

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Dayna Leever (applicant)
<b>AND</b>	Drake Personnel (NZ) Limited (respondent)
<b>REPRESENTATIVES</b>	Trish MacKinnon for the applicant Maurice O'Brien for the respondent
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	Wellington, 15 February 2005
<b>DATE OF DETERMINATION</b>	17 February 2005

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. The applicant, Dayna Leever, says she was unjustifiably dismissed by the respondent (the Company) – statement of problem received on 31 August 2004. She claims lost wages of \$4,477.20, compensation for humiliation, etc of, originally, \$8,000, but increased to \$12,000 on the morning of the investigation and costs.

2. The Company says the applicant was substantively and procedurally justifiably dismissed – statement in reply received 16 September.
3. Following the filing of Ms Leever's application the parties underwent mediation but their employment relationship problem remained unresolved.

### **Investigation**

4. During a telephone conference held on 8 November the parties agreed to a one-day investigation in Wellington. The parties subsequently agreed to an investigation date of 15 February 2005. The parties provided written statements in advance of the investigation. The applicant usefully provided bundles of relevant documents and a chronology of key events. The respondent did not dispute the accuracy of the chronology or challenge any of the documents produced by the applicant in her bundle.
5. The parties' effort during the investigation to settle this matter on their own terms was unsuccessful.

### **Background**

6. The parties are largely agreed as to the key events. They can be summarised as follows:
7. Ms Leever was appointed by the respondent to the position of customer services consultant based at a client contact centre in Wellington.
8. The applicant was employed by the Company from 16 March 2004 to her dismissal on 23 April of the same year – a period of 6 weeks and 2 days.
9. For the first three weeks of her employment Ms Leever attended training for her role: she successfully completed the training course meeting the required 80% pass mark.
10. Ms Leever spent only 10 days actually working as a customer service consultant before being summarily dismissed on non-performance grounds. Her actual working

days were: 8 April, 13 – 16 April and 19 – 23 April. Note: Easter fell on the period 9 – 12 April of that year.

11. On Friday 16 April (her fifth day on the job) Ms Leever had a late afternoon meeting with her team leader who told her that she needed to improve but that she was not to worry as her job was not at stake. Assistance and advice was also tendered to the applicant around this time in respect of the performance requirements of her job.
12. Late on Wednesday 21 April the applicant received a letter advising her, amongst other things, that she was required to attend a meeting to discuss her non-performance. The meeting was scheduled for 23 April. Ms Leever was advised she was entitled to have a support person present. She was also advised that disciplinary action including dismissal could result (document 2 in the applicant's bundle).
13. A record of the meeting was prepared by the respondent (document 3 of the applicant's bundle) and is said by it to be accurate. Ms Leever says the record is not entirely accurate: she denies some of the comments attributed to her and says that others are not recorded. I am satisfied little hangs on these differences.
14. At the conclusion of the 23 April meeting Ms Leever was summarily dismissed. The basis of her termination was set out in a subsequent letter from the respondent dated 28 July (document 6 in the applicant's bundle). Amongst other things it records that,
  1. *Dayna was employed as stated.*
  2. *During her initial period post-training she made many errors and generated customer complaints. They were discussed with her and extra coaching and training was provided.*
  3. *A disciplinary process was started when it became apparent that the extra training and coaching was not proving beneficial.*
  4. *During the disciplinary meeting Dayna's reaction to the concerns was simply one of denial. ...*
  5. *The meeting can be characterised as going around in circles. All attempts to get Dayna to recognise there was a serious problem were met with the same lack of acceptance.*

6. *You are correct that we have an obligation to allow time to improve. However, that obligation is based on the employee being willing and able to improve.*
7. *No(t) only did Dayna fail to show any willingness to improve, she failed to accept there even was anything to improve. Under such circumstances we as the employer have no options left. ...*
8. *Faced with customer complaints, significant evidence of errors including tapes of calls, and evidence of the ineffectiveness of extra coaching, it would be incredible for us to conclude there was no serious performance problem, so the only option left is termination. This was done.*
9. *You comment on the short space of time performing the job and assert it is unfair to dismiss so soon. I am sure you are aware of the Air New Zealand case where an employee was fired immediately post-training for poor attitude. We would characterise this as the same problem.*

...

*It is also clear to us that Dayna completely failed to accept there was a problem, and it is equally clear from this claim that that is still the case. I fail to see the merits of mediation when the parties are so far apart. Put another way, I doubt any amount of mediation assistance is going to change Dayna's view and I know it will not change ours. We therefore decline to attend.*

## **Discussion and Findings**

15. I find in favour of the applicant's claim that she was unjustifiably dismissed for the following reasons.
16. I am satisfied from the evidence presented to the investigation in respect of the process originally applied by the Company that it elected to summarily dismiss the applicant, as if she had repudiated the employment agreement by way of serious misconduct, when a fair and reasonable employer could not reach such a conclusion.
17. As is made clear above, the investigation quickly confirmed that there were few if any differences between the parties as to the significant events and facts.
18. During the investigation the parties quickly agreed that at issue was an application of the relevant law to the largely agreed facts.

19. While the applicant relied on a stream of case law including *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, the Company drew the Authority's attention to *Fowler v Air New Zealand Ltd*, unreported, 5 February 2003, Colgan J, AC 7/03. *Fowler* involved an unsuccessful application to the Employment Court for leave to appeal out of time in respect of an Employment Tribunal decision going against the appellant: it was refused.
20. Unfortunately for the respondent, I regard *Fowler* as supportive of the applicant's position. That is because, amongst other things, it describes as implicit an employer's obligation to continuously appraise a trainee's performance and not only point out shortcomings but advise about correcting those to achieve the objective of a training contract. The judgement also accepted the appellant's claim that his former employer was in breach of that obligation and for that reason the Court would have concluded that the respondent unjustifiably dismissed the appellant.
21. *Fowler* is also of little assistance to the respondent because there are few if any factual parallels between that judgement and Ms Leever's employment relationship problem. The appellant had completed a training programme but was not offered full time work whereas Ms Leever had completed a training programme and had commenced full time work. The Court held that that Tribunal wrongly concluded that the appellant had been counselled and assisted. If leave to appeal had been allowed the Court would have concluded that the respondent unjustifiably dismissed Mr Fowler for failure to comply with expectations of conduct that were insufficiently brought to his attention. However the evidence did not show that he would have been appointed at the end of his fixed term training programme and therefore he would not have been entitled to losses or damages.
22. I am satisfied that *Trotter*, etc sets out the correct case law to be applied in this instance. That, and similar decisions, emphasise the following:
  - a. The test for any justified dismissal is the same: what was open to a fair and reasonable employer to do? Or, rephrased consistent with *W & H Newspapers v Oram* [2000] 2 ERNZ 448, what could a fair and reasonable employer do?

- b. A dismissal for poor performance is fundamentally no different from one for misconduct. In both cases the question is whether the employee's behaviour was a breach of the contract and was so serious that the employer was entitled to accept the repudiation of the contract.
  - c. The same requirements of fair and reasonable treatment apply in both situations. These requirements mean that the employee who may potentially be dismissed for poor performance must be given:
    - i. specific reasons for the dissatisfaction;
    - ii. reasonably specific and measurable improvements; and
    - iii. a reasonable period to establish whether the employee is able to achieve the improvement.
  - d. Without a fair trial of the employee's capacity the employer has no reasonable basis for reaching a conclusion adverse to the employee and must be treated as if it had not in fact reached such a conclusion. Was reasonable time allowed for the attainment of the required standards, etc?
23. In this case the employer agrees it elected not to provide the employee with a fair trial. No reasonable time was given for Ms Leever to attempt to attain the required standard. That the respondent has deliberately stepped outside of this approach is made crystal clear in the written statement provided by its HR Manager, Mr Mario Chetcuti. He says,

*Under normal circumstances the performance issues that we were having with Dayna would have been dealt with through coaching and possibly written warnings if improvements were not made. In Dayna's case, based on her responses and continued reluctance to accept that her performance was a long way from acceptable. I was left with no confidence that Dayna would improve, primarily because I felt that if she refused to accept the need to change then the realistic possibility of change was nil. I therefore felt I had no option other than to terminate her employment as I had lost all confidence in her willingness to make the necessary changes.*

24. What was abnormal about Ms Leever's situation? The Company elected not to give Ms Leever a reasonable period to establish whether she was able to achieve the improvement required of her because it was of the view that the applicant refused to accept the need to change. Mr Chetcuti says he reached that view in his interview with the applicant on Friday 23 April. He explained that his decision was based not on what the applicant said but on the tone or flavour of Ms Leever's comments – something he says is not recorded in the record of that meeting. The difficulty with Mr Chetcuti, and hence the Company's, approach is that it is entirely subjective, whereas the purpose of providing a reasonable period is that of ensuring performance is objectively measurable. Forgoing the opportunity that case law clearly requires means that, in this instance, the respondent cannot justify its decision to dismiss the applicant.
25. The claim about the tone and flavour of the applicant's comments is simply not credible: it flies in the face of the evidence of Ms Leever's actual language. A close and objective evaluation of the record of the 23 April meeting clearly shows that there was no evidential basis to support that view. It is not the action of a fair and reasonable employer. A measured response was required, one based on giving the applicant a real opportunity to meet her employer's legitimate requirement.
26. The respondent's assessment also failed to take objective account of the situation: Ms Leever's first advice that her employment was in jeopardy was only put to her as recently as the letter of 21 April. The investigation confirmed Ms Leever's claim that, as recently as 16 April (and as accepted by the Company), the applicant was told by her team leader that she needed to improve but was not to worry as her job was not at stake.
27. I do not accept that the respondent could fairly and reasonably reach the conclusion it did, as to the 'tone' or 'flavour' of the applicant's comments, because the 23 April interview record shows that,
  - a. Ms Leever was uncertain as to the purpose of the meeting (line 2, 1<sup>st</sup> page of document 3);

- b. She was of the view that she had not been provided with the time to prove herself (e.g. line 20, 1<sup>st</sup> page; line 4, 6<sup>th</sup> page);
  - c. She clearly believed in herself and her ability to improve (e.g. line 1, 2<sup>nd</sup> page; line 17, 8<sup>th</sup> page); and
  - d. She did not expressly or impliedly refuse to accept the need to improve her performance.
28. As I make clear above, any evidence of hesitation by the applicant can be explained by the fact that Ms Leever – at short notice and in the face of earlier advice to the contrary – was having to come to terms with the specifics of alleged non-performance and, as a consequence, the fact that her employment was very much at risk.
29. I am satisfied from an objective and fair scrutiny of the record of the 23 April interview, and the absence of any other evidence, that there is simply no fair and reasonable basis to support the respondent's conclusion that Ms Leever refused to accept the need to improve her behaviour. Instead, what the record makes clear is that, either before the commencement of the meeting or shortly after it had commenced, Mr Chetcuti's mindset toward the applicant was decidedly negative: shortly after the commencement of the 23 April meeting he made clear his view that he had little or no confidence in the applicant's ability (refer to 11<sup>th</sup> line, page 2; 20<sup>th</sup> line, page 3; 1<sup>st</sup> & 26<sup>th</sup> lines, page 5; etc).
30. I am satisfied from the above that the Company has adopted an entirely unfair process in respect of its concerns about the applicant's performance. No grounds have been adequately advanced by the respondent to support its decision to step outside an employer's well-known and clearly defined obligations in respect of poorly performing employees. There is no evidence suggesting that Ms Leever's performance was placing the respondent's contract with its client at risk or that her non-performance amounted to serious misconduct, such that immediate steps were required. No evidence has been advanced to in this case to justify the employer's deliberate refusal to provide the employee with a fair trial. There is no evidence to support the claim that Ms Leever was inflexible in her approach to the Company's legitimate performance requirements.

31. Consistent with *Trotter*, without a fair trial of the employee's capacity the employer has no reasonable basis for reaching a conclusion adverse to the employee.
32. I am reinforced in this conclusion by proper regard to clause 25 of Ms Leever's employment agreement. It provides that,

*For matters not considered to be serious misconduct, for example, but not limited to, performance shortfalls, the employment of the Employee may be terminated by notice in writing in accordance with the notice period set out in paragraph 9 of the Schedule (i.e. two weeks) **only after** the Employer has provided sufficient warning to the Employee.*

(emphasis added – document 1)

33. No evidence or argument has been advanced by the Company to justify its actions in breach of this plainly stated contractual requirement.
34. For reasons known only to itself the Company has elected to act outside of case law requirements that it admits to being clearly familiar with and its contracted undertakings to the applicant.

## **Remedies**

35. In her original statement of problem Ms Leever sought compensation of \$8,000 for humiliation, etc. That figure was increased on the day of the investigation to \$12,000. Counsel for the applicant, Ms Trish MacKinnon, explained that the increase was based on a reassessment of the humiliation, etc experienced by her client. However, no additional evidence was adduced to support the increase sought.
36. The applicant gave compelling and uncontested evidence of the impact and effects on her of her termination. Notwithstanding the blow to her self-esteem, Ms Leever promptly set about finding new employment. Within a relatively brief period she successfully found fresh employment. Any concerns she may have felt about the termination and its effect on her prospects of fresh employment were mitigated by her success.

37. But, I am satisfied that Ms Leever's humiliation was unnecessarily extended by the respondent's refusal to undertake mediation until after the matter had been filed with the Authority (refer to Mr O'Brien's letter of 19 July 2004 – document 5 in the bundle).
38. Having regard to the applicant's evidence of the humiliation, etc that she experienced arising out of her unjustified summary dismissal I accept the applicant's original submission that an award of \$8,000 is an appropriate level of compensation: ss. 123(c)(i) of the Act applied.
39. Because of her unjustified summary dismissal, the applicant is also entitled to recover wages for the intervening period of unemployment. I accept the claimed (and uncontested) calculation of \$4,477.20.

### **Contributing Behaviour**

40. The investigation disclosed no evidence of any action by Ms Leever's that contributed to the situation that gave rise to her personal grievance. I reach this conclusion notwithstanding the evidence that the applicant's performance during the brief period of her employment was clearly less than satisfactory. However, Ms Leever's was not responsible for the employer's subsequent decision to deny her any opportunity to address its concerns. As a consequence the applicant cannot be fairly held to have contributed in any way to the situation giving rise to her grievance: s. 124 of the Act applied.

### **Determination**

41. For the reasons set out above I find in favour of Dayna Leever's claim that she was unjustifiably summarily dismissed by the respondent, Drake Personnel (NZ) Limited.
42. I therefore direct the respondent to pay to the applicant \$8,000.00 (eight thousand dollars) compensation for humiliation, etc.
43. The respondent is also to pay to the applicant the sum of \$4,477.20 (four thousand four hundred and seventy seven dollars and twenty cents) being wages lost to Ms Leever's.
44. As requested costs are reserved.

**Denis Asher**  
**Member of Employment Relations Authority**