

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Janice Anne Jones (Applicant)  
**AND** Denise Gunson (Respondent)  
**REPRESENTATIVES** Janice Anne Jones, In person  
Denise Gunson, In person  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 6 October 2005  
**SUBMISSIONS RECEIVED** 25 October 2005  
1 November 2005  
**DATE OF DETERMINATION** 14 February 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

- [1] Ms Jones claims that she was unjustifiably dismissed from her employment on 22 December 2004. She seeks that the Authority finds that she has a personal grievance and award her the remedies of loss of wages and compensation. Ms Jones also says that her employer failed to provide her with an employment agreement but does not seek a penalty under the provisions of the Employment Relations Act 2000.  
Ms Gunson denies the claims of Ms Jones and says that the dismissal of Ms Jones was justified on the grounds of serious misconduct.

**Background Facts and Evidence**

- [2] The investigation of this matter and obtaining the relevant evidence has not been an easy task particularly given the obvious animosity that remains between the parties and the absence of professional advocates. While the parties have produced a substantial amount of material for my digestion, much of that material is not relevant to the issues to be determined and it has been something of an onerous exercise to extract the “wheat from the straw,” so to speak. The following summary is an analysis of the background to the matters to be determined, taking into account the vagaries encountered.
- [3] At the material times, Ms Gunson owned and operated a small locally produced complimentary newspaper called the *Informer*. The circulation base of the newspaper is approximately 4,200, largely comprised of businesses and individuals located in the Coromandel town of Whitianga and surrounding areas. The revenue for the business comes from the sale of advertising to local businesses. The format of the newspaper is quite

rudimentary comprising articles of general interest, local activities, and advertising, all interspersed with some jokes, cartoons and other miscellaneous information.

- [4] Ms Jones was employed by Ms Gunson in June 2004 – initially as a Personal Assistant and then as the Editor/Manager of the newspaper. Soon after Ms Jones commenced her employment, Ms Gunson moved to Hamilton.
- [5] The physical absence of Ms Gunson from the day to day operation of the business required Ms Jones to produce the newspaper. Nonetheless, it appears that Ms Gunson retained overall contact with the affairs of the business from a distance via regular email and telephone communications. The evidence of Ms Jones is that the frequency of the communications was a source of some frustration to her and she did not agree with some of the instructions given by Ms Gunson.
- [6] In September 2004, a new printing machine was purchased for the business and Ms Gunson became physically involved in the business again. It appears that Ms Jones was unhappy about the primary computer be utilised by Ms Gunson at that time as the secondary computer was less reliable. It appears that by October 2004 considerable tension existed between the two women. Ms Jones says that they were hardly speaking to each other.

#### **The meeting of 5 October 2004**

- [7] At this meeting, Ms Gunson raised a number of issues with Ms Jones:
  - (a) The view that the personal life of Ms Jones was affecting her work performance.
  - (b) That Ms Jones was working longer hours than deemed necessary to produce the newspaper.
  - (c) That Ms Jones was using the resources of the business to source information regarding prospective business ventures for herself.
  - (d) That Ms Jones was spending an unacceptable time emailing her family members.
  - (e) That it was unacceptable for Ms Jones to use the business telephone for personal toll calls.
  - (f) That it was not a “good look” for the newspaper for Ms Jones to be seen standing smoking outside the entrance to the newspaper office.
  - (g) That the office was being left unattended too often.
  - (h) Was Ms Jones committed to her job given that her work performance had slipped badly and that she was actively looking at other business ventures?
- [8] The evidence of Ms Gunson is that Ms Jones gave an assurance that she was committed to her position and that she would take the necessary actions to correct the matters that had been raised with her. Ms Jones also raised the matter of the provision of an employment agreement and that she wished to have some time off work to go to Wellington on personal business. It seems to be mutually accepted that the meeting had “cleared the air” and the relationship would progress in a more positive manner.
- [9] In November 2004, Ms Gunson underwent surgery requiring a period of convalescence while residing back in Hamilton. Ms Jones was once again left to conduct the day to day operations associated with producing the newspaper.

## Matters pertaining to the dismissal

- [10] On Sunday 19 December 2004, Ms Gunson received two phone calls at her home in Hamilton. The caller was another employee, Ms Kaye Jackson. Ms Jackson reported to Ms Gunson that Ms Jones had approved the publication of certain cartoons that Ms Jackson deemed to be inappropriate for a community newspaper, particularly given that one of the cartoons was to be placed in the vicinity of the children's page of the newspaper. There was also the matter of the content of a caution to readers in a regular column of the newspaper, "*Penelope Possum*". This was in regard to making a *Google* search for web sites referring to Beethoven's Eroica Symphony. The caution warned that given the spelling of the name of the symphony, people accessing web sites could inadvertently find that they have accessed erotic or pornographic sites.
- [11] Upon hearing a description of the content of the cartoons and in consideration of the fact that the content of the *Penelope Possum* column could encourage access by young people to pornographic web sites, Ms Gunson concluded that the material in question was inappropriate and could potentially damage the reputation of the newspaper. She instructed that the material in question be withdrawn.
- [12] On Monday 20 December 2004, despite still recovering from surgery, Ms Gunson travelled from Hamilton to the newspaper office and viewed the material in question. She also accessed the computer email files and other files and discovered a variety of material that gave her concern about the activities of Ms Jones and the overall wellbeing of the business. Ms Gunson also became aware of what appeared to be the unauthorised presence of the partner of Ms Jones on the business premises, and them both sleeping there on one occasion, and inappropriate use of the business computer to access pornographic websites. Ms Gunson sought advice from a Human Resources Consultant, Ms Sande Gates, as to how to handle matters with Ms Jones.
- [13] Ms Jones did not work on Mondays. She came into work at approximately 8:35am on Tuesday 21 December 2004. She was met by Ms Gunson, Mr Gunson and Ms Gates. The evidence of Ms Gates is that the appearance of Ms Jones, her manner, and the smell of alcohol on her breath and person, gave the impression that Ms Jones had arrived at work directly from a party, and that Ms Jones was not in a fit condition for work. Clearly, Ms Jones was surprised to be met by the other three people. She says that she was "ambushed" and that the office area was in semi-darkness but I do not accept that this was so. The business is owned by the Gunsons and they were entitled to be there along with their representative and I accept that the discussion with Ms Jones was conducted in a fair and reasonable manner. I also accept the evidence of Ms Gunson and Ms Gates that the office area was quite normal and well lit.
- [14] Ms Gates advised that due to the ill health of Ms Gunson, she would be conducting an investigation pertaining to various matters, as contained in a letter that she had written and given to Ms Jones - as follows:

"Re: The Informer –v- Janice Jones : Allegations of Serious Misconduct

Due to the fragility of your employer's health, Denise Gunson : Gate-Ways Consultancy has been engaged to conduct an "**independent, confidential, and full investigation**" into the following allegations against you during your employment:

- Unauthorised and inappropriate material intended for publication in this weeks edition of the "The Informer
- Allowing unauthorised access of your employers[sic] personal computer "laptop" to an

unauthorised person

- Allowing unauthorised visitors access to the business premises after business hours and allowing them to stay overnight with you on the premises
- Completing personal errands during employed hours
- Use of company computer during employed hours for personal use
- In appropriate[sic] use of the business computer to visit pornographic websites

Effectively immediately, your employment therefore has been suspended with pay, until this investigation has been completed. You are advised to take this matter very seriously as termination of your employment is a possible outcome.

You are to relinquish all access key, information and/or property belonging to your employer, and you are not to return to the business premises or to approach the employer, employees or interviewees until the investigation has been satisfied and your presence with a support person is required.

We further request and advise you also – to maintain confidentiality of all information during and post this investigation.

As your employer does not have your current contact details, I therefore request you supply these details to the writer or leave them with your employer upon departure.”

[15] Later that day, Ms Gates interviewed Ms Jackson and another employee, Ms Speights. The following day, 22 December 2004, Ms Gate met with Ms Jones and her support person, Ms Philpot, and discussed the various matters of concern. At the completion of the meeting, Ms Gates advised that a decision about the future employment of Ms Jones would be made as soon as possible. Ms Jones indicated that she wished this to be conveyed to Ms Philpot.

[16] Following Ms Gates conferring with Ms Gunson regarding the findings of her investigation, via a letter dated 23 December 2004, Ms Jones was notified of the termination of her employment, for [“the following reasons:

- Unauthorised and inappropriate material intended for publication in this weeks edition of “The Informer”
- Allowing unauthorised visitors access to the business premises after business hours and allowing them to stay overnight with you on the premises
- In appropriate[sic] use of the business computer to visit pornographic websites.”

## **Analysis and Conclusions**

[17] Apart from the evidence of the respective witnesses, the Authority has been provided with a considerable amount of other written material, some it relevant to the investigation of this matter and some not. On the basis of the overall evidence, I conclude that at the time that Ms Jones was employed at *The Informer*, some of her behaviour was very questionable indeed, largely, I suspect, due to the manner in which she conducted her personal life. However, it is not the role of the Authority to make value judgements as to how individuals conduct their personal lives and I have studiously avoided doing that in the case of Ms Jones.

[18] Ms Jones says that her dismissal was unjustified, largely on the alleged grounds that the explanations offered were reasonable and credible and that Ms Gunson was mistaken in the conclusions that she reached to the contrary. Effectively, Ms Jones seeks to have the Authority re-open the investigation that her employer conducted, but that is not the role of the Authority. Neither is it the role of the Authority to place itself in the shoes of the employer in regard to its analysis of the information received, as a result of, what I find was a fair and reasonable investigation into the alleged conduct of Ms Jones. As the Employment Court has stated:

“A personal grievance is not an appeal to the Employment Relations Authority from the employer’s findings of fact but is an inquiry into the question whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal. In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where there are conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other.” *Chief Executive of the Ministry of Maori Development v Travers-Jones* [2003] 1 ERNZ 174 at 184.

- [19] Furthermore, it is not for the Authority to substitute its decision to dismiss or not, for that of the employer. Rather, the role of the Authority is to determine whether the employer’s decision was a fair and reasonable one in the circumstances.<sup>1</sup> Section 103A of the Employment Relations Amendment Act (No 2) 2004 requires that the question of whether a dismissal or an action was 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 would have done in all the circumstances at the time the dismissal or action occurred.

## **Determination**

- [20] On the basis of the evidence presented, confusing as it is in places, and given the totality of the actions of Ms Jones, whether directly or indirectly, taking into account the involvement of her partner Mr Erik Collins, in regard to his unauthorised presence on the premises and his unauthorised use of the business computer to access inappropriate websites, I find that Ms Gunson was entitled to view the actions of Ms Jones as serious misconduct warranting dismissal, hence the dismissal of Ms Jones was justified. It follows that I must find that Ms Jones does not have a personal grievance and the remedies that she seeks from the Authority cannot be granted.
- [21] In regard to the failure to provide an employment agreement to Ms Jones, I find that Ms Gunson breached section 65 of the Employment Relations Act 2000. This provision of the Act states that a written individual employment agreement must be provided and sets out the minimum content of any agreement. Ms Jones has not sought that a penalty be awarded and I decline to do so.

## **Costs**

- [22] Both parties represented themselves and no advocacy fees were incurred. Cost will lie where they fall.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**

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<sup>1</sup> *BP Oil NZ Ltd v Northern Distribution Union* [1992] 3 ERNZ 483 (CA).

