

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Shelley Maree Harwood (Applicant)
AND First Aluminium Dunstan Limited (Respondent)
REPRESENTATIVES Shelley Maree Harwood In person
Kirsten Knights, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 26 October 2005
DATE OF DETERMINATION 25 November 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Shelley Harwood worked for First Aluminium Dunstan Limited from Monday 3 May 2004 until the employment was terminated on Tuesday 18 May 2004. Ms Harwood says that she was unjustifiably dismissed and seeks compensation for lost remuneration and distress. First Aluminium Dunstan Limited says that Ms Harwood left the employment of her own free will and there cannot be a personal grievance.

[2] First Aluminium Dunstan Limited is a family owned and operated company. Dick Chisholm and Noeline Chisholm are both directors and shareholders. Their son, Mark Chisholm, is the production manager. Ms Harwood's claim is that she was abused and dismissed by Dick Chisholm and soon after there was an altercation involving Mrs Chisholm and Mark Chisholm before she left the premises on 18 May 2004.

[3] The company provided a statement of evidence from Dick Chisholm but he was not present for the investigation meeting. Mark Chisholm explained to me that the company had decided that Dick Chisholm would not appear to answer questions even though they understood that it weakened the force of his account of the relevant events. I was told that an adjournment would make no difference. Accordingly, I heard evidence on oath from Ms Harwood, Mrs Chisholm, Mark Chisholm, Angela Cleaver (Mark Chisholm's partner and also an employee) and Lisa Sutherland (also an employee).

[4] To resolve the problem I will first set out some background matters before turning to the events of 18 May 2004.

The employment

[5] First Aluminium Dunstan Limited used a recruitment agency to help fill a vacancy. Heather Erekson is the recruitment agent. Ms Erekson identified Ms Harwood as a potential employee and Mark Chisholm then interviewed her. Ms Harwood was offered and accepted employment full time as an aluminium fabricator at \$12 per hour. A three month probationary period was also agreed. None of the terms of employment were put in writing but Ms Harwood has not sought a penalty for that breach of the Employment Relations Act 2000.

[6] Ms Harwood's evidence is that things were fine for the first few days, but on the third day, when she went to turn up the radio after lunch, Dick Chisholm yelled at her to *leave the radio alone or I will put a fucking hammer through it* or something similar. Employees preferred to have the radio turned up especially because they wore earmuffs or earplugs. I accept Angela Cleaver's evidence that Dick Chisholm does not like the radio to be too loud. On the evidence available, I accept Ms Harwood's account of what Dick Chisholm said to her at that point. The next day, Ms Harwood was asked by another employee to change stations, and when she did, she was again yelled at by Dick Chisholm.

[7] Ms Harwood's evidence is that during the second week of work she was told by Dick Chisholm that she should be assembling doors in about 12 minutes as against the 30-40 minutes she was taking. Other employees later told Ms Harwood that they would take at least 20 minutes to do the same task. Ms Harwood says that she began to feel quite stressed by Dick Chisholm's criticism of her performance. In evidence, Ms Harwood denied that the comment from Dick Chisholm was conveyed as a target rather than a criticism of her current performance. Even though Mr Chisholm did not give evidence, it is clear that he is experienced in all facets of his business which would include how long a new employee might take to learn to do assembly work quickly. It is unlikely that he would have expected a new employee to be able to work more quickly than more experienced employees. I find that Dick Chisholm was conveying a target rather than criticising Ms Harwood's current performance. However, I accept that Ms Harwood at the time genuinely felt some apprehension about whether she was meeting her employer's expectations.

Events of 18 May 2004

[8] On Tuesday 18 May 2004, Ms Harwood was assembling a large bifold door before lunch. She put silicone sealer on the corner of the frame but did not screw the frame together before knocking off for lunch. As she returned from lunch she noticed Dick Chisholm waiting for her by the frame. He told Ms Harwood that she had done the job wrong. Ms Harwood made some comment intending it to be light hearted. Dick Chisholm took it as rudeness on her part and told her not to speak to him that way. Ms Harwood apologised. Dick Chisholm then told her about the mistake with the silicone sealer. Ms Harwood told Dick Chisholm that he needed to tell her what his expectations were if he had a problem with her work so she could fix it. However, Dick Chisholm's response was to say *you're just a stupid girl!*. Ms Harwood objected to that.

[9] Ms Cleaver was about 5 or 6 metres away and the radio was going. Her evidence is that she could not hear anything at first but then the situation escalated. She put her earmuffs on to keep out of the way. However, she described it in the following way: *the argument soon became heated and Shelley was yelling*. That point was probably reached after Ms Harwood was called a *stupid girl*.

[10] As Mrs Harwood objected loudly to the comment, Dick Chisholm started to wave at her and say *goodbye*. Ms Harwood asked what he meant but Dick Chisholm just waved and said *goodbye* and *get out*. Ms Harwood asked if he was firing her but Dick Chisholm just walked off without saying anything more. Ms Harwood said that she would ring the recruitment agency and she went

to another area of the workshop to use her cell phone to call Ms Erikson. Ms Erikson said that she would ring back and she did so, perhaps 20 minutes later. She then told Ms Harwood that it was a matter to be resolved between the employer and the employee rather than the recruitment agency.

[11] After the exchange with Ms Harwood, Dick Chisholm went into the office area. Mrs Chisholm was there but Mark Chisholm was at lunch, as was Lisa Sutherland (another employee). Mrs Chisholm's evidence, which I accept, is that Dick Chisholm was angry and upset, that he told her that he had just shown Ms Harwood how to do a joint and that she had spoken to him rudely. On Mrs Chisholm's evidence, Dick Chisholm gave no indication about his calling Ms Harwood a *stupid girl*, waving at her and saying *goodbye* and *get out*. However, I accept Ms Harwood's evidence that these things happened.

[12] Mark Chisholm returned to his office at about 12.50pm. At that point Ms Harwood was in the workshop waiting for Ms Erikson to ring back. Neither Dick Chisholm nor Mrs Chisholm said anything to him about what had happened with Ms Harwood and Mark Chisholm went into his office as usual. After Ms Harwood received the advice mentioned above from Ms Erikson, she went into the office area to speak to Dick Chisholm. Mark Chisholm's evidence, which I accept, is that he heard *heated voices* and in particular *Shelley questioning Dick, saying: are you firing me? You can't do this!*. He then came out of his office to intervene. I accept Mark Chisholm's evidence that Ms Harwood was quite agitated and was talking quickly and he found it difficult to intervene. His evidence, which I accept, is that Mrs Chisholm, who was present, then wanted to guide Ms Harwood into his office. I accept this evidence that his mother did take hold of Ms Harwood's arm to do that. Ms Harwood reacted by pulling her arm away and accusing Mrs Chisholm of assault. Mrs Chisholm said that she just wanted to talk to Ms Harwood and the two women then went into Mark Chisholm's office and the door was closed. Mark Chisholm's evidence, which I accept, is that neither he nor Dick Chisholm could hear what was said by the two women while they were in his office.

[13] Mrs Chisholm's evidence is that she does not recall what was said in Mark Chisholm's office except that Ms Harwood accused Dick Chisholm of calling her a bad name, but would not elaborate. Ms Harwood's evidence is that Mrs Chisholm said she was being dismissed because they did not like her attitude. Ms Harwood asked for an explanation and Mrs Chisholm referred to her sitting with her back to someone during a smoko break on her first or second day. Ms Harwood said *are you serious?* and asked what Mrs Chisholm was talking about. Ms Harwood said that was not sufficient reason to dismiss her.

[14] There is a dispute about what happened next. Ms Harwood says that she went to leave the office but Mrs Chisholm blocked her exit and deflected her hand away from the door handle. Mrs Chisholm denies blocking or striking Ms Harwood and says that she came to the door to call Mark Chisholm in to witness what was being said. I do not accept that Mrs Chisholm intentionally blocked or struck Ms Harwood who went out the door in any event.

[15] Mark Chisholm then told Ms Harwood to take off her tool belt and go. His evidence is that *at that stage, I was just fed up*. Ms Harwood took off her tool belt and left, making it clear that she intended to seek legal advice. She went into the workshop, collected her personal belongings and left via the side entrance. It was about 1.20pm by then.

[16] Ms Harwood went to the Citizens Advice Bureau for advice. Their note on that contact reads: *caller upset re employer telling her to leave immediately. She came straight here to know her rights*. Later, Ms Harwood instructed a solicitor.

[17] Mark Chisholm's evidence, which I accept, is that they decided to do nothing further about the incident and wait until they received any approach from a solicitor.

Dismissal or resignation?

[18] It is helpful to consider who initiated the termination of the employment. The starting point is Dick Chisholm's perception that Ms Harwood reacted rudely when spoken to about a mistake. He then called her a *stupid girl*, waved at her saying *goodbye* and responded to her questions by waving again and saying *goodbye* and *get out*. A little later, in the office area, Mark Chisholm heard Ms Harwood complaining to Dick Chisholm about being fired. Mrs Chisholm overheard that and took Ms Harwood into Mark Chisholm's office.

[19] Lisa Sutherland says that she could still hear Ms Harwood's voice while the two women were in Mark Chisholm's office but she was unable to hear Mrs Chisholm. Mark Chisholm's evidence is that he could hear neither woman. Mrs Chisholm giving evidence that (except as mentioned above) she does not recall what was said. The only evidence of what was said by Mrs Chisholm in the office is from Ms Harwood. I accept Ms Harwood's evidence that Mrs Chisholm spoke of her being dismissed.

[20] After the exchange in Mark Chisholm's office, Ms Harwood went to leave and was told to take off her tool belt and go.

[21] On the basis of the whole of that sequence, I find that the initiative for the termination of the employment lay with the employer. Accordingly, First Aluminium Dunstan Limited dismissed Ms Harwood. There was no attempt by First Aluminium Dunstan Limited to justify any dismissal, counsel's submissions being largely directed at the point of contributory conduct, more of which shortly. I find that Ms Harwood has a personal grievance because she was unjustifiably dismissed.

Remedies

[22] There was evidence about some dissatisfaction with aspects of Ms Harwood's work performance. However, counsel explained that the various matters had not been raised with Ms Harwood as they were seen as teething issues only. I accept the point and those matters are not relevant for present purposes. An assessment about any blameworthy contribution by Ms Harwood to the situation giving rise to the grievance is limited to the exchanges between her, Dick Chisholm, Mrs Chisholm and Mark Chisholm on Tuesday 18 May 2004.

[23] Ms Harwood is 34 years old and has a direct manner. When Dick Chisholm spoke to her after lunch, she took that opportunity to raise some concerns she had about her employer's expectations. I found it unlikely that she intended to respond rudely to Dick Chisholm. I also accept that she apologised to him. Dick Chisholm escalated the situation and it is hardly surprising that Ms Harwood reacted badly to being called a *stupid girl* or that she questioned his intention when he waved and said *goodbye* and *get out*. On that basis, there was no blame-worthy contribution by Ms Harwood to that point. However, the evidence indicates that Ms Harwood pursued Dick Chisholm in a loud and aggressive manner after her phone call and that no doubt contributed to the way the matter ended in the office. I assess Ms Harwood's contribution to that at around 20%.

[24] Ms Harwood seeks three months lost wages, a period which goes past the end of the agreed probationary period. However, the probationary period had not been recorded in writing. That would have created a problem if First Aluminium Dunstan Limited had wanted to end the employment at the conclusion of the probationary period. In addition, I find it probable that Ms Harwood would have successfully concluded the probationary period, given her mechanical aptitude. I therefore accept that Ms Harwood should be compensated for her ordinary time loss for three months. At \$12.00 per hour, 40 hours per week, that amounts to \$7,280.00. Ms Harwood received earnings of \$1,283.00 from other employment in that period, so the loss is reduced to

\$5,997.00. Taking account of the assessment of Ms Harwood's contribution, I order First Aluminium Dunstan Limited to pay Ms Harwood \$4,800.00 (gross) compensation for lost remuneration.

[25] The best information available about how Ms Harwood reacted to her dismissal is to be found in a letter she wrote on 25 May 2004 to a counsellor. In that letter, Ms Harwood says that *emotionally, I am great! physically, I am healthy and financially, I am broke!!! So some things have not changed!! ... I have pulled myself out of the spell of depression that I was battling with. ... My employer's response to me, was to fire me on the spot!!! ... at the time, I was very confused as I simply did not know what had happened. Now I have accepted the fact that the problem lay with my employers and not with me.* That indicates that the distress associated with the sudden dismissal had largely been resolved in Ms Harwood's mind within a week.

[26] Ms Harwood provided a lengthy statement about the financial difficulties she has experienced since the dismissal. I accept that Ms Harwood's circumstances have been very difficult, but given the short duration of the employment, for the most part those difficulties cannot be attributed to the personal grievance. The proper course in this case is to limit compensation for distress to that suffered in the first week after the dismissal. I assess \$2,500.00 as an appropriate award, subject to adjustment to recognise Ms Harwood's contribution. Accordingly, I order First Aluminium Dunstan Limited to pay Ms Harwood \$2,000.00 compensation pursuant to section 123(c)(i) of the Employment Relations Act 2000.

Summary

[27] Ms Harwood was unjustifiably dismissed and therefore has a personal grievance.

[28] First Aluminium Dunstan Limited is to pay Ms Harwood \$4,800.00 (gross) compensation for lost remuneration.

[29] First Aluminium Dunstan Limited is to pay Ms Harwood \$2,000.00 compensation for distress.

[30] Costs are reserved. Ms Harwood represented herself, but if she wishes to make a claim to cover any legal expenses including the lodgement fee, she should write to the Authority within 21 days setting out any details. The respondent may then have 14 days to lodge and serve any memorandum in response. Costs will then be decided on the basis of that material.

Philip Cheyne
Member of Employment Relations Authority