

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 218
5366542

BETWEEN

JO-ANNE JARVIS
Applicant

A N D

CANDYLAND LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Mark Nutsford, Advocate for Applicant
Michele Coker, Director of Respondent

Investigation meeting: 16 March 2012 at Hamilton
26 April 2012 at Hamilton

Date of Determination: 27 June 2012

DETERMINATION OF THE AUTHORITY

- A. Candyland Limited's dismissal of Mrs Jo-Anne Jarvis was unjustified.**
- B. Candyland is ordered to pay Mrs Jarvis:**
- (i) Lost remuneration of \$3,748.28;**
 - (ii) Distress compensation of \$3,750;**
 - (iii) Legal costs of \$5,250;**
 - (iv) Disbursements of \$71.56.**

Employment relationship problem

[1] Mrs Jarvis claims she was unjustifiably dismissed by Candyland.

[2] Candyland is a tourist attraction which operates a café and candy shop and which holds candymaking shows during school holidays. It is open every day except Christmas Day with school holidays and public holidays being the busiest days.

[3] Mrs Jarvis commenced employment on 12 March 2011 as a sales assistant. Mrs Jarvis was a permanent employee who had no fixed or set days or hours of work. She worked on an as-required basis, with her days and hours of work being advised via a weekly roster, which could change up to the day before she was due to work.

[4] Mrs Jarvis worked on Sunday 24 July 2011. This day fell during the July school holidays and it turned out to be Candyland's busiest day. Mrs Jarvis was rostered to work from 9am to 5pm, but left work at 4pm. Mrs Jarvis says she left because she was cold, tired, and ill and did not feel well enough to stay until her shift ended at 5pm.

[5] Ms Michele Coker, sole shareholder and director of Candyland, also worked on 24 July. She says that Mrs Jarvis abandoned her employment at 2pm that day because, although she remained on the premises until 4pm, she did not do any work after that time.

[6] Mrs Jarvis' husband, Barry Jarvis, also worked for Candyland on an as-required basis. As a show of support for his wife, Mr Jarvis did not continue working for Candyland after Mrs Jarvis and Ms Coker had a discussion in the carpark on the morning of 27 July during which Ms Coker made it clear she did not want Mrs Jarvis back.

[7] Mrs Jarvis was not rostered to work on Monday 25 July 2011 but she was rostered to work five more days that week; from 9am to 5pm Tuesday 26 to Thursday 29 July and Sunday 31 July. Mrs Jarvis did not actually work any of her rostered hours during the week commencing 25 July because Ms Coker advised she had removed her from the roster.

[8] Ms Coker says she removed Mrs Jarvis from the roster for the week commencing 25 July because she believed Mrs Jarvis had abandoned her employment and Ms Coker did not want her back at work because she did not trust Mrs Jarvis and thought she may undermine the business if allowed to return to work.

[9] Candyland also says it was entitled to end Mrs Jarvis employment because she engaged in serious misconduct. This allegedly consisted of:

- (a) Unacceptable conduct and behaviour on 24 July which included upsetting other staff;
- (b) Causing customer complaints which were made in April 2011;
- (c) Her allegedly making comments to other employees over the course of her employment¹ about the running of the business which Ms Coker believed undermined her role as business owner.

[10] Mrs Jarvis expected to work as rostered during the week of 25 July. She sent two texts to Ms Coker on 25 July asking whether she was starting at 9am or 10am the next day. Ms Coker sent Mrs Jarvis a text at 10pm that evening saying she had given all of her shifts that week to two other named employees. When Mr Jarvis worked on 26 July he saw that neither of the two named employees worked that day.

[11] Mrs Jarvis sent Ms Coker three texts on 26 July asking for her rostered shifts to be reinstated. When she received no response, Mr and Mrs Jarvis turned up at Candyland around 10am on Wednesday 27 July 2011 with the intention that Mrs Jarvis would be able to sort out her employment situation by speaking to Ms Coker in person.

[12] They had not arranged to meet Ms Coker, so they caught up with her in the carpark as she was on her way in to work. It was a brief rushed discussion because Ms Coker had a Candymaking show on at 10.30am. Because she needed to do half an hour preparation for the show she did not have much time to speak to Mrs Jarvis.

[13] Mrs Jarvis could see Ms Coker was short staffed so she offered to work that day. Ms Coker declined that offer because she had already made up her mind that she did not want Mrs Jarvis back at work, mainly due to the events of 24 July but also because of ongoing dissatisfaction with her.

[14] Whilst talking to Mrs Jarvis in the carpark, Ms Coker expressed this dissatisfaction with Mrs Jarvis' behaviour both during her employment and more

¹ It is not known when Mrs Jarvis was alleged to have made such comments or when these alleged comments were drawn to Ms Coker's attention.

specifically on 24 July. She also referred to customer complaints which she believed related to Mrs Jarvis' actions towards customers.

[15] Ms Coker's criticisms were wide ranging both in nature and time span. Mrs Jarvis did not accept these criticisms which Ms Coker told me made her even more certain that Mrs Jarvis should not be allowed to return to work. Ms Coker informed Mrs Jarvis that she was not prepared to accept her type of behaviour in the workplace and that she considered Mrs Jarvis actions during her employment were *deemed serious misconduct and grounds for instant dismissal*.

[16] When Mrs Jarvis asked to be kept on for a couple of weeks until she got another job, Ms Coker told her she *would not even consider taking her back unless [she] received written apologies from her to the staff and myself for her abusive comments and reckless abandonment of her post at 2pm on 24 July*.

[17] Ms Coker told Mrs Jarvis she would meet her the following week (after the school holiday period had ended) to talk about the situation but that did not occur.

[18] On 1 August 2011 Mrs Jarvis sent a text to Ms Coker asking what was happening with her rostered shifts, but Ms Coker did not reply. Mrs Jarvis then wrote a letter to Ms Coker dated 3 August asking what was happening with her employment; to clarify her employment status; to discuss the shifts that she had been rostered off; and to see if Ms Coker would agree to attend mediation. Ms Coker did not respond.

[19] Mrs Jarvis says that made it clear Ms Coker was not going to let her return to work so on 2 September she sent Ms Coker a text which asked if she would be paid her holiday pay if she gave notice to end her employment. Ms Coker immediately responded that she would.

[20] On 27 September, Mrs Jarvis sent Ms Coker a resignation letter which linked her resignation to the fact that she had not been given any work since 25 July. Mrs Jarvis received her holiday pay on 7 October 2011.

[21] Finally, Mrs Jarvis raises a concern about whether or not Candyland was the legal entity which employed her and therefore whether it was the correct respondent in this matter.

Issues

[22] The following issues require determination:

- (a) Is Candyland the correct respondent?
- (b) How and when did Mrs Jarvis' employment end, in particular:
 - (i) Did she resign?
 - (ii) Did she abandon her employment?
 - (iii) Was she dismissed?
- (c) If dismissed, was dismissal justified? In particular:
 - (i) Were statutory good faith requirements complied with?
 - (ii) Were the s.103A(3) tests in the Employment Relations Act 2000 (the Act) complied with?
 - (iii) Was dismissal substantively justified?
- (d) If dismissal was unjustified, what if any remedies should be awarded? In particular:
 - (i) Did Mrs Jarvis mitigate her loss?
 - (ii) What if any lost remuneration should be awarded?
 - (iii) What if any distress compensation should be awarded?
 - (iv) Should any remedies that are awarded be reduced to reflect contribution?
- (e) What if any costs should be awarded?

Is Candyland the correct respondent?

[23] Contrary to the requirements of s.65 of the Act, Mrs Jarvis was not given a written employment agreement when she commenced employment. That breach has caused her some uncertainty about the correct legal identify of her employer.

[24] Up until recently Mrs Jarvis believed she was employed by Candyland, but that was called into question when a printout she obtained from the Inland Revenue Department (IRD) website recorded her wages as having been paid by MicheleCoker.com Limited.

[25] Ms Coker is the sole director and shareholder of both MicheleCoker.com Limited and Candyland Limited. Ms Coker made it clear during the Authority's investigation that Mrs Jarvis' employer was Candyland, not MicheleCoker.com Limited. Ms Coker said MicheleCoker.com Limited changed its name to Candyland Limited on 14 December 2010 so she thought the discrepancy in the IRD printout could be attributed to a failure by IRD to update its records.

[26] Ms Coker assured me that Mrs Jarvis was employed by Candyland. I accept her evidence, so find that Candyland is the legal entity which employed Mrs Jarvis, so it is the correct respondent.

How and when did Mrs Jarvis' employment end?

Did she resign?

[27] I find that Mrs Jarvis' letter to Ms Coker dated 27 September was not a genuine resignation, it was merely a device she used to obtain her outstanding holiday pay.

Did she abandon her employment?

[28] Ms Coker says Mrs Jarvis abandoned her employment because she:

- (a) Milled about the premises doing no real work from 2pm to 4pm when she should have been helping Ms Coker in the shop which was overrun with customers;
- (b) Left work at 4pm when she had been rostered to work until 5pm.

[29] The legal requirements which are necessary to establish that the employment ended by operation of contract on the grounds of abandonment are not present:

- (a) There was no written employment agreement which meant there was no contractual abandonment clause for Candyland to rely on;

(b) Mrs Jarvis' departure from work an hour early on 24 July was impliedly authorised, she did not just disappear without any explanation. When Mr Jarvis advised Ms Coker's former de facto partner² that he was taking Mrs Jarvis home because she was unwell he told Mr Jarvis *that was a good idea*;

(c) Mrs Jarvis made it clear she was available to work her rostered shifts for the week commencing 25 July. She sent two texts on 25 July asking for confirmation of her start time the following day; three texts on 26 July asking for her rostered shifts to be returned to her; she attended Candyland's premises on the morning of 27 July and offered to work; she sent a text on 1 August asking about work; and she wrote to Ms Coker on 3 August asking for her shifts back.

[30] I find that Mrs Jarvis was ready, willing, and asking to return to work. She did not abandon her employment.

Was she dismissed?

[31] Ms Coker told me that she had decided on 25 July 2011 that she did not want Mrs Jarvis back at work. She was unhappy with Mrs Jarvis' behaviour and did not trust her to act appropriately if she returned to work. That decision resulted in Ms Coker removing Mrs Jarvis' five rostered shifts from her. She also decided not to give Mrs Jarvis any more work in future.

[32] I find that Ms Coker's actions amounted to a summary dismissal because they immediately and permanently deprived Mrs Jarvis of the ability to continue working for Candyland.

[33] I find Mrs Jarvis was dismissed on 25 July 2011 because that was the day her rostered shifts were unilaterally removed and the date on which Ms Coker decided that Mrs Jarvis would not be given any more work. Mrs Jarvis did not receive notice of her dismissal, or pay in lieu of notice.

² He assisted Ms Coker with the business and also worked on 24 July 2011.

Was dismissal justified?

[34] Justification falls to be determined in light of the s.103A justification test in the Act as it applied from 1 April 2011. The full Court of the Employment Court provided guidance in *Angus & McKean v. Ports of Auckland*³ as to how the justification test is to be applied in practice. It involves an examination of the process that Candyland used before it dismissed Mrs Jarvis (procedural fairness) and an assessment of whether dismissal was what a fair and reasonable employer could have done in all of the circumstances (substantive justification).

[35] Section 103A(3) of the Act sets out four tests which relate to widely recognised procedural fairness and natural justice requirements. Failure to comply with any one of the s.103A(3) tests will render a dismissal unjustified.⁴

[36] A fair and reasonable employer is also expected to comply with its statutory good faith obligations as per s.4 of the Act. In particular, an employer which is proposing to make a decision which may have an adverse impact on an employee's ongoing employment is required under s.4(1A)(c) of the Act to provide the employee with access to information relevant to its decision⁵ and an opportunity to comment on that information before a final decision is made.⁶

Were statutory good faith requirements complied with?

[37] The following information influenced Ms Coker's decision to summarily dismiss Mrs Jarvis:

- (a) Her observations about Mrs Jarvis mood and behaviour on 24 July 2011;
- (b) Her interviews with staff about Mrs Jarvis' actions on 24 July which apparently involved Ms Coker taking *verbal statements*;
- (c) Feedback from staff about adverse comments Mrs Jarvis allegedly made over the course of her employment about the way the business was being run;

³ [2011] NZEmpC 160

⁴ Supra

⁵ S.4(1A)(c)(i) of the ERA

⁶ S.4(1A)(c)(ii) of the ERA.

- (d) Two customer complaints dated 25 and 28 April 2011 which did not name Mrs Jarvis but which Ms Coker attributed to Mrs Jarvis' actions;
- (e) Her view that Mrs Jarvis had left work early without permission on an unspecified date to collect a dress for her mother in law's funeral;
- (f) Her view that Mrs Jarvis had not undertaken any work from 2pm to 4pm on 24 July;
- (g) Her view that Mrs Jarvis had abandoned her employment on 24 July.

[38] All of this information was relevant information which Ms Coker had an obligation to disclose to Mrs Jarvis because it impacted on her ongoing employment. Candyland had to not only disclose this relevant information to Mrs Jarvis, it also had to give her an opportunity to comment on it before it made the decision to summarily dismiss her. That did not occur.

[39] Candyland did not communicate with Mrs Jarvis at all before she was summarily dismissed on 25 July 2011. Mrs Jarvis was therefore unaware that Candyland had information relevant to its decision about her ongoing employment which put her employment in jeopardy. It follows that Mrs Jarvis was deprived of any opportunity to respond to this relevant information before she was dismissed.

[40] I find that Candyland failed to comply with its s.4(1A)(c) obligations to provide Mrs Jarvis with access to relevant information and an opportunity to comment on it before it dismissed her.

Were the s.103A(3) tests in the Act complied with?

[41] Candyland did not comply with any of the s.103A(3) tests in the Act because it failed to communicate with Mrs Jarvis at all before it decided to summarily dismiss her on 25 July 2011.

Was dismissal substantively justified?

[42] Summary dismissal is a disciplinary sanction which may be available as a justified response to serious misconduct. It is not a justified response to performance or misconduct concerns, both of which require a graduated warning process to be

exhausted before the final sanction of dismissal can be imposed. Dismissal for poor performance and/or misconduct must also be on notice.

[43] Substantive justification of a summary dismissal requires a fair and reasonable employer to genuinely believe, based on reasonable grounds, serious misconduct occurred. I find that a fair and reasonable employer could not have concluded Mrs Jarvis had engaged in serious misconduct.

[44] The matters Candyland were concerned about involved (assuming they could have been established by evidence - which I find they were not) at worst either performance or misconduct concerns. A fair and reasonable employer could not have concluded Candyland's concerns, if established, amounted to serious misconduct.

[45] I therefore find that Candyland did not have a good reason for concluding that serious misconduct had occurred or that summary dismissal was an appropriate response to its concerns. Mrs Jarvis' dismissal was not substantively justified.

Justification findings

[46] Candyland's summary dismissal of Mrs Jarvis was unjustified because:

- (a) It failed to comply with s.4(1A)(c) statutory good faith requirements;
- (b) It failed to comply with all four s.103A(3) tests in the Act;
- (c) It could not fairly or reasonably have concluded that Mrs Jarvis had engaged in serious misconduct;
- (d) Summarily dismissal was not an outcome which was available to a fair and reasonable employer as a response to the concerns Candyland had, even if it had been able to prove them. .

What if any remedies should be awarded?

Did Mrs Jarvis mitigate her loss?

[47] Mrs Jarvis first applied for alternative work on 6 August 2011. This was only three days after she wrote to Ms Coker to resolve her employment status. Mrs Jarvis also took other appropriate steps to find new employment. She had some success

because she obtained part time work from 21 September to 10 October 2011 which earned her a total of \$556.72.

[48] I am satisfied Mrs Jarvis took appropriate steps to attempt to mitigate her loss, so she is entitled to lost remuneration.

What lost remuneration should be awarded?

[49] Mrs Jarvis has lost remuneration as a result of her grievance so she is entitled to be reimbursed for that under s.128 of the Act.

[50] Mrs Jarvis seeks three months' lost remuneration of \$5,034.92 under s.128(2) of the Act. That amount is based on what she says she would have earned in the three months after her dismissal (\$5,591.64, being 3x her average monthly remuneration of \$1,863.88) less what she earned over that period (being \$556.72).

[51] Mrs Jarvis worked on average 28.67 hours per week during the 20 weeks she was employed and was paid \$15 per hour. Her average weekly hours of 28.67; multiplied by 52 weeks in the year; equals 1,490.84 hours per annum; multiplied by \$15 per hour; equals \$22,362.60 gross remuneration; divided by 12 months in the year; equals \$1,863.55 average monthly remuneration; based on the average number of hours she worked per week when employed by Candyland.

[52] Ms Coker says calculations based on average weekly hours of 28.67 grossly inflates lost remuneration because Mrs Jarvis' actual hours of work would have been vastly reduced had she remained employed after the July 2011 school holidays.

[53] Ms Coker says Mrs Jarvis' average weekly hours do not give a true picture because she worked more hours than would normally be the case whilst employed because she:

- (a) Worked the Easter and July school holidays which are the busiest periods and therefore involve longer than normal shifts;
- (b) Picked up extra hours because other staff were not available;
- (c) Covered the shifts of an employee who had left until a replacement could be found.

[54] Ms Coker says that during school holidays she needed eight staff over seven days to cover candy-making, show guide, shop, and café. During school term week days she only needed one person in the shop, and on weekends during school terms she only needed a candy-maker, shop staff, and show guide (which was often her).

[55] Ms Coker said this level of staffing meant that during term time staff would only get one or two days' work each. Ms Coker said the months of August and September were very quiet because the next school holidays were from 8–24 October 2011.

[56] In order to assess the sum equal to Mrs Jarvis' lost remuneration I need to form a view about what hours she was likely to have worked in the three months following her dismissal, which is a 13 week period. There are three weeks and three days over that period which fall within school holidays (25-31 July; 8-14 October; 15-21 October; 22-24 October 2011).

[57] Mrs Jarvis worked 99.5 hours over the April (Easter) school holidays and if she had not been dismissed and had worked her rostered hours over the July school holidays, then she would have worked 95 hours. The October school holidays were one day longer than the previous two school holidays periods because Monday 24 October was Labour Day, so this public holiday was tacked on to the end of the school holiday period.

[58] I find that for three of the 13 weeks following Mrs Jarvis dismissal it was likely she would have worked a total of 137 hours (38 hours as rostered from 25-31 July plus 99 hours I consider she would have been likely to have worked over the October school holidays). I find that Mrs Jarvis has lost remuneration of \$2,055 (137 hours x \$15 per hour) for the school holiday periods she would have worked but for her dismissal.

[59] That leaves me to now assess what Mrs Jarvis' lost remuneration would have been for the ten weeks which fell during the school term after her dismissal.

[60] Ms Coker estimated Mrs Jarvis would have got one or two days work per week. I adopt the higher figure of two days on the basis it was likely that Mrs Jarvis would have continued to have provided cover for staff who were unavailable or who had left the business, so her hours can reasonably be expected to be at the top end of Ms Coker's estimate.

[61] Mrs Jarvis usually worked between 7 and 8 hours per shift, so for the purposes of calculating lost remuneration I adopt the mid point of 7.5 hours. I therefore find Mrs Jarvis lost remuneration of \$2,250, (being 2 days work per week x 10 weeks = 20 days work x 7.5 hours per day = 150 hours in total over the 10 weeks x \$15 per hour).

[62] I find that Mrs Jarvis lost remuneration of \$4,305 in the three months following her dismissal (\$2,055 x 3 weeks' school holiday work plus \$2,250 for 10 weeks of normal term time work). Mrs Jarvis' earnings over that period of \$556.72 must be deducted (\$4,305 - \$556.72) resulting in total lost remuneration of \$3,748.28.

[63] I award Mrs Jarvis lost remuneration of \$3,748.28 under s.128(2) of the Act on the basis it is the sum equal to her actual lost remuneration which is a lesser amount than her three months' ordinary time remuneration.⁷

What if any distress compensation should be awarded?

[64] Mrs Jarvis claims \$10,000 distress compensation however the evidence did not support an award at that exceptionally high level. I accept Mrs Jarvis' evidence about the very detrimental emotional effects her unjustified dismissal had on her. I also accept Mr Jarvis' evidence about the adverse effects dismissal had on his wife.

[65] Based on the evidence, I consider an award of \$5,000 is appropriate to compensate Mrs Jarvis for the distress she suffered.

Should remedies be reduced to reflect contribution?

[66] Having found Mrs Jarvis has a personal grievance, s.124 of the Act requires me to consider the extent to which her actions contributed towards the situation that gave rise to the personal grievance, and if required, to reduce remedies accordingly.

[67] This requires an assessment of blameworthy conduct by Mrs Jarvis, which must be proved to the standard of the balance of probabilities. I was not satisfied that standard had been reached in respect of any of the allegations which Ms Coker relies on in support of the claim that Mrs Jarvis engaged in serious misconduct.

⁷ Based on the average number of hours she worked whilst employed by Candyland which gave a figure of \$5,034.90.

[68] However, Mrs Jarvis did contribute to the situation which gave rise to the grievance in the following ways:

- (a) She did not take her lunch break when directed to do so by Ms Coker, but did not advise Ms Coker she had assisted another employee instead of having her lunch break. That omission led Ms Coker to conclude that Mrs Jarvis was not working when she should have been. It also made Mrs Jarvis less able to cope with the rigors of Candyland's busiest day because she was not adequately rested or refreshed;
- (b) Mrs Jarvis failed to advise Ms Coker that she was becoming increasing unwell over the afternoon or that she had not fully recovered from being unwell earlier in the week. That omission caused Ms Coker to conclude that Mrs Jarvis was failing to perform the duties expected of her without any good reason;
- (c) Mrs Jarvis elected not to wear the uniform provided by Candyland which was warmer than her own light fairy outfit she decided to wear. Her flimsy fairy costume caused her to become cold and that resulted in her becoming more unwell and unable to cope as the day progressed. I consider it likely that had she been properly attired her health would not have deteriorated to the extent it did and she would have been on a more even keel emotionally;
- (d) Mrs Jarvis criticised the standard of the third candy-making show in front of customers, which caused Ms Coker's former de facto partner (who had presented the show) to form a very adverse view of her. I find his strong adverse view of Mrs Jarvis heavily influenced Ms Coker in her decision making;
- (e) I also consider it likely, on the balance of probabilities, that Mrs Jarvis upset another staff member by accusing him of being engaged to spy on other staff and by commenting that he was not wanted at Candyland. That person was very upset by such comments and complained to Ms Coker which also heavily influenced Ms Coker's decision-making.

[69] All of the above matters involve blameworthy conduct which contributed to the situation which gave rise to Mrs Jarvis' unjustified dismissal. I consider a 25% reduction to the award of distress compensation is appropriate to reflect Mrs Jarvis' contribution.

Costs

[70] Mrs Jarvis has incurred total legal costs of \$9,128.13 excluding disbursements. Although Mrs Jarvis claimed an unspecified amount for disbursements, no actual disbursements were itemised. I therefore decline to award any disbursements other than the reimbursement of the \$71.56 filing fee because that is the only disbursement I am satisfied was properly incurred.

[71] In accordance with the Authority's usual approach to costs, I adopt a notional starting tariff of \$3,500 per day which then has to be adjusted to reflect the particular circumstances of this case. I find that there are no circumstances which would warrant an adjustment to the notional daily tariff.

[72] The daily tariff of \$3,500 must be applied to 1.5 days of hearing time, so Candyland is ordered to contribute \$5,250 towards Mrs Jarvis' actual legal costs.

Summary

[73] Mrs Jarvis' dismissal was procedurally and substantively unjustified so she is entitled to remedies. Mrs Jarvis' actions contributed to the situation which gave rise to her dismissal grievance, so her award of distress compensation is reduced by 25% to reflect that.

[74] Candyland is ordered to pay Mrs Jarvis:

- (a) \$3,748.28 lost remuneration under s.128(2) of the Act;
- (b) \$3,750 (\$5,000 less 25% to reflect contribution) under s.123(1)(c)(i) of the Act;
- (c) \$5,250 towards her actual legal costs;

(d) \$71.56 to reimburse her for her filing fee.

Rachel Larmer
Member of the Employment Relations Authority