conclusion eventually reached that she had engaged in serious misconduct. It was put to her by Sanitarium that dismissal was being contemplated as the outcome of the disciplinary enquiry. Although asked to respond if she wished, she did not.

[28] I conclude that when looking at the element in s 103A of "the employer's actions," those actions were what a fair and reasonable employer would have done in

all the circumstances at the time the dismissal occurred. Mrs Fotofili I find was accorded by Sanitarium all of the protections of a fair and reasonable enquiry.

How the employer acted

[29] When considering the additional element of s 103A of “how the employer acted,” the Authority recognises that Sanitarium’s conclusion there had been serious misconduct by Mrs Fotofili was based on a combination of circumstances without the availability of any direct information, such as from eye witnesses or closed circuit camera.

[30] The principal factors taken into account were that Mrs Fotofili had been angered by Asheem’s very recent earlier bullying conduct to the point of complaining about it. She was not a totally dispassionate or disinterested person in relation to Asheem but bore a grudge against him because of his behaviour towards her. It was also reasonable for Sanitarium to regard Mrs Fotofili as having expressly threatened to get even with Asheem. It is obvious enough what the statement I find she made “he needs to pay for what he did” meant or implied, without needing to seek an explanation for those words from Mrs Fotofili. Also, Mrs Fotofili’s son Frederick at the beginning of the night shift had had a confrontation with Asheem, which included shoulder barging by Frederick.

[31] Further, I am satisfied it was a reasonable conclusion of Sanitarium that Asheem’s car was damaged while parked in the staff car park between about 2 and 4 am. on 18 February. It was reasonable to conclude that Asheem had not damaged his own car, a possession he prized apparently, and that damage caused elsewhere or at some other time would have been noticed by Asheem and a passenger who had ridden in the car that night. It was therefore reasonably probable that a Sanitarium employee working the 18 February night shift had damaged the car.

[32] It was I find reasonable to conclude that Mrs Fotofili had the opportunity to damage Asheem’s car, or be complicit in that conduct by another person. She had been seen and heard in the vicinity of the car with her son Frederick and others at about the time it was reasonably concluded the damage must have occurred early on the morning of 18 February. There was evidence that she had lingered on in the carpark, with her son, when others returning from a break had re-entered the plant from the carpark.

[33] Added to motive and opportunity is another compelling factor; the inconsistent answers Mrs Fotofili gave when questioned about her movements and activities at the time the car was believed to have been damaged. These were present to such a degree I find as to give Sanitarium reasonable grounds for believing the answers given were deliberately false or misleading. This added weight to the belief that Mrs Fotofili had been, despite her denial, involved in the damaging of Asheem's car, as well as providing the basis for a second allegation of misconduct.

[34] The Authority must look objectively when assessing how the employer acted. The employer conducted a measured and searching enquiry, widely and without undue haste, before reaching conclusions based on a number of circumstances it found had been established. Those conclusions were reasonably open to Sanitarium in my view.

[35] It is not disputed that wilful damage to a co-workers property or complicity in that conduct, if established, is serious misconduct.

[36] In the assessment of the Authority, the way the employer acted was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. There was opportunity, a motive of revenge, and the unexplained inconsistency in answering straightforward questions about recent matters of fact directly related to Mrs Fotofili. I find that in the circumstances at the time Mrs Fotofili was dismissed, taking that action was what a fair and reasonable employer would have done. Accordingly the test of s 103A is met and the dismissal was justifiable, I find.

Determination

[37] For the above reasons, the determination of the Authority is that Mrs Fotofili does not have a personal grievance arising out of her dismissal, which the Authority concludes was a justified dismissal.

Costs

[38] Costs are reserved. Mrs Fotofili's receipt of legal aid may have an impact on how this question would be disposed of, but if application is to be made to the Authority that shall be in writing by Sanitarium within 21 days of the date of this determination. Mrs Fotofili will have a further 21 days in which to respond to the application.

A Dumbleton
Member of the Employment Relations Authority