

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Amanda King (Applicant)
AND Patricia Harvey t/a Flowers by Trish (Respondent)
REPRESENTATIVES Danny Jacobson, for Applicant
Patricia Harvey in person
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 2 December 2005
DATE OF DETERMINATION 2 February 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Ms King submits she was unjustifiably dismissed from her employment with the respondent. To remedy her alleged grievance she seeks lost remuneration, compensation pursuant to s.123 (1) (c) (i) and costs.

The respondent denies the claim and submits that Ms King was summarily dismissed for serious misconduct.

Background

On 3 April 2003 the applicant commenced employment with the respondent who trades as Flowers by Trish. She was employed as a florist and at the time of the events in question she was the head florist.

During 2004 the respondent took some time out of the business when she was pregnant and in February 2005 she moved to Rotorua. From that time she managed the Tauranga based business from Rotorua and attended at the premises on a Monday and Friday. Ms Harvey's mother (Ms Phillips) also worked in the business for 30 hours per week.

It is not in dispute that the business faced financial difficulties and was in and out of debt to suppliers from the commencement of its operation in March 2002.

The applicant and the respondent enjoyed excellent relationships for the greater part of the employment relationship.

In January 2005 Ms King and her partner Mr Edmonds submitted a proposal to Ms Harvey to buy the business. Ms Harvey considered that proposal but declined it. Ms King made no secret of her ambition to have her own business one day and it is not in dispute that Ms Harvey volunteered to release her from the restraint provision contained in the Individual Employment Agreement (IEA) that governed the relationship.

By April 2005 Ms Harvey was finding it too difficult to run the business from Rotorua. She decided to put the business on the market but she first approached Ms King and advised she had first option to buy the business prior to it being put out for sale through agents.

Between 14 and 22 April the parties took steps consistent with progressing the sale and purchase of the business. Over this period other options were considered by Ms Harvey. If she could not get a price for the business that met her objectives she proposed to restructure it and work in the business full time.

Negotiations to sell the business concluded amicably on 22 March with a view to meeting on the proposal again on Tuesday 26 April.

However, things had changed by Tuesday morning. Ms King felt distinctly uncomfortable in the shop all morning that day. This was because Ms Harvey's financial and staff adviser (Mr Halling) had come to the business that morning with his wife and daughter. They treated Ms King differently that morning, as did Ms Phillips. Mr and Mrs Halling spent time working with Ms Harvey in the office at the back of the shop.

Late in the morning Mr Edmonds arrived to discuss the sale and purchase of the business with Ms Harvey. Ms King expressed her disquiet to him. Mr Edmonds went to deliver the business proposal to Ms Harvey and requested that he and Ms King go out for lunch prior to returning to resume discussions on the sale proposal.

Ms Harvey said she wished to speak to Ms King prior to lunch. Ms King went to meet with Ms Harvey in the office. There she was presented with a letter summarily dismissing her and notifying her of her final pay.

The reasons for the dismissal were expressed generally e.g. failing to comply with instructions, undermining the business by informing suppliers of the company's financial situation.

Ms King asked for specifics in relation to the stated reason for dismissal. The only specifics discussed that day related to Ms King's alleged refusal to incorporate sunflowers in the corporate arrangements prepared that morning.

Positions of the Parties

It is submitted for the applicant that in dismissing Ms King the respondent relied on allegations including historical allegations, which no fair and reasonable employer would rely on. Further, the respondent failed to conduct an inquiry into any of the allegations relied on to dismiss and denied Ms King the right to representation and a fair opportunity to address and respond to the allegations. The respondent also dismissed Ms King citing only general reasons for the dismissal and refused to provide specific details of the reasons when requested.

In these circumstances it is not possible to say the employer based her decision to dismiss on a reasonably founded belief, honestly held that serious misconduct had occurred.

The respondent defends her position that the dismissal was justified for serious misconduct. It is her position that the applicant deliberately set out to undermine the reputation of the business with suppliers so as to destroy the value of the business with a view to acquiring it at a bargain basement price.

The Legal Framework

The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A:

103A Test of justification

For the purposes of section 103(1) (a) and (b), 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.

In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of **a fair and reasonable employer ...in all the circumstances ...at the time....**

It is convenient in determining whether or not the employer has acted fairly and reasonably in all the circumstances to consider whether the employer had **good reasons** for the actions it took in respect of Ms King's employment and **whether she was treated fairly in the process**. Demonstrating the following steps were followed is essential to showing that a dismissal for serious misconduct is justified.

Investigation: the employer must carry out a full investigation of all the relevant facts before actually terminating the employee and the result of such an investigation should be communicated to the employee. The investigation carried out by the employer must be fair and thorough and sufficient to allow the employer to arrive at a reasonable belief that misconduct or poor performance exists such that dismissal is warranted. *Airline Stewards and Hostesses (NZ) IUOW v Air New Zealand Ltd* [1990] 3 NZILR 797. No investigation will be thorough and complete without inquiry of the worker.

Opportunity to be heard: Before the dismissal is effected the employee must be provided with a real opportunity to be heard and to offer an explanation to the allegations made. The worker should be advised of their right to representation and notice to the employee should advise how seriously the allegations are viewed and if the worker's employment could be in jeopardy. An opportunity to be heard also requires that serious consideration will be given to the worker's explanations. That consideration must be free from bias and predetermination.

Reasons: Reasons for the dismissal must be given to the employee before the dismissal is effected and it is only the reasons given at the time of the dismissal that may be subsequently relied on to justify the dismissal.

I must also note that it is not fair and reasonable conduct for an employer to gather up a host of complaints relating to incidents that go back over time (and which were not raised and dealt with at the time) and put those complaints to a worker enmasse weeks or months after the event. In *Donaldson and Young v Dickson* [1994] 1 ERNZ the Court had this to say about such an approach to raising complaints with an employee.

“To store them up and to smite the employee with them, hip and thigh, in one giant instalment, is about as great a breach of the duty of trust and confidence inherent in every employment contract as can be imagined”.

Issues to be Decided

- Did Ms Harvey carry out a thorough and fair inquiry that disclosed conduct capable of being regarded as serious misconduct?
- Was dismissal an option open to Ms Harvey based on the inquiry conducted and having regard to what a fair and reasonable employer would do in the all the circumstances?

Discussion and Findings

In response to a request pursuant to s.120 of the Act for reasons for the dismissal, Ms Harvey responded (11 May 2005) that Ms King had breach her terms of employment by offering to buy the business in January 2005 and that this offer had been accompanied by threats to compete with Ms Harvey’s business. It was also stated that between January and April 2005 Ms King had over ordered stock to the value of \$4000 in contravention of instructions to always obtain the approval of Ms Harvey or her mother Val Phillips prior to ordering. Ms Harvey also advised that Ms King had given Bexley Flora (a supplier) confidential information about the financial position of the business. Other reasons included alleged threats to poach staff from Flowers by Trish causing a conflict of interest between Ms Harvey and a staff member, Linda Trafford. Also included was the alleged refusal by Ms King to use sunflowers in the corporate arrangements prepared by her on the morning of 26 April.

Two additional reasons for dismissal were cited in the statement in reply dated 16 September 2005 – that Ms King had taken \$40 from the till to buy herself and Linda lunch and she had committed Flowers by Trish to a design for the Yellow pages.

An employer may only defend a dismissal relying on the reasons given at the time. Leaving aside the fact that the reasons given at the time for Ms King’s dismissal were extremely general, it is immediately apparent, on inquiry into the reasons now given/explained for Ms King’s dismissal, that the majority of the concerns in question were historical. That being the case they offend against the principle cited in *Donaldson* above and cannot possibly have given rise to justifiable grounds to dismiss her. In any event they would not give rise to justification for dismissal for serious misconduct unless the concerns in question (e.g. over ordering of stock/ordering stock without authorisation) had been previously taken up with the worker and she had re-offended in the face of a clear instruction and notice that her employment would be in jeopardy if she continued to over order and/or to order without the appropriate authority.

The only reasons given for Ms King’s dismissal that could be argued to be contemporary allegations were those relating to her alleged refusal to use sunflowers in the corporate arrangements on the morning of 26 April and the allegation that Ms King had informed suppliers of the financial position of Flowers by Trish¹. Ms Harvey leapt to the conclusion Ms King had

¹ I note the stated reason for dismissal pertaining to this issue refers to Ms King informing suppliers (plural) of the company’s financial position. The evidence reveals that Ms Harvey had concerns only in regard to Ms King’s conversation with *one* supplier, Bexley Flora. It is noted the staff member concerned (Francine) declined to assist the Authority with its investigation.

behaved this way to give her and her partner an advantage in the negotiations on the purchase of the business. It is this latter allegation, I find, that was the real reason behind Ms King's dismissal.

The problem with this dismissal is that was conceived and carried out in a manner that was completely inconsistent with the rules of natural justice (procedural fairness). The employer carried out no inquiry whatsoever into the allegation that was the real issue here. There being no full and fair inquiry it was just not possible for Ms Harvey to arrive at a genuine belief, honestly held that Ms King had engaged in the conduct complained of. The failure to carry out any inquiry was compounded by the failure to put the worker on notice of the allegation(s) against her (including notice of the seriousness with which those allegations were viewed), the failure to allow her the opportunity to obtain representation and the failure to allow her the opportunity to explain/refute the allegation(s).

I note for the sake of completeness that I accept Ms King's evidence relating to discussions on the morning of 26 April regarding the use of sunflowers and I find that nothing said by Ms Harvey that morning amounted to a clear instruction that sunflowers must be included in all corporate arrangements that day. Neither did the discussion escalate to the situation that Ms King was put on notice that failing to use the sunflowers as Ms Harvey wished would become an issue that could put Ms King's employment in jeopardy.

In conclusion, to answer the questions posed above (Issues to be Decided), I find that Ms Harvey carried out no fair and thorough inquiry into the concerns she had regarding Ms King's conduct and could not therefore have a reasonable belief, honestly held, there had indeed been serious misconduct on Ms King's part. In these circumstances Ms Harvey could not arrive at any reasonable decision that dismissal was appropriate in all the circumstances. In fact it is hard to imagine how more unfair this dismissal could have been and there is no question other than that this was an unjustified dismissal.

Determination

Ms King was unjustifiably dismissed and she has a personal grievance against the respondent Patricia Harvey t/a Flowers by Trish.

Remedies

S.124 of the Act dictates that I consider the extent to which (if at all) the worker contributed to the events that gave rise to the personal grievance.

I have found, however, that the real reason for the dismissal is that Ms Harvey had formed the opinion that Ms King had set about a course of conduct to undermine supplier(s)' confidence in the business with a view to destroying the value in the business so as to purchase it at a low price.

If Ms King had been found, after a fair and thorough inquiry (including an inquiry of the worker), to have undermined the reputation of the business for her own gain then that would have provided grounds for summary dismissal.

Given the absence of any inquiry whatsoever this allegation could not be relied on to justify dismissal. However, I must consider it to determine if there is any basis for reducing the compensation payable in this matter because of the contribution of the worker.

This is how I see it. It was not in dispute that the business was often in debt to suppliers and that suppliers often called to discuss the payment of their bills. Ms Harvey can hardly say the financial affairs of the business were unknown in the industry.

Further, at the time in question Flowers by Trish owed Bexley Flora \$5000. There would be nothing out of the ordinary for Bexley's to call to urge payment of its bill. I accept Ms King's evidence that it was her practice to be circumspect in such situations and to pass on Ms Harvey's telephone number and/or to leave messages for her. She denies saying anything in her conversation with Bexley's staff member that would have the effect of undermining Flowers by Trish.

I conclude that on the morning of 26 April Ms Harvey, who was fresh from robust negotiations with Mr Edmonds on the sale of the business where some of the realities going to the question of the value of the business had been pointed out to her, had a discussion with a member of Bexley's staff, Francine. Francine advised Ms Harvey she had phoned the shop and spoken to Ms King about an unpaid account. Ms Harvey jumped to the far fetched conclusion that Ms King had discussed the company's financial affairs with clients (plural) with a view to undermining the value of the business to her own advantage.

This was an erroneous and unsafe conclusion to arrive at especially having made no inquiry of the worker herself. Neither has Ms Harvey taken any steps to establish the veracity of her claim in this regard.

In conclusion, I find on the facts before me that Ms King was circumspect when fielding inquiries from creditors (which was a frequent occurrence) and did nothing to deliberately damage or undermine the respondent's business. For this reason I decline to weigh contribution by the worker in setting remedies in this matter.

Lastly on this it is hard to see how damaging the reputation of the business could possibly have benefited Ms King. In the first place it had been made known to Mr Edmonds and Ms King that if Ms Harvey did not achieve the purchase price sought (regardless of the value of the business) it would not be sold. Further, it would make no sense to undermine the reputation of Flowers by Trish if one hoped to make a profitable business of it.

Lost Remuneration

I am satisfied on the evidence that Ms King took serious steps to mitigate her loss. She obtained temporary employment approximately three weeks in May 2005 but did not find permanent full time employment until 8 August 2005. In all the circumstances of this case I direct that Ms King be reimbursed by the respondent for remuneration she lost in the six months following her dismissal. I calculate that sum to be \$7,871 gross.

The respondent is directed to pay to the applicant the sum of \$7,871 gross to reimburse her for remuneration lost as a result of the personal grievance she has suffered. (Paye is to be deducted from this sum).

Compensation pursuant to s.123 (1) (c) (i)

I am satisfied on the evidence that this dismissal, coming as it did completely out of the blue, had a devastating effect on the worker. That effect was still visible at the investigation meeting held eight months after the dismissal.

This was a totally unjustified dismissal effected without good reason and in a thoroughly unfair manner.

For these reason an award at the higher end of the scale is warranted.

Therefore, I direct the respondent to pay to the worker the sum of \$10,000 net to compensate her under this head.

Costs

I direct the respondent to pay to the worker ***the sum of \$1,500*** as a reasonable contribution to the costs incurred by her in pursuing her claim.

Janet Scott
Member of Employment Relations Authority