

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 162
5371343

BETWEEN SAPPHIRE HOSE
 Applicant

A N D ALLAN WEBB
 Respondent

Member of Authority: James Crichton

Representatives: Hamish Burdon, Advocate for Applicant
 Garth O'Brien, Counsel for Respondent

Investigation meeting: 8 May 2012 at Hamilton

Date of Determination: 11 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Hose) alleges that she has suffered a disadvantage as a consequence of unjustified actions of her employer (Mr Webb) and she seeks the usual redress. Mr Webb resists the claim. Because this is a continuing employment relationship (or was), the Authority undertook to deal with the matter on an urgent basis.

[2] Ms Hose told the Authority that she had been employed at the Regent Theatre, Te Awamutu by Mr Webb and that she had been employed at the theatre for nearly eight years, although Mr Webb was not the employer for all of that time. There is no written employment agreement nor have there been previous disciplinary issues.

[3] Ms Hose says that on 30 January 2012 she was given a letter dated 27 January 2012 which summonsed her to a disciplinary meeting. That letter is in the following terms:

Dear Sapphire

There have been concerns over your work performance and disobedience. In particular there have been many occasions whereby you have not completed known duties and those as instructed in the timeframe given.

In regards to your behaviour, your actions have been unsatisfactory.

You are required to attend a meeting at the beginning of your shift on Tuesday January 31st to have the concerns presented to you and for you to give an explanation for this unacceptable conduct.

You can ... arrange for a support person to attend the meeting and my solicitor will also be in attendance.

You will then be given an opportunity to have a short break to think about this serious matter. You will then return with your support person to determine what measures will be taken.

*Yours sincerely
A Webb*

[4] Ms Hose says that this letter is deficient in a number of material respects. It is short on specificity for one thing and it fails to make clear the extent of the employer's concern and thus the prospect that disciplinary action, up to and including dismissal, might be in the employer's contemplation.

[5] Those concerns are magnified by the approach taken in the disciplinary meeting that followed, according to Ms Hose. In particular, she draws attention to the fact that there were 53 separate allegations made by the employer about both her performance and her behaviour but that all she was allowed to do at the disciplinary meeting was have the allegations read to her and then be required to provide an explanation on the spot. She says that she did her best to respond and, to her credit, she acknowledged wrongdoing in relation to some of the employer's allegations. However, she alleges that at no stage prior to this disciplinary meeting was she ever advised that the employer had concerns about either her performance or behaviour and yet it was apparent to her from the catalogue of complaints in the disciplinary meeting that there had been concerns going over some little time.

[6] For his part, Mr Webb told the Authority that Ms Hose's behaviour had suddenly deteriorated on 18 December 2011 when there was a disagreement between the two of them about a banner which had been used in the theatre and which she had wanted when the business was finished with it. In the result, Mr Webb decided to keep the banner for himself and then gave it to another staff member who he said had

asked for it before Ms Hose had. Mr Webb told the Authority that Ms Hose “*sulked*” after this banner incident and that her behaviour dramatically deteriorated from that point on. In particular, he referred to the fact that she ceased speaking to him, notwithstanding that they frequently worked together in the theatre, and that on occasions she was rude to customers.

[7] Mr Webb decided to conduct some further inquiries and he asked senior staff members to effectively keep a log of Ms Hose’s behaviour. By late January, he had assembled a list of 53 allegations which he recorded in his own hand and these were the allegations that were put to Ms Hose at the disciplinary meeting on 31 January 2012.

[8] Ms Hose says that the sheer enormity of the allegations in number and the refusal of the employer to provide details of the allegations in advance made the process unfair. Furthermore, she draws attention to the fact that the meeting was of significant duration; she says three hours and Mr Webb says two hours. But either way, it took a significant period of time. Mr Webb’s explanation for this is simply that he had to ask her to respond to each one of the allegations which at one point in the investigation meeting he erroneously described as 53 “*statements of fact*”. But that cannot be the position of course; they are only allegations and can only be allegations, until the person accused of their perpetration has had an opportunity to respond.

[9] While there is no doubt there was an opportunity to respond in the present case, Ms Hose says the opportunity was not a fair one because she was not given proper notice, she was not provided with the raft of allegations in advance and she was not given adequate time to respond.

[10] The outcome of the meeting was advised to Ms Hose at the end of it after Mr Webb had retired for 30 minutes to consider what Ms Hose had told him and to discuss matters with his solicitor who had attended the meeting as well. A warning letter was prepared by Mr Webb’s solicitor, issued by him on letterhead and signed by him on behalf of his client. The letter of warning simply confirms the oral intimation at the end of the disciplinary meeting, that Ms Hose was to receive a written warning. The letter also refers to the fact that her behaviour warranted dismissal but that Mr Webb had decided to issue a warning instead and to monitor her behaviour over the ensuing four weeks.

[11] The findings on which the disciplinary warning was issued are then listed by way of the briefest of bullet points (seven in number). Ms Hose readily conceded that she was guilty of some of the allegations made against her and referred to in the letter but that two of the matters listed were not even referred to in the disciplinary meeting, so far as she could recollect.

[12] One of those bullet points in particular caused further disputation. The final bullet point reads: *“You will sign a written contract. A copy will be provided”*. The imperious tone of this particular provision rather belies the fact that the employer (Mr Webb) on whose behalf the letter was written, had absolutely failed to fulfil his legal obligations to have a written employment agreement for this staff member. There was further argument between the representatives about the appropriateness or otherwise of the employment agreement provided for Ms Hose to sign, and in the result, certainly by the time of the investigation meeting, no progress had been made on that issue.

[13] One of Ms Hose’s complaints about the conduct of the disciplinary meeting was that she felt *“bullied, threatened and intimidated”*, not just by Mr Webb but also by his counsel, Mr O’Brien. Ms Hose made that very clear during the investigation meeting when she repeated the claim to Mr O’Brien’s face during cross-examination. For his part, Mr Webb maintained that the tone of the disciplinary meeting was perfectly acceptable and that he was simply trying to get to the bottom of what was going on.

[14] Ms Hose’s representative alleges that Mr Webb’s counsel refused to engage to try to resolve the outstanding issues, including the alleged inadequacy of the draft employment agreement and accordingly an application to the Authority was made to try to progress matters.

[15] In the meantime, Mr Webb (through counsel) continued trying to complete further disciplinary proceedings against Ms Hose but her response, through her representative, was to present medical certificates which she says kept her away from the workplace and away from any prospect of engaging further with the employer on the basis that both of those environments were what was making her unwell.

The issues

[16] It will be convenient if the Authority considers the following questions:

- (a) Was the disciplinary notice adequate;
- (b) Was the disciplinary meeting fair and just;
- (c) Has Ms Hose suffered disadvantage; and
- (d) Can the employment relationship continue?

[17] The Authority notes for the sake of completeness that the fourth question referred to in the preceding paragraph is not strictly speaking a question that requires an answer, given the proceedings filed in the Authority. However, the Authority has a general obligation to promote good faith behaviour in employment relationships: s. 157(2) of the Employment Relations Act 2000 (the Act) and a further obligation to identify any particular behaviour of an employer which may impact on appropriate compliance with employment law: s. 123 (1) (ca) of the Act. It is in those two contexts then that the Authority offers those observations which are, of course, obiter.

Was the disciplinary notice adequate?

[18] The Authority has no hesitation in concluding that the disciplinary notice was completely inadequate. Given the seriousness and extent of the allegations, going as they appear to do to the very heart of the employment relationship and the necessary trust and confidence which must exist between parties in such a relationship, it seems axiomatic that the notice would first identify that disciplinary consequences of serious magnitude were in prospect and second, and perhaps more important, make a better fist of explaining to the employee precisely what it is she stands accused of. Generalised allegations about “*work performance and disobedience*” , “*actions (being) unsatisfactory*” and failing to complete “*known duties ... as instructed in the timeframe given*” is, in the Authority’s opinion, simply not express enough to alert the recipient of what it is that she is facing. Not only does this failure to provide sufficient particularity fail to do justice to Ms Hose, but it also fails to do justice to Mr Webb because presumably what he wants as the employer is a full and explicit explanation for Ms Hose’s behaviour and actions in order that he can make an informed decision about what to do. By failing to give the degree of particularity that is needed, he has contributed to what was plainly an unsatisfactory result.

[19] Of most importance to the employee is reasonable notice of the scale and seriousness of the allegations. The wording of the letter frankly could mean anything.

If Ms Hose had been aware that she faced 53 allegations which, taken together, might result in her dismissal, it seems inconceivable that she would not have engaged adequate representation for that meeting. As it was, she was represented, but that representative, on the evidence, was not able to help as much as a specialised employment lawyer, or advocate might. This was particularly so because of a mistaken belief that, because Ms Hose was not represented by counsel, her representative was not entitled to the courtesy that would have been applied to another practitioner.

[20] The Authority reaches that conclusion because the evidence is that Ms Hose's support person, once the full enormity of the allegations became clear at the beginning of the disciplinary meeting, immediately sought to adjourn so that legal advice could be obtained. It was argued for Mr Webb that it was unclear to the employer whether that legal advice was for Ms Hose's benefit or not, but that is mere sophistry. Quite clearly, a break was sought for the purposes of obtaining legal advice and any reasonable person would have assumed that that legal advice was to assist Ms Hose in dealing with what was plainly a series of very serious allegations. The fact that it is also clear to the Authority that the employer failed to allow an adjournment at that point and implied (even if it was not stated) that an adjournment would result in Ms Hose being dismissed, does the employer little credit.

Was the disciplinary meeting conducted fairly?

[21] The Authority is satisfied that the disciplinary meeting was not conducted fairly. A request for the list of allegations (53 in number) was apparently made by Ms Hose or her representative and they were told that because Ms Hose was not represented by a lawyer that information was not available. The request for the notes of that meeting (taken by Mr O'Brien) was also refused, presumably for similar reasons.

[22] Ms Hose describes the meeting as hostile and she made it clear during cross-examination by counsel for Mr Webb that she was including counsel in that allegation as well as Mr Webb himself. Of course, disciplinary meetings are not generally a walk in the park, but that does not entitle employers to conduct proceedings in a way which disempowers vulnerable employees. There is ample judicial precedent for the view that the Employment Court and the Authority are both concerned to address apparent imbalances of power between the employer and the employee, and the recent

decision of the Full Bench of the Employment Court in *Massey University v. Wrigley* [2011] NZ EmpC 37 is a good case in point. In that decision, the Court said that the employer must ensure that the employee was provided with all the material that the employee could reasonably require in order to appropriately participate in and around decision making which might result in termination of the employee's position.

[23] That is precisely the situation that we have in the instant case where, in the employer's own document, namely counsel's letter of 1 February 2012, is the intimation that the employer thought the behaviour warranted dismissal. In that circumstance, the employer has an absolute obligation under the law to ensure that the employee is sufficiently empowered by the provision of information so as to adequately participate in the process which might lead to the termination of the employment.

[24] It follows that running a disciplinary meeting in the way that this employer did, first by refusing an adjournment so that legal advice could be obtained, second by failing to provide a genuine opportunity to enable Ms Hose to provide a considered response, and third by the conduct of the meeting in a way that plainly upset her, the employer is making it impossible for the employee to adequately engage in its disciplinary process.

[25] It would be a very unusual disciplinary process where an employer could adequately defend this sort of process involving so many allegations together with a requirement that they all be responded to on the spot without any notice whatever. Clearly, what should have happened was either that Ms Hose be provided with a schedule of the issues on which comment was to be required and then given a reasonable opportunity to prepare or, at the very least, once the extent of the complaints was identified, the employer ought to have allowed the adjournment which plainly, on the facts, Ms Hose sought.

Did Ms Hose suffer disadvantage?

[26] The Authority has no hesitation in concluding that Ms Hose has suffered a disadvantage as a consequence of unjustified actions of the employer. It is trite law that in order to succeed in an unjustified action personal grievance, there must be both a disadvantage suffered by the applicant and unjustified actions by the respondent. Dealing with each of those points in turn, the disadvantage suffered by Ms Hose is

plain to see; she has been found wanting in a disciplinary process which has made findings of fact against her in circumstances where the Authority is absolutely satisfied that she cannot have had any proper measured opportunity to consider her response and provide effective and meaningful engagement with the employer.

[27] Similarly, the employer's process in running the disciplinary inquiry in the way that it did is plainly unfair. Aside from the points already made by the Authority, in addition Ms Hose was never provided with any of the underpinning for the 53 allegations (that is, the material from various other staff members who gave the employer information about her behaviour was never put before Ms Hose), nor was Ms Hose given an adequate opportunity to respond to the allegations, being required to answer them on the spot without adequate notice and without a request to get legal advice being properly considered by the employer. In essence then and for reasons that have been traversed in the two previous sections of this determination, the process adopted by the employer in relation to this disciplinary inquiry was a series of unjustified actions in terms of the law.

[28] The statutory test for justification for a disciplinary action is set out in the Act at s. 103A. The Authority is required to assess whether the action the employer took is the action that a fair and reasonable employer could have taken in the circumstances that obtained at the time. Further, in applying that test, the Authority is required to consider four particular matters. The first of these is whether the employer sufficiently investigated the allegations before taking action against the employee. Looked at in the round, the Authority might reasonably conclude that Mr Webb did sufficiently investigate.

[29] Next, the Authority must consider whether the employer raised the concerns he had with the employee before taking action. Here, the Authority's considered view is that Mr Webb failed absolutely to provide sufficient particularity of his concerns so as to fatally unbalance the process.

[30] Third, the Authority must reflect on whether the employee was given a reasonable opportunity to respond before action was taken. Again, the Authority's considered view is that Mr Webb, by conducting his disciplinary meeting in the way he did, simply did not meet his legal obligations of treating Ms Hose fairly.

[31] Finally the Authority must consider if Mr Webb genuinely considered Ms Hose's explanation before acting. Given the procedural defects the Authority has already identified, it is difficult to see how the decision Mr Webb made can stand.

[32] From the foregoing analysis, it will be apparent that the Authority is not persuaded that it was available to Mr Webb to reach the conclusion that Ms Hose could be subjected to disciplinary consequences because the process was just so unfair.

[33] As a consequence the Authority concludes that Ms Hose has suffered disadvantage because of a series on unjustified actions of Mr Webb.

Can the employment relationship continue?

[34] The Authority, as a dispassionate observer, advanced the opinion during the course of the investigation meeting that it considered neither party could seriously contemplate the employment relationship continuing.

[35] It became apparent as the evidence came out that Mr Webb had another series of disciplinary matters to put to Ms Hose and she was not engaging with him in reliance on her continuing ill health which her medical advice attributes to workplace stress. The most recent medical advice from Ms Hose's doctor which was referred to by her representative suggests that Ms Hose cannot contemplate returning to this workplace at all.

[36] On the other hand, the Authority must have sympathy for Mr Webb who , despite the evident failures in his process, has endeavoured to get to the bottom of what, for him, has been a very unsatisfactory working environment. In the result, Mr Webb told the Authority that he himself was also suffering from stress, but that because of his obligations as an employer, he had to continue on.

[37] The Authority told the parties it thought the best option for both of them was to terminate the employment in a formal way. Presumably this would be initiated by Ms Hose in resigning her employment.

Determination

[38] Ms Hose has satisfied the Authority that she has suffered a personal grievance by unjustified disadvantage. She is entitled to a consideration of remedies.

[39] However, before doing that, the Authority is obligated to consider whether Ms Hose has contributed in any way to the circumstances giving rise to her grievance. It is clear that Ms Hose readily accepts that she is guilty of some of the matters that she was accused of, but the Authority's finding relates to the process adopted by Mr Webb in reaching the conclusions that he did and because that process was so unfair to Ms Hose, the conclusions reached by the employer, simply cannot stand. It follows that the Authority is satisfied that Ms Hose has not contributed in any way to the circumstances giving rise to her personal grievance.

[40] The nature of Ms Hose's employment was casual. Despite her contention that she had enjoyed 20-30 hours of work per week, that evidence was contested by Mr Webb who pointed out that she had worked longer hours during the school holidays and to relieve other staff who were on holiday. The evidence before the Authority is that Ms Hose was employed on a casual no fixed hours basis and although she had worked regularly at the business over a period of years, there is nothing before the Authority to suggest that her employment was other than on the basis described. It follows that the Authority's conclusion is that Ms Hose cannot expect an award of lost wages consequent upon her personal grievance, first because the very nature of her employment is such as to not guarantee a particular number of hours and second, and equally importantly, Ms Hose has been absent from the workplace for an extended period because of ill health, which her doctor attributes to the workplace. It follows that if Ms Hose is unable to work, she cannot reasonably expect to be paid wages because she was not able to work in any event.

[41] The position is otherwise with compensation. Ms Hose is entitled to be compensated for the wrong done to her and I award her the sum of \$2,000 under s.123(1)(c)(i) of the Employment Relations Act 2000, this sum to be paid by Mr Webb to Ms Hose to compensate her for the legally unsustainable disciplinary process.

[42] However, looking at the matter in a practical way, the Authority notes that Ms Hose owes Mr Webb the sum of \$1100 which he kindly loaned to her. On the assumption the employment relationship come to an end, this loan must be repaid and the sensible way to achieve this is for Mr Webb to pay to Ms Hose the sum of \$900, having set off the proceeds of the loan to achieve that figure.

[43] In making the award it has, the Authority has reflected on the evidence available to it about Ms Hose's health status and that evidence is plain that her general practitioner attributes her ill health to the stresses placed on her by recent events in the workplace. It requires little imagination to conclude that those recent events are the recent disciplinary engagements between the parties

[44] The final matter the Authority must address is the failure to provide an employment agreement in writing. This is against the law: s. 65 of the Act. Penalties can apply for breaches. However, the imposition of a penalty is discretionary. In the present case, the Authority is not persuaded that the absence of an employment agreement contributed in any way to the dispute between the parties and accordingly no penalty is awarded. The Authority is also influenced in that regard by the indication that Mr Webb was in the process of attending to employment agreements..

[45] Mr Webb is also to pay Ms Hose's filing fee in the Authority of \$71.56.

Costs

[46] Both parties have engaged their own representatives and thus incurred costs. The usual legal rule is that costs follow the event and on that basis Ms Hose could expect to receive a contribution to her costs from Mr Webb.

[47] The parties are urged to discuss matters between them with a view to resolving that matter by agreement but failing agreement, leave is reserved for either party to make application to the Authority for costs to be fixed.

James Crichton
Member of the Employment Relations Authority