

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 179
5308571

BETWEEN LAYLA LAING
 Applicant

A N D GEORGE WESTON FOODS
 (NEW ZEALAND) LTD
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in person assisted by Louisa Burrell
 Vlad Purgaric , Advocate for Respondent

Investigation Meeting 15 August 2011 at Oamaru

Date of Determination: 18 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Laing) alleges that she was unjustifiably dismissed from her employment as a merchandiser by the respondent (George Weston Foods). George Weston Foods resists the claim and say that the employer conducted a proper investigation into disciplinary allegations made against Ms Laing and reached a conclusion that a fair and reasonable employer would have made.

[2] Ms Laing commenced employment with George Weston Foods on 1 July 2008 working in a part-time capacity in the Oamaru area. Her role necessitated her

attending at the various supermarkets in the district and replenishing stocks of her employer's products.

[3] Ms Laing maintains that she was a diligent employee and certainly, there are no disciplinary warnings before the Authority up to the point at which George Weston Foods commenced its final disciplinary investigation.

[4] The first documentary evidence available to Ms Laing that all was not well in the employment relationship was a letter from George Weston Foods dated 28 January 2010 in which it set out an allegation of serious misconduct which was alleged to have happened at Oamaru's Northside New World store on 20 January 2010. The letter requested Ms Laing's attendance at a disciplinary meeting on 2 February 2010.

[5] This letter however was not the first sign of trouble because Ms Laing had received a telephone call from a George Weston Foods' Manager advising her that she was *banned* from the North Side New World store in Oamaru. Ms Laing was not told during this telephone discussion why she was banned and it was not until she received the 28 January letter some days later that she was able to make the link between the two communications.

[6] Ms Laing was unable to get her usual support person (Ms Burrell) to attend the disciplinary meeting to which she had been summoned, Ms Burrell having left Oamaru for Christchurch to attend the funeral of her sister. George Weston Foods says that the disciplinary meeting on 2 February 2010 proceeded after its presiding manager Carolyn Moyle, the Regional Sales Manager, had satisfied herself that Ms Laing was *comfortable* about proceeding with the meeting in the absence of a support person. Ms Laing was as clear as could be in her evidence to me that she was in no sense *comfortable* about proceeding but was given no choice by the employer.

[7] The disciplinary meeting proceeded over something less than one hour in the morning of 2 February 2010 and Ms Laing makes a number of criticisms of the approach taken by George Weston Foods. First, she says that at no time until the Employment Relations Authority's processes started had she seen the written complaints on which George Weston Foods proceeded against her. In particular, those written complaints were not made available to her at the disciplinary meeting and indeed, as I noted above, she did not actually see them until long after her

dismissal had been effected. This is so notwithstanding the fact that those complaints about her are dated 23 January 2010, that is to say nine days before the disciplinary meeting.

[8] Ms Laing told me that she had absolutely rejected the wrongdoing of which she was accused in the general way in which it was put to her by George Weston Foods. Of course, had she had the opportunity to review the written complaints on which the employer acted, she might well have been able to make a better and fuller defence of her position. But the point remains that she was adamant in the evidence she gave me that she absolutely denied the elements of the wrongdoing of which she was accused. Those elements were:

- *Using abusive, threatening and offensive language and behaviour in the workplace;*
- *Being violent;*
- *Harassing and bullying a customer.*

[9] Ms Laing told me that she did not use bad language and she provided some evidence to corroborate that position. She also denied being violent and made the point that the allegations of violence were made by a young man who was, she said, at least 6ft tall and on the Authority's own assessment of Ms Laing herself, she would be 5ft 2in tall. Finally, the allegation that Ms Laing had *harassed and bullied a customer* was denied and indeed Ms Laing's position was that if there were any harassment at all it was the other way around with the young man who made the principal complaint harassing and bullying her on a regular basis.

[10] Ms Laing says that in the face of that trenchant denial of wrongdoing, she would have expected George Weston Foods to revert to the store where these events allegedly occurred and seek comment from the store owner and the complainant and other witnesses about what she said. In fact, Ms Laing says that there was no attempt made by George Weston Foods to put her side of the story to the complainant and his supporting witnesses nor was there any attempt by George Weston Foods to speak again directly to the store owner, presumably the person who originally banned Ms Laing from attending at the store.

[11] Furthermore, Ms Laing took it upon herself after the dismissal to contact the store owner in relation to the alleged banning only to be told by the store owner that he had never banned her from the store at all. Furthermore, the store owner allegedly

told Ms Laing that he had not been consulted by George Weston Foods after the disciplinary meeting.

[12] Ms Laing also complains that at the 2 February disciplinary meeting, George Weston Foods' Manager Carolyn Moyle asked her the names of the young men involved in the incident as if she (Carolyn Moyle) did not know who they were and may not even have seen their statements at the time she conducted the disciplinary meeting.

[13] Finally, Ms Laing complains that the notes of the disciplinary meeting are not accurate and have been *adjusted* after the notes were taken but before copies were made available to her some weeks later.

[14] At the conclusion of the disciplinary meeting, Ms Laing is clear that there was no decision made by the employer and she remembers thinking at the time that she thought that the meeting had gone tolerably well from her perspective. She was somewhat surprised then to receive a telephone call at 4.07pm on that same afternoon from one of the George Weston Foods' managers asking her to attend at the Oamaru depot. At the meeting at the Oamaru depot which took place at around 4.30pm on that same afternoon, Ms Laing was asked to sign a document. Ms Laing explained to me that the document was put to her as the second page of a two page document. She asked to see and read the first page. The first page was her letter of dismissal. She had never seen that letter before and had no prior warning that she was dismissed from her employment nor was she given any opportunity to comment on the issue of penalty after the employer had concluded that the conduct complained of was indeed serious misconduct.

[15] Having read the first page of the letter, which of course is dated 2 February 2010, Ms Laing was then puzzled to see the second page requiring her signature referred not to a letter of dismissal but to a record of warning. The copy of this document provided to the Authority has the word warning underlined and then somebody has written beside it a second version of the word warning. Ms Laing thinks that the underlining of the typed written word warning was hers. She proceeded to sign the document under the heading *employee acknowledgement* but then added the following message in her own handwriting at the bottom:

Dear Carolyn,

I will sign the dismissal form but I cannot agree with the accusations made of me by members of North Side New World staff. I accept that I am banned from NSNW (North Side New World) which affects my employment with GWF (George Weston Foods) a little bit on my part and a huge amount of pressure on the other side has led to my termination with GWF. Sorry that it went that way. Enjoyed my work and time with the company. Cheers. Layla Laing signed under duress bullied out of my job.

[16] In much the same way as Ms Laing did not receive a copy of the notes of the disciplinary meeting, she also was not given a copy of the disciplinary letter and had to wait until 25 March before that copy document was provided to her in the mail.

[17] The parties attended mediation but were unable to resolve their differences there and the matter then proceeded to the Authority for investigation. The Authority's investigation was made a little more challenging than usual by the cold snap which affected the South Island of the country during mid August 2011. On the day appointed for the investigation meeting to proceed in Oamaru, Ms Laing was late to the investigation meeting because of snow falling in Oamaru and Mr Purgaric was unable to attend the investigation meeting at all because he was snow bound in Dunedin.

[18] The Authority proceeded to take Ms Laing's evidence first and gave Mr Purgaric an undertaking that George Weston Foods' evidence would be taken at a time and date convenient to the Authority and the employer. The evidence of the employer was taken on 14 September 2011 at Christchurch and subsequently, on 16 September 2011, the Authority spoke by telephone with Mr Brendon Murray, the owner of the Northside New World store at Oamaru.

[19] In the particular circumstances of this case, the Authority decided it would be appropriate to give the parties the opportunity to resolve matters on their own terms but in the result, their efforts were unsuccessful and this determination became necessary.

Issues

[20] For the purposes of determining this matter, it will be helpful if the Authority considers each of Ms Laing's objections to the process adopted by the employer. To that end, I intend to consider the following questions:

- (a) Did Ms Laing forego a support person?
- (b) Did Ms Laing see the written complaints?
- (c) Was Ms Laing's explanation properly considered?
- (d) What was the position of North Side New World?
- (e) Were the notes of the disciplinary meeting accurate?
- (f) How was the dismissal communicated?
- (g) Did Ms Laing receive timely copies of correspondence?

Did Ms Laing forego a support person?

[21] As I have already noted, Ms Laing was adamant that the disciplinary meeting convened for 2 February 2010 proceeded without her freely agreeing to take part in the absence of her support person. She says that she was given no choice in the matter. That is not how Carolyn Moyle, the Regional Sales Manager for George Weston Foods, remembers the situation at all. She told me that Ms Laing was *comfortable* about proceeding without a support person and the notes of the meeting taken by another George Weston Foods manager, confirmed that.

[22] Subject to the question of whether the minutes of the disciplinary meeting themselves are generally able to be relied upon or not, which I deal with further on in this determination, I am satisfied that on this point anyway Ms Laing is mistaken and that she made it plain enough to the employer that she was happy to proceed without a support person. If an employee says unequivocally that they are happy to proceed with a meeting in the absence of a support person, it is not fair for the employer to be required to second guess that consent and discern that the employee is not happy, when she or he says they are.

Did Ms Laing see the written complaints?

[23] I have already noted that Ms Laing claimed she was not shown the written complaints at the disciplinary meeting. This question can be dealt with shortly. Ms Moyle confirmed that she may not have given copies of the letters to Ms Laing at the disciplinary meeting. She went on to tell me that "*we didn't say who it was*" that had complained and "*she [Ms Laing] tried to guess who it was*". That suggests that

Ms Moyle's recollection, that the written complaints were not presented to Ms Laing, is correct.

[24] That assessment being consistent with Ms Laing's evidence, I am satisfied Ms Laing was not shown the written complaints, notwithstanding that they were dated 23 January 2010, as I have already noted, nine days before the disciplinary meeting. It follows they were in existence before the disciplinary meeting, available to the employer, and ought to have been made available by the employer to the employee.

Was Ms Laing's explanation properly considered?

[25] It will be recalled that Ms Laing thought she had given a good account of herself at the disciplinary meeting and felt reasonably positive about the outcome. However, she pointed out to me, and I accept, that she was only responding to general allegations consistent with the three bullet points in the employer's letter of 28 January 2010, summoning her to the disciplinary meeting. I have set the bullet points out in full in para.[8] of the determination but broadly they allege abusive language, violence, and harassing behaviour.

[26] George Weston Foods maintains that it properly assessed the material advanced by Ms Laing on her own behalf which I referred to especially in para.[9] of this determination. But the reality is that, without putting the actual complaints to the affected employee, it is not possible to accurately assess the nature of the rebuttal offered. Rebuttal of a general nature relating to general allegations is simply not the same as particular rebuttal directed at precise complaints.

[27] Furthermore, the meeting between the principal protagonists, having commenced at 10am on the morning of 2 February 2010, was over within an hour and by 4.30pm that same day, Ms Laing was looking at a letter of dismissal. That short time span tends to suggest a want of reflection and time to consider by the employer.

[28] It follows that I am not satisfied that Ms Laing has been given a proper opportunity to be heard in defence of the allegations made against her, principally because she was never actually shown the written statement of those allegations from the persons making the complaint at first instance.

What was the position of North Side New World?

[29] It will be recalled that Ms Laing was told by her immediate manager that she had been *banned* from North Side New World. Allegedly, this banning was because of the behaviour complained of. As part of the Authority's investigation, I spoke to the owner of North Side New World, Mr Brendon Murray, who told me that he had not *banned* Ms Laing at all, but had simply told George Weston Foods that because of the problems that Ms Laing was causing in his store, he did not want her merchandising in the store in the future. He says that he provided notes of the various incidents to George Weston Foods and these incidents included incidents of Ms Laing following some of his staff home on more than one occasion, confronting one of the staff members on his own doorstep, accusing one of the staff of stealing, and ultimately physically confronting one of New World's young male staff member in the store.

[30] Mr Murray also confirmed to me that he had received correspondence dated 30 November 2010 from Ms Laing and the parties subsequently had a short telephone conversation in which the owner of North Side New World confirmed to me that he had told Ms Laing that he had not banned her from the store but that the ban had been imposed by George Weston Foods, her employer. Either way, the factual position is that he had expressed to Ms Laing's employer his wish that Ms Laing not work in his store into the future and it had implemented that request in a way it thought was appropriate.

[31] I am satisfied then that North Side New World did tell George Weston Foods that Ms Laing was not to work in its store in the future, but that it was George Weston Foods' decision to refer to Ms Laing as having been *banned* from North Side New World, Oamaru.

Were the notes of the disciplinary meeting accurate?

[32] It is difficult for the Authority to form a view about the accuracy of the meeting notes in the absence of their author, Ms Ange Jarvis, who was Ms Laing's immediate manager. Ms Jarvis has ceased her employment with George Weston Foods and was not available to the Authority during its investigation. However, Ms Moyle, the Regional Sales Manager for George Weston Foods who presided at the

meeting, thinks the notes are accurate (although they are difficult to read), while Ms Laing regards the notes as having been *adjusted*.

[33] It is difficult to take this question any further; nothing turns on the accuracy or otherwise of the notes, save for the question whether Ms Laing did in fact agree to proceeding with the meeting without a support person present.

How was the dismissal communicated?

[34] Ms Laing's evidence, as I have already sketched, is that she received a telephone call at 4.07pm on the day of the disciplinary meeting. That call was from Ms Jarvis, her immediate manager, who instructed her, allegedly without preamble or further explanation, to report to the Oamaru depot at 4.30pm. When Ms Laing did that, she was confronted with Ms Jarvis inviting her to sign, in effect for the receipt of her own letter of dismissal, but without first showing her the letter of dismissal itself. Because Ms Jarvis is not available to the Authority's investigation, it has not been possible to take her evidence and assess her recollection of these events.

[35] If it is true that Ms Jarvis initially failed to show Ms Laing the letter of dismissal and sought only to get Ms Laing to sign receipt of it, that would be grossly unfair. Certainly, Ms Moyle confirmed to me in her evidence that she had no further part in the dismissal process after the disciplinary meeting that she presided over and her subsequent telephone discussion with the owner of North Side New World which happened during the course of that same day, 2 February 2010. Ms Moyle also participated in the preparation of the letter of dismissal, and while the letter is ostensibly to be signed by her, it was in fact pp'd by another staff member of George Weston Foods. Certainly Ms Moyle told me that she did not personally communicate the fact of the dismissal to Ms Laing.

[36] It follows that the communication of the dismissal of Ms Laing by George Weston Foods happened solely at the Oamaru depot at 4.30pm and following. Ms Laing's evidence is that Ms Jarvis told her nothing and it was only Ms Laing's own insistence on seeing the letter of dismissal (which was stapled to the front of the second sheet which Ms Laing eventually signed to acknowledge), that Ms Laing found out that she had, in fact, been dismissed. In the Authority's view, that process of conveying a dismissal in that haphazard and unstructured way is not in accordance with principle and not the action of a fair and reasonable employer.

Did Ms Laing receive timely copies of correspondence?

[37] Ms Laing's evidence is that Ms Jarvis was supposed to supply this material and I accept that that seems likely. George Weston Foods, in its evidence, also thought Ms Jarvis would be the appropriate point of contact. However, Ms Laing says that she did not receive timely copies of correspondence, including the letter of dismissal, of which there was apparently only one copy at the meeting at the Oamaru depot. On the evidence before the Authority, I have to accept that Ms Laing did not receive timely copies of correspondence.

Determination

[38] I have no hesitation in concluding that Ms Laing has a personal grievance as a consequence of being unjustifiably dismissed. I reach this conclusion for two principal reasons. The first is George Weston Foods' failure to provide Ms Laing with copies of the written complaints about her to facilitate her response to those complaints. The failure to do that is unfair and prejudices the ability of the complainant to give a full account of the circumstances and perhaps to satisfy the employer that there is an innocent explanation to the matters in contention. The second major reason I consider the dismissal unjustified is the process used by George Weston Foods to deliver the decision to dismiss. As I have described it, based on the evidence available to the Authority, it is not a dismissal effected by a fair and just employer. There is, as George Weston Foods now accepts, no reason either in law or in practice to require an employee to acknowledge in writing, either receipt of a warning or receipt of a dismissal letter. What was extraordinary about the present circumstance, apart from this archaic process of seeking a receipted acknowledgment from the employee, was the fact that the acknowledgment plainly referred to a warning whereas the letter itself was actually a letter of dismissal. But the main concern about the dismissal process was not the attachment or otherwise of a receipt to the letter of dismissal, but rather the unsatisfactory way in which the fact of the dismissal was communicated to the dismissed employee. Ms Laing ought to have been told by the decision-maker that she had been dismissed, and why, and that decision ought to have been conveyed in person or, at the very least, in a personal telephone call. Leaving it to a subordinate to pass on a letter, which it seems the subordinate did not even want to give Ms Laing until she had signed for its receipt, is

a poor process indeed and does not, in my opinion, conform with the dictates of New Zealand's employment law.

[39] Having reached the conclusion that Ms Laing has suffered a personal grievance by reason of having been unjustifiably dismissed, it follows that, in principle anyway, she is entitled to remedies. However, before considering that aspect, I must turn, as the statute requires, to the question of contribution. The Act requires me to consider whether Ms Laing has contributed to the circumstances giving rise to her personal grievance.

[40] I am satisfied that in the present case Ms Laing has contributed significantly to the circumstances giving rise to her personal grievance. I do not accept Ms Laing's evidence that she was blameless in the complaint made against her. I much prefer the measured conclusions reached by the owner of North Side New World who was very clear in what he told me about Ms Laing's "*odd*" behaviour and his determination not to continue to tolerate that behaviour in his store. Ms Laing sought to persuade me that the harassment was against her rather than perpetrated by her; I do not accept that on the evidence available to me. The complaints of verbal and physical abuse by Ms Laing are less clearly made out, but there seems no doubt in my mind that the harassment allegation against Ms Laing was clearly made out and ought to have been dealt with by the employer. Indeed, this is a case where, had the employer dealt appropriately with the information at its disposal, the Authority's fundamental conclusion in this matter might well have been different.

[41] I assess the contribution of Ms Laing at 50%.

[42] Taking that contribution figure into account, I think Ms Laing is entitled to compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$1000 and I think a contribution to her wages of another \$500 would be appropriate. Both those figures reflect the 50% contribution finding that I have arrived at.

[43] In addition, she is entitled to have the Authority's filing fee reimbursed. George Weston Foods is to pay \$71.56 to Ms Laing in that regard, together with the compensation sum and wages already referred to.

Costs

[44] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority