

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Pamela Lawson (applicant)
AND	Alex Parsons t/a Napier Contract Cleaning (respondent)
REPRESENTATIVES	Tony Taunt for the applicant Alex Parsons represented himself
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Napier, 5 September 2006
DATE OF DETERMINATION	7 September 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Ms Lawson says that she was unjustifiably dismissed by Mr Parsons on or about 4 August 2005 – statement of problem received on 27 March 2006. She seeks compensation of \$15,000 for humiliation, etc, reimbursement for lost wages of \$5,115.99 nett (further witness statement provided at the investigation on 5 September) and full solicitor/client costs.

2. Mr Parsons says the applicant was dismissed for poor performance after being warned many times – statement in reply received on 5 April.
3. The parties have undertaken mediation.
4. By agreement, a one-day investigation was convened in Napier; it was concluded before midday. The parties usefully supplied witness statements in advance as well as on the day, along with relevant documentary evidence.

Summary of Key Events

5. The following key events are not in dispute.
6. Ms Lawson worked for Mr Parsons for approximately ten months, from October 2004. Her job was to clean the Port Ahuriri Primary School.
7. Ms Lawson had a written employment agreement which she signed on 20 October 2004. While the agreement refers to an attached job description no actual description was provided.
8. During the second week of July 2005 Mr Parsons left Ms Lawson a note. It reads verbatim:

Interior glass in doors

Vaccuming

dusting of shelves in library

benches in classrooms

mirrors in toilets

wipe down tops of tables &

shelves not the desk

vinyls need sweeping

Pam, when I arrived to do the

Vinyls, a board member ? was there and was not happy with the term

above needs attention before school

starts tomorrow. Please phone me for any further info.

Thank you

24/7/05

Alex

9. Ms Lawson rang Mr Parsons, as requested by the note. She says he told her to do what was specified on the note, which she did. Ms Lawson says "*some of the mess*" (statement of problem) was made by the caretaker installing shelves and a teacher who had been in one of the rooms prior to the commencement of the School term.
10. At this point the parties' respective accounts conflict: Mr Parsons says he and his wife (they are business partners) began getting complaints about Ms Lawson's performance soon after she commenced employment. He says he raised these matters "*many times*" with the applicant (statement in reply). The respondent says he specifically, and orally, warned Ms Lawson on 2 June and 29 July 2005 that she needed to improve her standard of cleaning or she would be replaced, i.e. dismissed. In support of his claim Mr Parsons relies on a file record he says he recorded on or shortly after the events that they record (file note produced by the respondent at the 5 September 2005 investigation). During the Authority's investigation Mr Parsons confirmed the computer he says he entered the file record into was not available for forensic examination, as it had been replaced because of a problem with its hard drive.
11. Ms Lawson denies receiving any complaints about her performance or that she was warned her employment was in jeopardy if her standards did not improve. She accepts that she received requests to undertake specific cleaning tasks from time to time (in particular, via the Cleaner's Book kept at the School and copied as an attachment to the statement in reply). The applicant says that the telephone call from Mr Parsons in which he advised her of her dismissal "*came as a shock because he had never told me that he was not happy with my standard of cleaning*" (statement of problem).
12. It is agreed that Ms Lawson was given one week's notice of her dismissal which she worked out, finishing on 12 August 2005.
13. The applicant says that, after her dismissal, she found it difficult to approach employers to find another job. She says she was scared that any potential employer would ask why she had left her last job as she would have been too

ashamed to say she had been sacked (Ms Lawson's second witness statement). The applicant says she applied unsuccessfully for a cleaning job in March 2006 but that her second attempt was successful and she commenced her present employment on 28 April 2006, i.e. 37-weeks after her termination.

Parties' Positions

14. As is made clear above, the applicant says she received no complaints about her work performance and no warnings that her employment was in jeopardy unless she improved her standards. The respondent claims Ms Lawson was advised many times by both himself and the School of the need to improve her performance, and that she was warned on two specific occasions her employment was at risk.

Discussion

15. Section 103A of the Act applies in respect of Ms Lawson's dismissal. I am required to determine, on an objective basis, whether the dismissal was justifiable, after considering the employer's actions and whether those actions "*were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred*".
16. Given the parties' opposing positions, a credibility finding is fundamental to the outcome of this application. For the following reasons I am satisfied that Ms Lawson's version of events is more credible and the she was unjustifiably dismissed.
17. Mr Parsons claims he issued specific oral warnings to the applicant on 2 June and 29 July 2005 that her employment was at risk if her cleaning standard did not improve. Ms Lawson denies receiving these warnings. Mr Parsons did not provide them to the applicant in writing. On a balance of probabilities basis, I am satisfied he did not issue any such warnings. I reach this conclusion because I note that Mr Parsons had no difficulty in writing out his requirements of the applicant dated 24 July 2005 (set out above), and because it is fair and reasonable to expect he would therefore have set out the more serious matter, that the applicant's employment was at risk, also in writing. He did not.

18. Furthermore, the note of 24 July makes no reference to any performance concerns and/or to Mr Parsons' claim that Ms Lawson had already received one warning that her employment was at risk. I am satisfied that, had a warning already been issued, it is likely the note would have made reference – directly or indirectly – to it, and linked what Mr Parsons claimed was another performance deficiency to an earlier warning for the same. In other words, if Mr Parsons' version of events were to be accepted (and it is not), the note of 24 July would have set out another warning to the applicant - which it plainly does not.
19. In terms of s. 103A, I find also that a fair and reasonable and prudent employer would set out their concerns in writing, not only as a safeguard to ensure a clear historic record, but also because it is reasonable to expect an employee to be given clear notice that their continued employment is at risk and what is required to them to avoid dismissal. I do not think this is too high a test in Mr Parsons' instance given his note to the applicant of 24 July and the file record he claims he kept in respect of Ms Lawson's performance.
20. Mr Parsons claims in his statement in reply that the applicant "*was told many times by me & the school*" about their dissatisfaction with her performance. That claim is not supported by the Cleaner's Book or any other evidence. As already noted, the Cleaner's Book records requests of Ms Lawson that she see to various matters. It does not however set out explicit records of dissatisfaction, nor is there an implied message of the same, for example, that might be drawn out of repeated requests for the same tasks to be undertaken. In the absence of an actual job description, and the extent of the cleaning tasks expected of the applicant, in 3-hours each night, I do not accept that the requests support the respondent's claim of performance shortcomings by Ms Lawson.
21. I am therefore satisfied that, in the absence of clear and reasonable warnings, Mr Parsons acted in breach of an employer's well-known obligation to give proper warnings about performance concerns, thereby procedurally and substantively unjustifiably dismissing the applicant: *Trotter v Telecom* [1993] 2 ERNZ 659, etc.

Remedies

22. Ms Lawson claims \$15,000 compensation for humiliation, etc and 37-weeks' lost wages totalling \$5,115.99. The basis of the claim for \$15,000 is the impact of the dismissal on the applicant, particularly given her 28-years association with the School. The applicant also attributes the delay in her seeking subsequent employment to the emotional impact on her of the dismissal. I do not accept either claim. Distressing as the dismissal was to the applicant, coming as it did without warning and in the context of her very long association with the School (but not in an employment context), the evidence provided by Ms Lawson does not support compensation at the level claimed. Her position was part-time (3-hours each night) and of limited duration (10-months). There is no suggestion that the loss of employment jeopardised the applicant's financial security or that of her family, or that it had significant career or future employment ramifications, or that it resulted in any objective loss of reputation in her community.
23. I also find insufficient evidence in the applicant's claim that she was effectively disabled by her unjustified dismissal to the extent of being unable to pursue further employment for over nine months. There is no medical or other independent evidence to support that claim.
24. Having heard and questioned the evidence brought by the applicant I am satisfied that compensation for humiliation is fairly and reasonably set at \$5,000: s. 123 (1) (c) (i) of the Act applied. I am also satisfied that Ms Lawson is entitled to recover wages lost for the 3-month period provided by s. 128 (2) of the Act. Consistent with the wages record provided at the investigation, the applicant is therefore entitled to recover the amount of \$1797.51 nett.

Contributory Fault

25. There is no evidence of contributing behaviour by Ms Lawson giving rise to her personal grievance. In particular, I do not accept that either the entries in the Cleaner's Book or Mr Parsons' note of 24 July amount to evidence of sub-standard performance which would otherwise equate to contributory conduct.

Determination

26. I find in favour of the applicant, Ms Pamela Lawson's, claim that she was unjustifiably dismissed by the respondent, Alex Parsons trading as Napier Contract Cleaners. Mr Parsons is therefore directed to pay the applicant the following sums:
- a. Compensation for humiliation, etc of \$5,000 (five thousand dollars); and
 - b. Lost wages totalling \$1,797.51 (one thousand, seven hundred and ninety-seven dollars and fifty-one cents) nett.
27. Costs are reserved. So as to assist the parties reach agreement on a fair and reasonable contribution to Ms Lawson's costs, I note here that – consistent with well-established case law – and in recognition of the modest scope of the applicant's claim, as reflected in the investigation being concluded in half of a day, that a sum of \$1,000 (one thousand dollars) could be anticipated as a likely costs award should that prove necessary.

Denis Asher

Member of Employment Relations Authority