Determination Number: WA 22/03
File Number: WEA 248/02

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Ellen Griffiths (applicant)
AND	Goodman Fielder NZ Limited (respondent)
REPRESENTATIVES	Jervis Cleary for the applicant Lewis Turner for the respondent
MEMBER OF AUTHORITY	Denis Asher
INVESTIGATION MEETING	Wellington, 29 January 2003
FINAL SUBMISSIONS	7 & 14 February 2003
DATE OF DETERMINATION	24 February 2003

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Ms Griffiths says she was unjustifiably dismissed – statement of problem 9 August 2002. The applicant wants the Authority to resolve that and other matters by determining her claim for a wage/mileage allowance entitlement, and by directing that lost wages be paid as well as compensation for humiliation, etc of $25,000 in respect of her unjustified dismissal claim and that her costs be met.

2. The respondent (the company) says the claims are without merit and should be dismissed – statement in reply 5 September 2002.

3. The parties undertook mediation without settling their employment relationship problem. Efforts during the investigation to encourage the parties to settle this matter on their own terms were also, unfortunately, unsuccessful.

Investigation

4. The parties agreed to a two-day investigation in Wellington commencing on Wednesday 28 January 2003.

5. Both parties usefully provided evidence in advance of the investigation including an agreed bundle of documents and written witness statements.

6. Many of statements were not challenged by the parties and as the Authority deemed it unnecessary to interview those witnesses the investigation was concluded on the first day subject to written submissions being forwarded by the parties' representatives.

Chronology

7. From that evidence I am satisfied that the following is an accurate chronology of key events:

- 4 October 2001 – Ms Griffiths commenced employment for the company as a merchandiser, initially by way of an oral employment agreement. She was provided with oral directions as to the stores she was to service and her start and finish times.

- 18 October – a letter of appointment is forwarded to the applicant setting out the terms and conditions of her employment in writing.

- 5 April 2002 – following an incident involving pies and other company employees the respondent advised Ms Griffiths in writing that it was ceasing its investigation of that incident and it recognised no wrong doing on her behalf.

- 10 April – by letter from her representative Ms Griffiths raised a number of grievances. The first related to the cause of the investigation abandoned by the company. The second raised a concern about the applicant being offered a written employment agreement after commencing her employment. The third related to a provision in the agreement, namely an unspecified mileage allowance being a component of her $10.50 an hour wage rate. A concern was expressed that an effect of the allowance might result in the applicant earning less than the minimum adult wage rate.

- 13 May – the company replied in writing putting its view that a fair investigation had been carried out and it had (properly) reached a decision not to progress the matter any further. The company also advised that Ms Griffiths' hourly rate was a standard one and the applicant had verbally agreed to her terms and conditions of employment.

- 14 May – Ms Griffiths was not satisfied with the company's response and she proposed mediation (letters of 14 May, etc) in respect of the unresolved grievances. At the same time the applicant also sought mediation assistance from the Department of Labour's Mediation Service.

- 4 June – the applicant repeated her mediation proposal and raised further grievances. They related to an apparent reduction of her hours of work following an abusive incident in an Island Bay store serviced by the applicant, attendant safety and health issues and advice Ms Griffiths was under a further investigation. Details were requested in respect of the last matter.

- 10 June – Ms Griffiths' representative forwarded a letter to the company. It recorded the outcome of a meeting that day between Ms Griffiths and the company and raised a frustration of contract concern. A response was sought. Also, a request for details about the current investigation was reiterated. Finally, a Privacy Act request was put to the company.
- 12 June – by way of a letter the company declined the applicant's request for mediation. The letter also confirmed another investigation was underway in

respect of the applicant. The applicant proposed a meeting on 19 June so as to discuss the allegations.

- 13 June – Ms Griffiths' representative advised 19 June was not suitable. The company was also advised that details were required in advance of a meeting.

- 27 June – for the reasons set out in a letter from Ms Griffiths' representative the company was advised that urgent assistance from the Mediation Service was being sought.

- 4 July – Ms Griffiths' representative replied in writing to a telephone enquiry from the company. He advised he could not attend a meeting that day, that he was available on 8 or 9 July, that his client was on sick leave and should not attend meetings while unwell, and that details of the alleged complaints were required in advance of a meeting. A response to the mediation proposal was also sought.

- 9 July – Ms Griffiths' representatives wrote to the company recording his understanding it did not want to meet that day. He also expressed his understanding the company was willing to attend mediation in respect of all of his clients concerns. The requirement of prior advice of alleged complaints was reiterated, as was a Privacy Act request.

- 12 July – the company advised it has investigated all complaints against Ms Griffiths and that only one remained relating to an Island Bay store. A copy of the letter of complaint from the relevant storeowner was attached. The letter further advised, *"it seems to the company that this may lead to Ellen's contract coming to an end due to the fact that she is unable to fulfil all of the duties that she was employed to undertake. We would like you to reflect on this and come back to us with any alternatives prior to us making our decision"*. The letter also made provisions for the parties to meet on 19 July, both in mediation and beforehand.

- 16 July – Ms Griffiths replied in writing to the company. She confirmed that, at the forthcoming 19 July meeting, she intended to pursue the issues set out in her letter of 10 April. She also filed two new grievances, the first in respect of alleged false complaints which resulted in her being on leave for stress, the second that

the company failed to investigate the Island Bay matter and failed to offer her assistance in relation to the owner abusing her. Ms Griffiths again sought copies of all material relating to the alleged complaints against her.

- 18 July – the company responded with copies of file notes and the reiteration that no further action would be taken in respect of other complaints made by store staff.

- 19 July – at the conclusion of the parties' meeting, and prior to an agreed mediation, the company terminated Ms Griffiths and paid her one month's notice in lieu.

- 27 July – Ms Griffiths serves notice on company of her unjustified dismissal grievance.

- 7 August – the company advised Ms Griffiths in writing of the grounds for her termination, that the ban by the Island Bay store meant the applicant was no longer able to fulfil all of the duties that she was employed to undertake.

Key Issues

8. Ms Griffiths' counsel, Mr Cleary, confirmed the applicant's key issues at the commencement of the investigation. They included the matters set out in the letter of 10 April and the statement of problem.

Findings

9. The Authority is not bound to treat a matter as being of the type described by the parties – ss. 160(3) of the Act.

Disadvantage

10. I find the applicant was seriously disadvantaged and that there was a significant breach of her employment agreement for the following reasons.
11. I am satisfied Goodman Fielder NZ Limited failed its obligations to properly and promptly respond to the grievances and other matters raised with it by the applicant's representative during the period 10 April until early in July 2002, and that it thereby

failed to act in good faith to the disadvantage of Mrs Griffiths. I reach this conclusion notwithstanding the difficulties posed for the respondent by the avalanche approach adopted by the applicant in respect of her complaints and that the parties appeared at times to be at cross-purpose in their communications.

12. During this period I am satisfied the company failed to undertake mediation as was fairly and reasonably proposed by applicant's representative and – in particular – as was required by its employment agreement with the applicant.

13. It is abundantly clear that, during that period, an objective but disinterested observer would have concluded there were serious unresolved issues between the parties such as to warrant third party assistance.

14. The failure to undertake mediation was a significant breach of the parties' employment agreement (clause 17.2, document a, agreed bundle). That clause requires the parties to undertake mediation when they are unable to resolve a problem and when one of them exercises its discretionary right to seek mediation assistance. Ms Griffiths clearly had a number of outstanding concerns that had been put to her employer without resolution. Her election to seek mediation was – in the circumstances – genuine, measured and appropriate.

15. It is also clear to me from the evidence disclosed by the investigation that the company could have, and should have, provided Ms Griffiths with the detail of the complaints against her in advance of any meeting. Under the applicable circumstances it was reasonable of the applicant to require that information so as to facilitate the fair and efficient conduct of a meeting when it eventually took place. Ms Griffiths was entitled to know in advance of any meeting the concerns that would be raised at it.

16. It was appropriate, in the circumstances, for Ms Griffiths to decline to meet until the purpose and detail of the intended meeting had been disclosed to her. The matters under investigation were not claimed to be urgent or confidential: there were no good reasons to deny the detail of the allegations to the applicant. The company representatives provided no satisfactory basis for refusing to provide the detail in advance of the meeting or its decision to, initially, decline mediation.

17. By failing to accommodate Ms Griffiths' reasonable request for information the company caused the applicant unnecessary distress.

18. The object of the Act should now be well known to employees and to employers alike, especially those aided by expert advice: it is to build productive employment relationships by, amongst other things, promoting mediation as the primary problem-solving mechanism. Given this statutory environment it is not an option for a party to decline to do so on the basis of cost considerations, that it was not the best use of its time and a unilateral assessment it was unlikely to advance matters, i.e. the reasons given by the company during the investigation.

19. An employer is in breach of its contracted duty when it declines mediation requested pursuant to the provisions of an employment agreement.

Unjustified Dismissal

20. I am also satisfied that Ms Griffiths has been unjustifiably dismissed. I reach this conclusion for the following reasons.

21. On appointment Ms Griffiths *"normal place of work"* was defined as Wellington (clause 1.1, above).

22. Her current hours were defined as 25.5 per week Ms Griffiths. But the applicant could *"be required from time to time to work reasonable extra hours in addition to* (her given) *schedule"* (clause 2.1, above).

23. Ms Griffiths terms and conditions also stipulated that *"operational and market requirements will at times require a variation by way of increased or alternative hours and/or days to those specified … The company may make those changes after discussion with you. During these discussions we will endeavour to find alternative arrangements for people who cannot reasonably make the changes required. Obviously, we will try and give you as much notice of these changes as practically possible and, unless otherwise agreed, you will be given no less than one week's notice of these changes"* (clause 2.2, above).

24. It is common ground that, in her last 6 weeks of working employment, Ms Griffiths' weekly hours of work ranged between 32.5 and 38.

25. This detail is reproduced in order to explain my conclusion that the parties worked in a flexible operational environment. Ms Griffiths had a contractual obligation to accept variations to the hours and days worked by her in the Wellington area. While her original schedule was specific as to location and time her agreement could require changes of both.

26. I am satisfied this was an environment in which considerable operational flexibility prevailed such that more time was available to the respondent to properly and fully explore alternatives to termination, once action was required in respect of the complaint from the Island Bay store owner.

27. I am reinforced in this finding by the failure of the respondent to address the grievance set out in the letter on Ms Griffiths' behalf dated 4 June (above). The company knew at that time of Ms Griffiths' concern about the loss of merchandising work in the store and the resulting reduction to her hours of work. Ms Griffiths had also raised a serious complaint about the circumstances under which that work was lost to her, namely that she had been subjected to abusive comment. The applicant's wish to pursue these matters had been reiterated prior to the meeting culminating in her dismissal (refer to document v, above). These were serious matters that should have been the subject of a prompt, full meeting of the parties. No such meeting occurred.

28. There is also no evidence of these matters being addressed by the company prior to arriving at its decision to dismiss the applicant. It was therefore in breach of its contracted and statutory obligations to properly respond to notices of grievance.

29. I register here my dismay that the pre-mediation meeting agreed to by the parties for 19 July was used by the respondent to advise of Ms Griffiths' dismissal. That action amounted to an ambush. It is not surprising to discover that, having been told of her dismissal, Ms Griffiths was too distressed to enter into the mediation that had been planned to immediately follow on from the pre-mediation meeting.

30. It is not sufficient for the company to attempt to rely on its letter of 12 July 2002 (document t, above). That letter advised – in advance of the 19 July meeting – of the complaint from the Island Bay store. It contained the observation that the complaint *"**may** lead to* (Ms Griffiths') *contract coming to an end due to the fact that she is unable to fulfil all of the duties she was employed to undertake"* (emphasis added – above).

31. The same letter does not, on a plain reading basis, serve notice the respondent was actively contemplating making a decision at the forthcoming 19 July meeting. It was also communicated against a background of two discontinued investigations undertaken by the company.

32. Being unable to fulfil her duties at the Island Bay store would not, on a similar reading, cause an objective but disinterested third party to conclude that Ms Griffiths was *"unable to fulfil all of the duties she was employed to undertake"* (above). That person would instead look, by way of fair and unhurried process, to be satisfied there was no prospect of alternate work elsewhere in the Wellington region for the applicant and/or that her working hours could not be reconfigured to the parties' mutual satisfaction.

33. At the time of her dismissal the applicant was on sick leave. The need to cover the more than 50 merchandisers who are employed by the company in the greater Wellington region when they are ill, on annual leave, etc is one that clearly requires – on a routine basis – flexibility and extensive planning. The company provided no operational reasons for the speed with which it effected Ms Griffiths' termination.

34. The parties dispute the extent of discussion at the 19 July meeting as to alternatives to dismissal. The company's representatives say they looked at all options in advance of the 19 July meeting, that they also sought the applicant's views as to alternatives in advance of the meeting (letter of 12 July, above) and considered all alternatives on the day in advance of dismissing Ms Griffiths. The latter and her representative dispute the company's claim of exploring alternatives. Neither party kept minutes of the meeting.

35. I am satisfied the company has failed to justify its decision that it was left with no alternative to dismissal. It is simply not credible. I am left with the overwhelming impression that, faced by a growing list of grievance matters, the company opted for – my term – the 'easy' option of terminating the applicant's employment. In other words, an objective assessment of the process adopted by the respondent – in particular its failure to adhere to contracted procedural requirements, its non-response to many of the matters raised by Ms Griffiths, the absence of clear evidence of a genuine exploration of alternatives to dismissal and the speed with which it was effected – leads me to an inevitable conclusion that the decision to terminate was not one that a fair and reasonable employer could have arrived at.

36. Consequently, I am satisfied the credibility of the respondent's claim it explored all alternatives to termination is seriously diminished by the company's treatment of the applicant during the April/early July period and, in particular, by its breach of its contracted and statutory obligation to undertake mediation when it was reasonably and repeatedly sought.

37. I make one final observation. The company's ability to explore and respond to the third party complaint from the Island Bay storeowner is understandably limited. That person is not a party to the employment agreement between the respondent and the applicant. His complaint cannot be easily tested, if at all. No doubt the company is also keen to protect its commercial relationship with that third party. Faced with a complaint the respondent has seemingly little choice but to please its customer by withdrawing the offending merchandiser.

38. Under these circumstances Ms Griffiths and other merchandisers are placed in a particularly vulnerable and invidious situation. What that means, I am satisfied, is that the respondent carries a corresponding – or heavier – burden of duty in respect of its obligations to that employee. In this case a complaint from a third party has lead directly to that person's dismissal. Was the third party's complaint valid or was it whimsical? The company does not know because it was unable to effectively pursue the matter, with the complainant. Can it solve its problem by simply terminating the worker's employment? I do not think so. While it may be that Mrs Griffiths could not realistically expect to continue to service the Island Bay store, she could expect the respondent to put reasonable effort into exploring alternatives to the termination of

her employment. The evidence of the company doing just that is not compelling. Its claims are less credible when proper regard is given to its conduct toward Ms Griffiths since her first grievance was communicated to it on 10 April 2002.

39. I am of the view that the company must discharge its obligation to justify its decision to terminate Ms Griffiths' employment to an even greater extent than what is otherwise normal. I have no difficulty in reaching a conclusion the respondent has failed that obligation in respect of Mrs Griffiths.

Other Matters

40. I find against the other matters raised by Ms Griffiths for the following reasons.

41. I find no substance to Ms Griffiths' allegations that a senior company employee lied to her or got others to do the same. I have no reason to conclude that three parties, participating in the same event, drew different conclusions as to what was happening. Nor do I accept that one of those participants lied in respect of what the applicant had said to him, or that he had written out an incorrect statement for another to sign without reading it. I accept the conclusion reached by the respondent that, having investigated a serious allegation, it properly elected not to pursue the matter.

42. I am less than impressed by the company's dismissal, in the same letter of 13 May 2002 (document d, above) of the claim raised on behalf of Ms Griffiths regarding the employment agreement's reference to a mileage allowance. The company's response is simply a reiteration of its position. It provides no explanation. It was therefore entirely understandable Ms Griffiths would seek to pursue the matter further.

43. The query raised by Ms Griffiths is a genuine one. She sought clarification of the reference in her agreement to her *"hourly rate of pay incorporat*(ing) *an allowance for the use of* (her) *motor vehicle on company business"* (clause 9.0, above). Having obtained advice from the IRD indicating the possibility this was a non taxable reimbursing allowance, Ms Griffiths reasonably asked to know how much it was worth.

44. At the investigation the company provided a more coherent account of its position: Ms Griffiths received a flat, or all-up hourly rate of pay. The hourly rate did not contain a discrete or measurable component intended to reimburse Ms Griffiths for the use of her vehicle. Applicants for merchandising positions with the company accepted (or rejected) the employment agreement on the basis that they used their own vehicle to get to and from their new places of work. The agreement was poorly worded. The company was in the process of changing the wording. There is no company record anywhere detailing a specific mileage allowance.

45. Mr Cleary would have me identify the mileage allowance as being worth at least 50 cents an hour. To set the allowance at that level would result in the company being in breach of the adult minimum provisions.

46. There is no basis to do as Mr Cleary urges. The agreement is silent as to an amount. There is no evidence of it being specified elsewhere. To determine a rate would be, I am satisfied a breach of ss. 161 (2)(b) of the Act.

47. I find that the clause is incapable of creating the contractual right the applicant is claiming. It is legally uncertain.

48. The respondent's failure to provide the applicant with a written employment agreement in advance of her commencing employment is a breach of s. 64 of the Act but, in the circumstances, too modest to warrant a penalty. There is no evidence of Ms Griffiths being disadvantaged by this failure and it is a matter best subsumed by remedies for the unjustified disadvantage and dismissal determinations.

49. It is not my intention to determine the claim of unjustified action in respect of an allegation the company failed to investigate the Island Bay incident. This claim was not pursued with any vigour at the investigation and should – I believe – be abandoned in light of my overall determination in favour of Ms Griffiths.

Remedies

50. Ms Griffiths is not seeking reinstatement. While some evidence was proffered of her efforts to find ongoing employment I am not certain how long her ill health continued following her termination. I am satisfied that Ms Griffiths is properly entitled to the provisions of ss. 128(2) of the Act, i.e. payment of 3 months' ordinary time remuneration, but calculated by way of an averaging exercise reflecting the duration of the applicant's paid employment with the company. I leave it to the parties to determine the sum after proper regard to the applicant's health records. In other words, Ms Griffiths is to receive 3-months' wages unless her doctor determined during that period she was not fit for work.

51. Leave is reserved in the event that agreement is not forthcoming.

52. Consistent with the provisions of ss. 123(c)(i) of the Act and the evidence presented during the investigation, I am satisfied that a global award of compensation of $7,500 is appropriate in respect of the humiliation, etc experienced by the applicant.

Contribution

53. It is clear to me that the employer has at all times been fully in command of its decision-making process and therefore, in terms of s. 124 of the Act, there can be no finding of contribution in respect of the applicant. In the absence of evidence in respect of the Island Bay complaint I am unable to reach any conclusion as to contribution by Ms Griffiths. At all times the applicant attempted to use the resolution process provided in her employment agreement.

Determination

54. For the reasons set out above I find in favour of the applicant, Ellen Griffiths, and direct the respondent, Goodman Fielder NZ Limited, to pay to her the sum of $7,500 (seven thousand and five hundred dollars) under ss. 123(c)(i) of the Act as well as a sum equivalent to three months' wages subject to the provisos set out in par. 43 above.

55. Leave is reserved to the parties to resubmit this matter to the Authority in the event that agreement is not reached on the quantum.

56. As requested by the parties costs are reserved.

Denis Asher
Member of Employment Relations Authority