

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 470
5445269

BETWEEN ANTONINA KNIGHT
 Applicant

A N D PRINTEK SUPPLIES
 LIMITED t/a DATATEK
 PACIFIC
 Respondent

Member of Authority: T G Tetitaha

Representatives: S E Greening, Counsel for the Applicant
 H Patel, Counsel for the Respondent

Investigation Meeting: 14 November 2014 at Auckland

Submissions Received: 14 November 2014 from the Applicant
 14 November 2014 from the Respondent

Date of Oral
Determination: 14 November 2014

Date of Written
Determination 17 November 2014

ORAL DETERMINATION OF THE AUTHORITY

- A. Antonina Knight was unjustifiably dismissed by Printek Supplies Limited t/a Datatech.**
- B. I decline to award any remedy for lost remuneration under s123(1)(b) and s128 Employment Relations Act 2000 because Ms Knight has failed to mitigate her lost remuneration.**
- C. I decline to award any remedy under s123(1)(c)(ii) Employment Relations Act 2000 for lost benefits under the Paid Parental Leave Act 1987.**

- D. There is an order that Printek Supplies Limited t/a Datatech pay to Antonina Knight compensation of \$5,000 pursuant to s123(1)(c)(i) Employment Relations Act 2000.**
- E. There shall be no reduction for contributory conduct pursuant to s124 Employment Relations Act 2000.**
- F. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served within seven days of the date of this determination. The other party shall have seven days thereafter to file and serve a reply.**

Employment relationship problem

[1] Antonina Knight alleges she was unjustifiably dismissed by Printek Supplies Limited t/a Datatek on 13 December 2013 for non-performance and excessive use of the internet.

Facts Leading to Dismissal

[2] On 2 August 2013 Ms Knight was employed as an account manager/BDM with an annual salary of \$45,000. Eighty five percent of her job was internet-based. This included finding and researching clients, using the MYOB accounting system, updating the respondent's Facebook page and creating promotional material. At the time, the respondent employed a total of four staff including Ms Knight.

[3] Ms Knight also ran a business "All About Tea" until October 2013. In October 2013 she started another small business known as "Creative Sand".

[4] On 7 October 2013, Rupesh Parikh, Managing Director, was alerted to telephone connectivity problems. The telephones ran through the internet connection. Mr Parikh contacted the internet consultant, Alatech Limited, to check about why the connectivity problems were occurring. Customers had been complaining about being unable to contact the respondent through the telephone system. Alatech Limited advised Mr Parikh this was due to excessive Facebook and YouTube usage.

[5] On 8 October 2013 a group email was sent to all staff about their excessive internet use. It asked everyone to monitor their use because it was affecting the telephone lines.

[6] On or about 2 November 2013, Ms Knight met with Kathy Bishop, Sales Director. It was agreed Ms Knight would sign a new employment agreement with reduced hours (25 hours per week) and a reduced salary (\$28,125 per annum).

[7] There is a dispute about whether certain meetings occurred through November 2013 about the employers concerns regarding Ms Knights internet usage and performance. I return to this later in my determination.

[8] On 13 December 2013, Ms Knight was called into a meeting with Mr Parikh and Ms Bishop. The meeting lasted for 10 minutes. At its conclusion, Ms Knight was dismissed.

[9] On 23 December 2013, Ms Knight's counsel raised a personal grievance with the respondent. A Statement of Problem was filed in the Authority on 10 May 2014. The matter is now before me for determination.

Issues

[10] The following issues arise:

- (a) Was Ms Knight's conduct misconduct which a fair and reasonable employer could have dismissed her for?
- (b) Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances?
- (c) If the dismissal was unjustified, what remedies (if any) should I award? What did Ms Knight do to mitigate her lost remuneration? Was there contributory conduct requiring a reduction in the remedies sought?

Was Ms Knight's conduct misconduct which a fair and reasonable employer could have dismissed her for?

[11] The respondent submits it is a small business, unsophisticated and there are language and communication difficulties. It followed an informal process using meetings with Ms Knight to raise its concerns. It accepts there was an oral warning was given to Ms Knight on 7 November 2013. Ms Knight was well aware that she had had excessive internet use and had been using work time to undertake personal business for the various businesses she had. It accepts that what it has done was not

as strictly as required by the law but it came against a background of concerns about dropping sales and customers being unable to access its phones. It submits even if it had done some investigation there were difficulties because Ms Knight had deleted or wiped off her browser history. Her explanation today that this was a habit of hers lacks genuineness. Even if it had tried to undertake an investigation of Ms Knight's browsing or internet use, it could not have obtained many results given her actions. The respondent further submits that there appears to be some sort of intention to conceal Ms Knight's behaviour.

[12] There is no doubt that Ms Knight's employment was terminated. Therefore the evidential onus falls upon an employer to justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action referred (s.103A(2) of the Employment Relations Act (Act). In applying that test I must consider the matters set out in s.103A(3) of the Act.

[13] I must not determine a dismissal unjustifiable if the procedural defects have been minor or did not result in the employee being treated unfairly (s.103A(5). Failure to meet any of the s.103A(3) tests is likely to result in dismissal being found to be unjustified.¹

[14] From the evidence, I understand Ms Knight was dismissed for two reasons. First, excessive internet use. Secondly, her use of work time to do personal business and that included unexplained absences from the workplace.

[15] Ms Knight produced certificates showing her good performance including the securing of a very good client supply contract. There were no performance reviews undertaken.

[16] No forensic evidence was produced showing Ms Knight used the internet excessively. This would have been useful given that 85% of her job was in fact internet-based. Her alleged excessive use of the internet could be attributable to her job alone. Even if she had deleted her browser history, there was no evidence this could not be recovered at all other than submission. At best the evidence confirmed the deletion but not the prospects of recovery.²

¹ *Angus v. Ports of Auckland* [2011] NZEmpC 160 at [26]
² Exhibit E Brief of Evidence R Parikh

[17] The deletion of the internet browsing history is also inconclusive. An employer may speculate that there is something to hide by deleting the internet browser history but without anything more, it is at best speculative. It does not reach or meet the balance of probabilities that is required for an employer to take further action.

[18] Other employees who gave evidence about Ms Knight being excessively on Facebook may be mistaken given this was part of her job or motivated to blame her to avoid the excessive use being attributed to them. They were not experts.

[19] The Facebook printout produced by Ms Bishop is inconclusive. It shows various entries during the working week on Thursday, 5 December and Tuesday to Thursday, 10-12 December 2013. However, there is no time stamp on those entries. They may have been made after work when Ms Knight was at home. At this time Ms Knight was only working 25 hours per week. She may not have been required at work when she made those entries. The remainder of the dates shown on the Facebook printout fall upon weekends or after the date Ms Knight was dismissed.

[20] It was accepted there was no policy about internet use.

[21] Standing back and looking at the evidence, it is at best equivocal. Ms Knight's conduct was not misconduct a fair and reasonable employer could have dismissed her for.

Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances?

[22] The respondent submits although it may not have complied with the statutory requirements, there were a number of informal meetings through November 2013.

[23] I do not accept that these meetings met the tests set out in s.103A(3) of the Act. An employer must sufficiently investigate concerns, raise those concerns with the employee, give the employee an reasonable opportunity to respond to those concerns and genuinely consider those responses before the dismissing the employee.

[24] The evidence before me showed the dismissal on 13 December 2013 was immediate and abrupt. There was insufficient investigation, no prior raising of the concerns with Ms Knight, no opportunity for Ms Knight to respond to the concerns about Facebook and excessive internet use before the dismissal decision was

communicated to her on 13 December 2013. These defects were not minor and did result in Ms Knight being treated unfairly (s103A(5)).

[25] I determine that Antonina Knight was unjustifiably dismissed by Printek Supplies Limited t/a Datatech.

Remedies

[26] Ms Knight has a personal grievance and therefore is entitled to remedies under s.123 of the Act.

[27] Ms Knight seeks lost wages. Section 128(1) requires the Authority to order lost remuneration equivalent to the lesser of the sum equal to the loss of remuneration or to three months' ordinary time remuneration. However, Ms Knight must act reasonably to mitigate her loss of wages. An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.³

[28] In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like⁴. Ms Knight made minimal efforts to find alternative employment. She sent a few emails over two weeks in December 2013. She submitted she found nothing in the sales and administration field then became somewhat depressed. That is insufficient to show mitigation. Issues of depression are relevant to compensation below.

[29] Accordingly, I decline to award any remedy for lost remuneration under s123(1)(b) and s128 Employment Relations Act 2000 because Ms Knight has failed to mitigate her lost remuneration.

Lost benefits

[30] Ms Knight also seeks an award under s.123(1)(c)(ii) of lost benefits equivalent to what she would have received in the form of parental leave under the Parental

³ *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

⁴ *Allen v Transpacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]

Leave and Employment Protection Act 1987. This is because she was pregnant at the time of the dismissal.

[31] Section 31 of the Parental Leave and Employment Protection Act 1987 requires an employee who wishes to take parental leave to give written notice to the employee's employer of their wish to take that leave (s.31(1)).

[32] Section 35 of that Act states that an employee who fails to give notice shall not be entitled to take extended leave under the Act unless they fall within the criteria of s.35(1)(a) to (b). This also requires the employee to give written notice and/or that the employer agrees to that employee taking that leave irrespective.

[33] I have no evidence that such notification was given to the employer. Ms Knight also admitted the respondent did not know she was pregnant at the time of the dismissal. At the time of the dismissal, Ms Knight also would not have met the eligibility criteria in s7 regarding 6 to 12 months continuous employment.

[34] Accordingly I decline to award any remedy under s123(1)(c)(ii) Employment Relations Act 2000 for lost benefits under the Paid Parental Leave Act 1987.

Hurt and humiliation

[35] Ms Knight seeks an award for hurt and humiliation \$10,000. She submits the lack of process left her 'shell shocked' and she had to endure the humiliation of leaving in front of other staff that had been told about her dismissal before she left. She refers to the financial impact upon her family as well. She suffered some depression requiring counselling. She was also angry and very upset.

[36] The amount of compensation for injury to feelings or other distress must be referable only to the harm done by the employer's behaviour.⁵ There is sparse evidence to support a large award of hurt and humiliation damages. There is no medical evidence. Taking into account her evidence, an appropriate award is \$5,000 in these circumstances.

[37] Section 124 of the Act requires me to consider the extent to which Ms Knight's actions contributed towards the situation that gave rise to the personal grievance. Having heard from both parties and especially in light of my

⁵ *New Zealand Institute of Fashion Technology v. Aken* [2004] 2 ERNZ 340 at 344

determination regarding the substantive justification for dismissal and the procedural justification, I can find no contributory conduct by Ms Knight towards this personal grievance. There shall be no reduction for contributory conduct pursuant to s124 Employment Relations Act 2000.

Orders

[38] The following orders are now made.

- A. Antonina Knight was unjustifiably dismissed by Printek Supplies Limited t/a Datatech.
- B. I decline to award any remedy for lost remuneration under s123(1)(b) and s128 Employment Relations Act 2000 because Ms Knight has failed to mitigate her lost remuneration.
- C. I decline to award any remedy under s123(1)(c)(ii) Employment Relations Act 2000 for lost benefits under the Paid Parental Leave Act 1987.
- D. There is an order that Printek Supplies Limited t/a Datatech pay to Antonina Knight compensation of \$5,000 pursuant to s123(1)(c)(i) Employment Relations Act 2000.
- E. There shall be no reduction for contributory conduct pursuant to s124 Employment Relations Act 2000.
- F. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served within seven days of the date of this determination. The other party shall have seven days thereafter to file and serve a reply.

Addendum

[39] A party seeking costs must ensure they file copies of their actual invoices including a breakdown of fees incurred for mediation, preparation and attendance at hearing. If more than one counsel's fees are sought to be recovered, justification for

the recovery of both counsels' fees and separation of the work undertaken by each counsel is required.

[40] Parties must provide justification for costs sought in excess of the Authority's daily notional tariff (currently \$3,500).

[41] Failure to provide adequate information in support of a costs award may result in its refusal and costs to lie where they fall.

T G Tetitaha
Member of the Employment Relations Authority