

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 103
5573189

BETWEEN JANICE GUISE
 Applicant

AND SPOTLESS FACILITY SERVICES
 (NEW ZEALAND) LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Jills Angus Burney, Counsel for Applicant
 Guido Ballara, Counsel for Respondent

Investigation Meeting: 1 June 2017 at Wellington

Submissions Received: 21 June and 12 July 2017 from Applicant
 30 June 2017 from Respondent

Determination: 10 October 2017

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Janice Guise, claims she was unjustifiably dismissed by the respondent, Spotless Facility Services (New Zealand) Limited (Spotless), on 1 May 2015. Ms Guise also claims she was unjustifiably disadvantaged by being suspended prior to the dismissal and there is a wage claim in respect to work said to have been performed on ANZAC Day 2015.

[2] Spotless accepts it dismissed Ms Guise but says its decision was justified. It denies she was unjustifiably disadvantaged and says her paid absence from work was agreed. Spotless says Ms Guise did not work on Anzac Day and was paid appropriately having been given the day as a public holiday.

Background

[3] Ms Guise was employed by Spotless as a Catering Assistant on 28 November 2008. Her place of work was the Wairarapa Hospital café.

[4] At 4.23pm on Monday 27 April 2015 Lizle McTavish, Spotless' Central Region Operations Manager, received an email from a Charge Nurse Manager at Wairarapa DHB. The email asked they meet which they did the following morning.

[5] Following the meeting, the Nurse Manager sent Ms McTavish an email. It reads:

Further to our conversation this morning – later Friday afternoon *an RN* came to see me concerned she had witnessed a kitchen worker take \$20.00 from the café till that lunchtime while she was at the counter. This person crumpled the note in her hand. *The RN* said this person talked to her a bit and walked off into the kitchen. She then said to the person who was then serving her that she had just seen \$20.00 being taken from the till and that counter person then looked behind her to see who that was. *The RN* describes this person as a bigger person with an eye complaint. *The RN* is not on duty again until Friday, please let me know if you require *the RN* to write any report. Regards ...¹

[6] The person to whom the RN had, at the time of the event, made the comment about money being taken was Elaine Early, the café supervisor and Ms Guise's immediate manager.

[7] Ms Early says she immediately looked over her shoulder and saw Ms Guise reaching behind a door leading to a rest room at the back of the facility. A while later she went and had a look behind the door, saw Mr Guises bag hanging there and looked inside. She says there was a twenty dollar note sitting on top.

[8] Later that day Ms Early telephoned Ms McTavish to tell her about the RN's allegation money had been taken. She did not mention seeing Ms Guise reach around the door or say she had looked in the bag. Ms McTavish, who was extremely ill and absent that day, was not focused on the call. She forgot it had occurred.

[9] On Tuesday morning when Ms McTavish returned to her office from seeing the Nurse Manager she found Ms Early waiting for her. Ms Early again advised Ms McTavish of the incident but once again did not mention looking in the bag. She

¹ The Registered Nurse was named in the letter – I have chosen to anonymise her identity

attributes this to being a bit torn about the situation and uncertain as to how great a part to play. Ms McTavish did not hear of this until after the dismissal and the lodging of the grievance.

[10] Ms Early also handed Mr McTavish a written statement she prepared after the phone call on the Friday. It mentioned additional points such as advice Ms Early had seen Ms Guise heading towards the rest room where her bag was. It also said the RN was not known to Ms Early but added *if she comes in again I will invite her in to see you regarding this event.*

[11] Ms McTavish concluded the reports warranted further investigation. She tried to contact Ms Guise by phone to advise her of the complaint and that there would be an investigation. She was successful on the third attempt at 11.16am. Ms McTavish says Ms Guise said she had not taken \$20 but come from the back of the café with it already in her hand. She wanted change and placed it in the till. Ms McTavish says she said this was not the time to go into details and they should wait till the meeting.

[12] Ms McTavish goes on to say:

I also asked Janice if she agreed to have time off on full pay until the meeting, which I said was to try to clarify what had been alleged. I offered the time off to Janice because, as I explained to her, I did not want Janice to feel uncomfortable at work. Janice agreed.

[13] In her written brief Ms Guise says she did not agree to this arrangement but was told she was *being stood down.*²

[14] At approximately 12.30pm the Nurse Manager advised Ms McTavish the RN was willing to speak to her and a telephone number was provided. The two spoke about 1.30pm. Ms McTavish concluded by asking the RN provide a written report which she did. It reads:

I am writing this email regarding the events of which I witnessed on Friday 24th, April. I was attending a study day at the hospital and went to the hospital café for lunch. When I was paying for my lunch by Eftpos the till opened and I noticed there was a \$20 note sticking out of the till. I then noticed the lady serving me took the \$20 and scrunched it up in her hand to hide it. I feel she noticed me witness this as she saw me looking at her hand with the money in it. She then increased the conversation between us maybe to distract me. One of the other kitchen workers came up to the till and stood next to her,

² Brief of evidence at [7]

once my payment had gone through I watched her quickly walk to the back of the kitchen with the \$20 still in her hand.

[15] Ms McTavish then prepared a letter inviting Ms Guise to a disciplinary meeting. It was scheduled for Thursday, 13 April 2015 at 1pm. The letter advised the meeting was to investigate allegations of theft, failure to follow cash and/or till handling policy and/or procedure and/or negligence or carelessness when handling cash and unauthorised possession and/or removal of company property.

[16] The letter went on to detail the events giving rise to the accusations before advising such behaviour, if proven, could constitute serious misconduct and there was a possibility of disciplinary action which could include dismissal.

[17] The following day, 29 April, Ms McTavish phoned Ms Guise to advise she was going to deliver the letter. She says Ms Guise asked she put it in her letterbox which she did.

[18] At about 10am on 30 April, the RN sent an email to Ms McTavish saying:

I am writing this email to confirm I am 100% certain that I witnessed the incident which occurred on Friday 24th, April. Thank you.

[19] The disciplinary meeting occurred, as scheduled, later that day. Ms Guise was accompanied by a union delegate and a colleague. Ms McTavish was accompanied by Patrick Hectors, Spotless' Catering Manager for Masterton schools.

[20] Ms Guise was given copies of the RN's texts though her identity was redacted.

[21] While their evidence is more detailed, Ms Guise and those who accompanied her essentially allege the inquiry was unfair. They say Ms McTavish had predetermined the outcome and exhibited a poor attitude.

[22] For example they say Ms McTavish was trying to confuse and trap Ms Guise by asking the same question in various ways. They say Ms McTavish refused an adjournment when one was sought and neither Ms McTavish nor Mr Hectors were listening to Ms Guise's response. It is also alleged Ms McTavish made comments such as *I don't believe you are telling the truth* and *I think you are lying* and Ms Guise was getting upset at being continuously being told she was a liar.

[23] Ms McTavish denies these allegations. She says when asked about the allegation Ms Guise *stated that she had a coughing fit and grabbed a tissue, not a \$20 note, and crumpled it in her hand and walked into the kitchen.* Ms McTavish says she asked why then had Ms Guise said, during the phone conversation the two had previously had, that she already had a \$20 note in her hand which she wanted to change to which Ms Guise replied she was thinking of another time. Ms McTavish goes on to say:

Janice then told me that she thought the nurse (the RN) saw her take \$20 from the till for change.

[24] During an adjournment, Ms McTavish rang the RN who advised there had definitely not been a coughing fit. The RN reiterated she was absolutely sure she had seen Ms Guise take the money. Upon resumption of the meeting, the RN's responses were put to Ms Guise who again stated she had a coughing fit and grabbed a tissue.

[25] A further adjournment occurred during which Ms McTavish checked the coughing fit suggestion with Ms Early and another staff member who had been on duty that day. Ms Early also denied there was a coughing fit and the other employee said she had not witnessed Ms Guise having any difficulties.

[26] While it had been intended to complete the meeting that day, the resumption did not occur until the following day, Friday 1 May. In the interim there had been yet another call between Ms McTavish and the RN where Ms McTavish again asked if the RN was sure about what she believed she had seen. The response was yes.

[27] The Friday meeting was attended by the same people. Ms McTavish says she explained the responses she had received from those she had made enquiries of and all denied seeing a coughing fit. She says Ms Guise responded by saying she did not have a coughing fit but had felt one coming on so grabbed a tissue and walked away. About that Ms McTavish says:

When I raised with Janice that this was now a fourth explanation, she said that we all say silly things.

[28] During an adjournment, Ms McTavish again phoned the RN who, the evidence would suggest, was becoming irritated at the continued approaches. The answer was *there were no tissues involved. This lady took the money okay.*

[29] Ms McTavish and Mr Hectors reached a preliminary view Ms Guise had taken the \$20. They advised Ms Guise of that and asked why they should not consider dismissal. Ms McTavish says Ms Guise did not answer but looked down and shrugged her shoulders. Ms McTavish says she then asked if anyone else had something to add. The answer was no so an adjournment was taken during which she and Mr Hectors consider what they had heard.

[30] Upon the resumption, Ms McTavish advised Ms Guise they believed she had taken the money and would be dismissed. The dismissal was confirmed by letter dated 4 May 2015.

Determination

[31] Ms Guise has three claims before the Authority. They are that she was:

- a. Unjustifiably dismissed;
- b. Unjustifiably disadvantaged by virtue of being suspended in an improper manner; and
- c. Not paid for working Anzac Day 2015.

[32] Addressing the dismissal first. Spotless accepts it dismissed Ms Guise and in doing so accepts it is required to justify the dismissal. Section 103A of the Employment Relations Act 2000 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.

[33] How that is interpreted is now well settled with the effect of s 103A being comprehensively considered by the Full Bench of the Employment Court in *Angus v Ports of Auckland Ltd* and *McKean v Ports of Auckland Ltd*.³ In that judgment, the Court makes it clear the Authority's task is to assess whether the employer's response to the conduct complained of is within the range open to a fair and reasonable employer in the circumstance of the case. If the response is one a fair and reasonable employer might reach then the decision to dismiss is lawful. Ms Guise needs to

³ [2011] NZEmpC 160

understand is the inquiry is not into whether or not she actually took the money but whether or not Spotless could reasonably have reached the conclusion it did.⁴

[34] Section 103A also requires the Authority consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[35] Resources are not an issue with Spotless being a substantial employer with access to a significant in-house HR expertise.

[36] Having considered the submission and the evidence I conclude Spotless was entitled to reach the conclusion it did and the dismissal is justified.

[37] Spotless's evidence was supported with relatively detailed and contemporaneous notes. The company's witnesses gave evidence consistent with those notes and their evidence was not altered or undermined by questioning during the investigation.

[38] When asked about the accuracy of the notes relating to discussions to which she was a party, such as the disciplinary meeting, Ms Guise accepted they were accurate. Likewise her supporting witnesses conceded the notes were fairly accurate and nothing significant was missing.

[39] The notes, relevant letters and emails clearly show Spotless advised Ms Guise of its concerns. They also record that she was given an opportunity to explain and have those explanations considered though Ms Guise takes issue with this and claims those attempts were undermined by repeated and confusing questioning and a predetermined outcome.

[40] I do not agree. There is no evidence supporting these allegations in any of the notes, including those prepared by Ms Guise's supporters. When asked to give examples during the investigation the answers offered on Ms Guise's behalf were less than convincing. Essentially the accusations went no further than being expressions of how the witnesses felt with no concrete examples as to why they had reached the conclusions they did. Ms Guise's witnesses also concede she is easily confused and struggled to comprehend what was being put to her. Those were, in my view, fair

⁴ *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA)

concessions given they were confirmed by Ms Guise's performance during the investigation meeting. Finally I have to suggest she was not assisted by offering a multiplicity of explanations the tendering of which was again confirmed by the notes, Spotless' oral evidence and various concessions Ms Guise made.

[41] For two reasons the allegation Ms Guise was put off by repeatedly being called a liar also fails to convince. The allegation was poorly supported with one mention in the rough notes Ms Guise's supporters jointly prepared after the meeting and nothing in Spotless'. Similarly, and when questioned about whether it occurred, the answers from Ms Guise's witnesses were at best ambivalent.

[42] The evidence also undermined the allegation of predetermination. Again Ms Guise's witnesses were unable to offer supporting evidence or adequately explain why they reached the conclusion the outcome was predetermined. Indeed the evidence shows Spotless' decision makers made a number of enquiries to confirm or reject Ms Guise's various explanations.

[43] The simple fact is it was alleged Ms Guise took the money. A conclusion it was more likely than not that she had was the reason for the dismissal. Ms Guise's supporters accept that was the rationale and they were aware of it.

[44] Ms Guise denied she took the money. She still does but when faced with the accusation offered various contradictory explanations as to what actually happened. Indeed there remains a lack of clarity about what she says happens and her explanation for giving various responses is unconvincing. One example was *we make mistakes*.

[45] As a result, and given adherence to the procedural requirements of s 103A of the Act, Spotless was, I conclude, entitled to prefer the evidence of the accusers and reach the conclusion it did.

[46] While not aware of it at the time I have to suggest had Spotless known of Ms Early's discovery when she looked in Ms Guise's bag the outcome reached would no doubt have been even more likely.

[47] There is one further issue and that was Spotless withholding the RN's identity. Having considered this I conclude it does not alter my conclusion Spotless can justify the dismissal. There is some confusion as to whether or not this was an issue with

various responses from Ms Guise's witnesses as to whether or not they even asked the question. One says yes, one says don't know and Ms Guise accepts she became aware of the RN's identity but was not sure when. In any event, and the reason why I say this will not alter the outcome, there is Ms Guise's concession she did not know the RN and that person would have no reason to make a false accusation.

[48] The claim Ms Guise was unjustifiably disadvantaged by a unilaterally imposed suspension did not survive questioning. Ms Guise, when questioned by Mr Ballara, conceded *I agreed with Lizle I be suspended*. She also accepted an allegation in the Statement of Problem suspension was advised by the leaving of a phone message⁵ was wrong. That the suspension was by agreement is also supported by a contemporaneous file note and the resulting letter which was not challenged at the time of the disciplinary investigation. For these reasons the claim is dismissed.

[49] Finally there is the claim regarding payment for ANZAC Day. Initially there was some confusion about what was being claimed and whether or not the claim related to 25 or 27 April. Ms Guise's answers indicate the claim related to 25 April.

[50] That was a day upon which the café was closed and Spotless says she was paid for it as a public holiday taken given it was a day upon which she would normally have worked. Ms Guise accepts she received that payment but says she worked three hours on a ward that day for which she was not remunerated.

[51] The evidence is Spotless uses a tele-clocking system under which staff phone an automated service and enter an ID when they arrive and leave. The system then generates their pay. Ms Guise did not clock in that day and there is no other evidence supporting her claims she worked. The claim therefore fails.

Conclusion and Costs

[52] Ms Guise brought three claims to the Authority. They were that she was unjustifiably dismissed; unjustifiably disadvantaged and not paid for working on ANZAC Day.

[53] For reasons already explained I conclude Spotless, having accepted it dismissed Ms Guise, has discharged the requirement it then justify its actions. The

⁵ Statement of Problem at [2.9]

disadvantage claims fails due to the fact Ms Guise's own evidence undermines its veracity and the evidence does not support the wage claim.

[54] All of Ms Guise's claims therefore fail.

[55] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority