

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 180  
5417732

BETWEEN            RECHEL GILLAN  
Applicant

A N D                WAKATU INCORPORATION  
Respondent

Member of Authority:    M B Loftus

Representatives:        Anjela Sharma, Counsel for Applicant  
Martin Logan, Counsel for Respondent

Investigation Meeting:    13 and 14 March 2014 at Nelson

Submissions Received:    14 April and 3 June 2014 from Applicant  
2 May 2014 from Respondent

Date of Determination:    11 November 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]    The applicant, Rechel Gillan, claims she was unjustifiably dismissed by the respondent, Wakatu Incorporation (Wakatu) on 25 January 2013.

[2]    She also claims to have been unjustifiably disadvantaged as a result of her suspension prior to dismissal. She also claims Wakatu breached its obligation to act in good faith (s.4(1)(b) of the Employment Relations Act 2000 (the Act)) in that it breached a contractual obligation to provide adequate training. Finally, there is a claim Ms Gillan was improperly deprived of a Christmas bonus paid to other employees.

[3]    Wakatu accepts Ms Gillan was both suspended and dismissed but contends its actions were justified. It denies the other claims have validity.

## Background

[4] Ms Gillan commenced with Wakatu as an accounts administrator in February 2012. Her prime function was *to ensure all debtor and creditor invoices are processed in a timely and accurate manner.*

[5] One of the key aspects of the role, and one at the heart of the decision to dismiss, was a requirement *only credit notes duly authorised (in accordance with company policy) are entered* and therefore paid.

[6] The employment was not without issue. Ms Gillan has various complaints about the quality of her induction and Wakatu's failure to adequately train her in its accounting system (Navision). She also thinks a number of the managers charged with approving the invoices she was to process failed to do so in accordance with Wakatu's policies. She says her attempts to address these deficiencies were unsuccessful and that left her no option but to circumvent some aspects of the required process. She says her circumventions were known to her managers and their failure to address these as concerns indicated tacit approval.

[7] Similarly Wakatu voiced concerns about Ms Gillan and her performance and there is evidence some external suppliers were dissatisfied with her. That said, and with one exception, it appears none of these issues resulted in formal action prior to November 2012.

[8] The exception occurred in April 2012 and involved Ms Gillan's processing of what turned out to be a fraudulent invoice. That resulted in a conversation between her and Mr Scragg, Wakatu's chief financial officer. He says he advised it was unacceptable for Ms Gillan to approve an invoice that had not been properly approved by a delegated staff member and unapproved invoices should not be entered for payment. He says he confirmed Ms Gillan understood the instruction and would comply. Mr Scragg also claims he issued a verbal warning.

[9] Ms Gillan accepts the event occurred and attributes it to a mistake engendered by the lack of training. She denies receiving a warning.

[10] The chain of events that led to Ms Gillan's dismissal appear to have commenced in November 2012. It was then Ms Venessa Ede, Wakatu's group financial accountant, spoke to Ms Gillan about her concerns around how Ms Gillan

dealt with telephone inquiries from Wakatu shareholders. Her concerns were, in Ms Ede's view, exacerbated by Ms Gillan's response which were contained in a letter dated 25 November 2012 and that led to a meeting between Ms Gillan, Ms Ede and Ms Hunter (Wakatu's HR coordinator).

[11] Ms Ede says a number of performance issues were discussed and, in particular, a requirement forthcoming rental invoices were processed with alacrity.

[12] Ms Ede says she later (mid December) asked Ms Gillan whether the rental invoices had been posted and was told they had. She claims this was not however true but she did not become aware of the failure to process the invoices till early January.

[13] Ms Gillan says she was surprised to be instructed to do the property invoices as she had not performed this task for some time. She says she printed the list of outstanding property invoices in early December and gave it to the property manager for his approval. She says that was the act to which she was referring when she advised the invoices were done and there was no attempt to mislead. She says attempts to continue the process once the property manager returned the list were stymied by system failures and various instructions to prioritise other tasks. It was not completed until 10 January 2013.

[14] Ms Gillan says these issues were discussed at a staff meeting on 14 January 2014 and Mr Scragg did not express concern about the delay.

[15] Ms Ede says the concerns were wider and there were ongoing performance problems which led to her decision to hold a disciplinary meeting in January 2013. While the meeting was triggered by Ms Gillan having entered incorrect codes on 7 invoices on either 21 or 22 January, Ms Ede says the issues causing particular concern, at least at that point, were Ms Gillan's failure to process the property invoices until the third week of January 2013 along with the earlier, and false, statement she had, along with expressions of dissatisfaction from Orbit Travel over the payment of its accounts. She says Orbit identified Ms Gillan as one of its concerns.

[16] Ms Gillan was notified of Ms Ede's wish to meet by letter dated 22 January. The meeting was scheduled for 23 January. The letter also advised Wakatu now considered its concerns serious and that they could result in disciplinary action.

[17] The meeting proceeded as scheduled. It was attended by Ms Ede, Ms Hunter and Mr Scragg. Ms Ede says Ms Gillan denied saying the property invoices had been issued in December and gave excuses as to why they had not been issued until January. Ms Ede says she noted Ms Gillan had not told anyone she was too busy and had not asked for help in respect to the alleged technical issues.

[18] Ms Ede says Ms Gillan's response regarding Orbit's concerns was that she frequently had to ask them to copy invoices as approving staff misplaced the originals. Ms Ede says Ms Gillan also *claimed nobody knew the correct coding procedure* before referring to a specific incident where she applied codes to invoices rather than the relevant department.

[19] Ms Ede goes on to say

*We were very surprised and concerned about what she had just told us. Joe Scragg then asked her what percentage of invoices were correctly authorised and she estimated higher than 80% and probably 90%. This meant 10% of the invoices were not duly approved. Joe Scragg express concern about this and the meeting was adjourned.*

[20] About the meeting, Ms Gillan simply says it is a bit of a blur as the situation seemed to escalate very quickly. She does, however, add it went for about an hour before an adjournment of half an hour. She says that upon resumption she was told she was to be suspended and to go home.

[21] Both Mr Scragg and Ms Ede accept Ms Gillan's estimate of the time taken. Both say they were surprised about what they had heard with Mr Scragg commenting on the possibility of abuse and that he *thought about the potentially large amounts of funds that had been paid without being approved.*

[22] He and Ms Ede discussed the issue and concluded they needed a better understanding of its extent. Mr Scragg told Ms Ede to review the invoices.

[23] About the recommencement Mr Scragg says

*I acknowledged a lot had been covered that day but the most serious issue for me was the posting of unauthorised invoices. I confirmed again that I had already spoken to her about this and retrained her in the procedure for authorisation requirements for invoices. I showed Rechel Gillan her job description which required only authorised invoices to be posted. Rechel Gillan's response was that she still believed she was meeting the required standard 90% of the time. I*

*informed her that Venessa Ede would review the posted invoices to identify the extent of invoice posted without authorisation. I advised Rechel Gillan that I considered the practice of posting unauthorised invoices to be entirely unacceptable and amounted to serious misconduct. If Venessa Ede's review confirmed that unauthorised invoices were being paid the possible outcome of this could be summary dismissal for serious misconduct in accordance with Wakatu's Human Resources Policy.*

[24] Mr Scragg accepts he then advised Ms Gillan she was to be suspended. He accepts he did not discuss that given what he saw as the suspension's limited duration. It was initially envisaged Ms Ede's investigation would occur that day and that there would be a meeting to discuss its findings the following morning.

[25] Ms Ede examined some 829 invoices. She found 62 (approximately 7.5%) to be deficient. To that she added the seven Orbit invoices that had been discussed in the meeting earlier that day. She reported her finding to Mr Scragg who says he was, as a result, ... *left in no doubt that this was serious misconduct and this irreparably damaged my belief in her ability to perform her designated role.*

[26] That evening (23 January) Ms Gillan sent an email stating she did not have the energy to come to work the next day before going on to say *please let me know the outcome of Joe's investigation*

[27] Ms Ede did not agree and wished to deliver Mr Scragg's decision in a meeting. After phone contact, it was agreed she and Ms Gillan would meet at 4.30 that afternoon.

[28] The decision to dismiss was advised orally during the meeting and confirmed in writing the next day (25 January). The letter states:

*After careful consideration of all the facts and information and due to the serious nature of this finding, you are informed that you were summarily dismissed for serious misconduct, specifically wilful failure to follow standard work practices and procedures as outlined by your job description, Incorporation policy and management directives, by processing and paying unauthorised invoices.*

[29] The finding referred to therein was confirmation that approximately 10% of the invoices were paid without proper authorisation.

## Determination

### *Dismissal*

[30] As already said Wakatu accepts it dismissed Ms Gillan. In doing so it also accepts it is required to justify the dismissal.

[31] Section 103A of the Act, states the question of whether a dismissal is 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 could have done in all the circumstances at the time the dismissal ... occurred.*

[32] In applying the test the Authority must consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations.

[33] Wakatu's resources are not, in my view, an issue. This is a substantial employer whose witnesses evidenced knowledge of what is required when addressing concerns with an employee's performance.

[34] Traditionally the objective review has been performed by considering the employer's actions from both substantive and procedural perspectives. While it is clear issues of substance and process overlap and there is no firm delineation, separation provides a useful means of analysis, especially as some of the requirements of s.103A have a procedural focus. Those requirements are, as a bare minimum, that the employer put its concerns, allow an opportunity to respond and consider the response.

[35] Ms Gillan was dismissed for serious misconduct. The particular failing, as listed under the heading *serious misconduct* in Wakatu's Human Resources Policy and upon which Wakatu relies is (j) ... *wilful failure to follow standard work practices and procedures as outlined by management*. Her wilful act was to code invoices prior to payment without being so authorised and having acknowledged it was not an appropriate process.

[36] It is the word *wilful* that distinguished this allegation from the Policy's lesser *misconduct* charge of *Failing to comply with Incorporation rules and procedures*.

[37] Wilful implies an act that is an intentional and deliberate violation of the required standards. I conclude, on the evidence before me, Ms Gillan's failings (such as they may be) were not wilful. I reach this conclusion for the following reasons which are based on a simplistic summary of what was considerably more detailed evidence.

[38] Ms Gillan complains she was inadequately inducted and her training in the use of Navision deficient. Those are claims Wakatu did not come close to undermining. She also claimed that while she accepts her practice of coding invoices on behalf of others was inappropriate it had, in fact, been recommended by her initial manager and trainer as the only way to counter deficiencies in the information provided by, and the poor practices of, authorising managers. This claim remained undisturbed by both Wakatu's evidence and cross examination, while Mr Scragg's claim he trained Ms Gillan in the correct procedure suffered under questioning. I was left with doubts about the extent of the alleged training or whether it had occurred at all.

[39] Ms Gillan also claimed her practices must have been known to her manager (Ms Ede) as it was obvious what she was doing. While Wakatu's evidence suggests Ms Gillan's practices may not have been known to Ms Ede (who was not the manager at the time of Ms Gillan's induction but later assumed responsibility) her answers would suggest that was because Ms Ede's checking of Ms Gillan's work was not as thorough as Ms Gillan believed. Indeed, it appears from her answers that Ms Ede's checks were, at best, perfunctory. I was totally underwhelmed by evidence of the quality of Wakatu's accounting processes.

[40] It is, I conclude, very difficult to claim someone wilfully breached policies and process in such circumstances. While there may have been failings the evidence is Ms Gillan was acting as initially advised and trained. The evidence suggests her allegedly poor practices then continued as a result of weak supervisory oversight.

[41] That, to me, means this should have been addressed as misconduct and, according to Wakatu's HR policy, appropriate remedial training provided. That did not occur. Wakatu's only argument in respect to its obligations when addressing what the HR policy classifies as *Unsatisfactory Work Performance* is the alleged warning Ms Gillan received in April (see 8 above).

[42] Ms Gillan, while accepting she was spoken to sternly, denies she received a warning. Wakatu did not provide any written evidence in support of its claim she did. There is then Ms Gillan's claim her failure in this respect was different from the one for which she was dismissed and one that was not repeated. Again the evidence leads me to agree.

[43] Given the evidence I conclude there is no substantive justification for this dismissal.

[44] Turning to procedure. Ms Gillan was called to a disciplinary meeting to discuss two allegations. The meeting then took an unexpected turn with Ms Gillan providing information Wakatu considered evidence of serious deficiencies warranting dismissal.

[45] Wakatu's problem is it did not reframe its concerns. According to Ms Ede, and the meetings notes, it decided to ascertain whether or not Ms Gillan's admission reflected reality. Ms Ede then appears to say Ms Gillan simply said tell me the result or words to that effect. She says Ms Gillan's email of 23 January (paragraph 26 above) asks that Ms Ede ... *let me know the result of Joe Scragg's investigation and what the decision is* (brief of evidence at paragraph 30).

[46] Ms Ede is wrong. Ms Gillan does not go so far as to ask for a decision and Wakatu was under an obligation to investigate why Ms Gillan approved the invoices and acted as she did. It failed to do so and thereby failed to comply with the requirements of s.103A(3)(b) to (d).

[47] Here I also note the claims of overwork which were not investigated by Wakatu but can do little more than record the evidence which shows the work Ms Gillan was previously asked to complete is now performed by multiple employees.

[48] Irrespective of how I look at it I must conclude, given the evidence, that Wakatu has failed to discharge the onus it carries to justify the dismissal. The dismissal is, I find, unjustified.

### ***Suspension***

[49] Ms Gillan claims she was unjustifiably disadvantaged by the suspension and the way it was implemented.

[50] It is well established the requirements of s.103A apply to a decision to suspend (*Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178). In other words suspension must be preceded by advice it is being contemplated and an opportunity to argue against the proposal.

[51] Mr Scragg accepts that did not occur so the suspension must, at first glance, be unjustified. I say at first glance as there are two other issues to be considered. The first is whether the failure can be considered minor and therefore de minimus (s.103A(5)). The second is Wakatu's argument its short length excuses the failure.

[52] I can agree with neither assertion. The failures in respect to section 103A were absolute with none of the requirements being met. As the Court observed in *The Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152 such all-encompassing failure is neither excusable nor minor.

[53] Similarly, and putting aside the fact the suspension was longer than initially planned, its length is irrelevant. As was said by the Court of Appeal (Richardson J) in *Birss v Secretary for Justice* [1984] 1 NZLR 513 (CA) at [521]:

*Suspension is a drastic measure which if more than momentary must have a devastating effect on the officer concerned. The prejudice occasioned the officer by a suspension can never be assuaged even if he is ultimately vindicated at the disciplinary hearing and is then restored to office and paid his arrears of salary.*

### ***Breach of the duty of Good Faith***

[54] In her statement of problem Ms Gillan claims Wakatu breached its obligation to act in good faith by failing to provide adequate training. She does not claim this constitutes a disadvantage but seeks a penalty payable to her.

[55] The claim faces two problems. The first is that a penalty is a fine imposed for deliberate and wilful breach or failure. Given Ms Gillan accepts she did nothing more than briefly raise her concerns in respect to training in an oblique manner it is difficult

to conclude Wakatu deliberately and wilfully failed to address an issue of which it was clearly aware.

[56] This conclusion may seem contrary to the finding in respect to the dismissal but I think not. There is a difference between a penalty for a deliberate and wilful omission and a possibly inadvertent failure which undermined the employer's ability to justify a dismissal.

[57] The second problem is that by the time of submission Ms Gillan was basing the claim for a penalty on a sustained lack of *good faith behaviour* throughout the employment relationship with an emphasis on overwork and a general lack of support.

[58] The claim, as argued in submission, is not that notified in the statement of problem. Given this was its first enunciation of the claim in its final form and as that occurred over a year after the employment ended the claim would appear to be barred by s.135(5) of the Act. In any event and if that were not the case Ms Gillan accepted when answering questions that once again she did not raise her allegations of overwork in anything other than an oblique and passing manner.

[59] For the above reasons the claim fails.

### ***Christmas bonus***

[60] Finally, there is a claim Ms Gillan was improperly deprived of a Christmas bonus paid to others.

[61] The notice advising the benefit states:

*Wakatu will thank you "properly" at our Christmas party on 14 December , but we would like to offer you the chance to choose your own Christmas gift(s) / voucher from Wakatu – to the value of \$150.*

*It would be appreciated if you could do your shopping over the next few weeks and pass your receipt/s to Katrina, so that we can arrange your reimbursement.*

[62] Entitlement is dependant on initial action by the employee concerned. It is they who must make the purchase and pass the receipt for reimbursement. Ms Gillan accepts she did neither. It is therefore difficult to see how Wakatu can be accused of failing to pay something that was not sought in the prescribed manner, especially when the reimbursable expenditure had not been incurred.

[63] Ms Gillan attributes her lack of action to a belief it was inappropriate she reimburse herself. That approach faces two impediments. The first is Katrina, and not Ms Gillan, appears as the authorising officer. The second is there is no evidence Ms Gillan raised this concern and allowed Wakatu an opportunity to address it.

[64] This claim is therefore dismissed.

### ***Remedies***

[65] The conclusion Ms Gillan has a personal grievance in that she was both unjustifiably dismissed and unjustifiably disadvantaged raises the issue of remedies. She initially (statement of problem) sought wages lost as a result of the dismissal and \$25,000 as compensation for hurt and humiliation with \$20,000 of that said to result from the harm caused by the dismissal and the rest emanating from the suspension.

[66] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis and Ms Gillan asks I exercise this discretion and reimburse a 12 month loss. Her claim includes recognition of earnings which came from some casual engagements during that period and totals \$35,544.

[67] Ms Gillan supported her claim with evidence of numerous job applications. She also says she previously had no problems in respect to getting interviews or expressions of interest when she applied for jobs but this had changed as a result of her honesty in advising the circumstances under which she was now applying.

[68] I have considered the extent of Ms Gillan's applications and conclude she made a commendable effort to mitigate her loss. Those efforts justify an increase in respect to the period for which her loss should be recompensed. Having reviewed the evidence I consider six months appropriate. The loss during that period is \$19,130 gross and that is payable.

[69] Ms Gillan also seeks interest on this sum. Interest recompenses one for the use, by others, of money that was the applicants. Until the issuing of this decision such a right had not been established and there was not, therefore, recompensable use. The claim fails.

[70] Turning to compensation for hurt and humiliation. Ms Gillan supported her claim with considerable evidence of the hurt which emanated from Wakatu's decisions to both suspend and dismiss. Her claims were not seriously challenged.

[71] Having considered the evidence I conclude a significant sum is due but not that claimed. It is, for example, difficult to consider \$5,000 for a suspension that only lasted a day and a bit.

[72] Having weighed the evidence I consider \$10,000 appropriate.

[73] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Gillan contributed to her dismissal in a significant way. While Wakatu will undoubtedly have a different view my conclusions regarding their failure to substantively justify the decision must lead to a finding the answer is no, at least in the way envisaged by the Act.

### **Conclusion and Orders**

[74] For the above reasons I conclude Ms Gillan has a personal grievance as she was both unjustifiably dismissed and unjustifiably disadvantaged. Her other claims fail.

[75] As a result the respondent, Wakatu Incorporation, is ordered to pay the applicant, Rechel Gillan, the following:

- i. \$19,130.00 (nineteen thousand, one hundred and thirty dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[76] Costs are reserved.