

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 331/08
5103717

BETWEEN Doreen Lelieveld
AND Tir Na Nog Enterprises Ltd

Member of Authority: Janet Scott
Representatives: Kerry Single for applicant
 Dessie and Rosina Cox for respondent
Investigation Meeting: 19 August 2008 in Tauranga
Submissions Received 3 September 2008 for applicant
 10 September for respondent
Determination: 22 September 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant submits she was unjustifiably dismissed by the respondent. To remedy her alleged grievance she seeks lost remuneration and compensation pursuant to s.123 (1) (c) (i). The applicant also seeks wages and holiday pay allegedly still owing to her after her dismissal.

[2] The respondent denies that it unjustifiably dismissed the applicant and says she was justifiably dismissed for serious misconduct.

Issues for Determination

- Was Ms Lelieveld unjustifiably dismissed?
- If she was, how should her personal grievance be remedied?

Background

[3] The respondent company owns and operates a suit hire business. The current owners Dessie and Rosie Cox bought the franchise business in October 2006. Ms Lelieveld had been employed by the previous owner and when the business transferred to the Cox's her employment transferred to the new owners.

[4] In the initial period of her employment with the respondent the applicant worked part-time. However, from early November the applicant worked full-time albeit only 15 hours per week was recorded and paid through the company books and Ms Lelieveld received a cash payment "under the table" for the bulk of the hours worked by her. Apparently this arrangement was entered into so Ms Lelieveld's benefit would not be affected. In effect both parties were conspiring to deny Inland Revenue the tax rightly payable on Ms Lelieveld's earnings.

[5] However, from 24 March 2007 this practice was rectified and Ms Lelieveld worked full-time for 37.5 hours per week and the appropriate tax was deducted from her earnings.

[6] Ms Lelieveld was dismissed on the evening of the wedding celebrations which followed the wedding of Dessie and Rosie Cox. The wedding took place on 20 September 2007 at 2pm. Mr Cox's family, including his father and sister, came from Ireland to attend and celebrate the nuptials. The Cox's closed the business for the day so staff could attend the wedding. The reception was held at a local restaurant/lodge and the newly wed couple planned to spend their wedding night there.

[7] To understand why Ms Lelieveld was dismissed it is necessary to take one or two steps back in time.

[8] In early 2007 Rosie Cox's son (Chris Morrison) and his partner (Lauren Tulitt) moved to Tauranga from Wellington. Ms Tulitt commenced working part-time in the Cox's business. She worked there for approximately three months. During this period Doreen Lelieveld shared with Ms Tulitt details of incidents she had seen and heard which led her to be concerned about the relationship between Dessie Cox and Rosie Morrison (now Cox). Ms Tulitt reported Ms Lelieveld's concerns to her partner, Mrs Cox's son, Chris. The evidence suggests he too was genuinely concerned about these reports.

[9] When the wedding rolled around Mrs Cox's other son, Ben, came to Tauranga from Christchurch for the wedding. He was accompanied by his partner Kirsty. On the

morning of the wedding Rosie's sons and their partners discussed the concerns relayed by Ms Lelieveld to Ms Tulitt.

[10] The wedding and reception went well. Alcohol was consumed. At some stage of the proceedings Ms Tulitt sat down and talked to Ms Lelieveld. Their conversation turned to Ms Lelieveld's concerns which had been heightened by a more recent event. (It is not necessary to detail these concerns in detail in my determination).

[11] During the evening Mr Cox Snr (Dessie's father,) became tired and went to lie down in the wedding night suite. At the end of the evening an argument developed between Dessie Cox and his sister about who was responsible for taking him home. Apparently, Dessie's sister wanted to go clubbing but Dessie and Rosie expected her to take Mr Cox Snr home so they could retire for the night. Apparently the exchange between Dessie and his sister was heated.

[12] Ms Tulitt, who was angry about the information she had received from Doreen Lelieveld that night, overheard this exchange and in her own words "poked her nose" into the argument between Dessie and his sister.

[13] I could not extract from witnesses details of what was said between Ms Tulitt and Mr Cox. However, the next thing was that Chris Morrison flew at Mr Cox and assaulted him with a bottle (in his hand).

[14] Ben Morrison became aware what was happening and together with the lodge owner he bundled his mother and Dessie into the Lodge where the door was shut. Chris and his partner and the other guests went home shortly thereafter.

[15] Inside the lodge Dessie and Rosie were somewhat bewildered by the turn events that had taken place and they asked Ben Morrison what was going on. He told them about the information relayed by Ms Lelieveld to Ms Tulitt.

[16] With no further ado Mr Cox telephoned Ms Lelieveld on her cell phone and dismissed her. Ms Lelieveld who was still at the Lodge when this call was made did not answer the phone before it rang off, but she immediately retrieved the message left by Mr Cox. That message accused her of causing the trouble that ensued that night and it was, she said, communicated in foul and insulting language. Ms Lelieveld said that she was told to drop the shop key off at the business the next day. Mr Cox said he was confident that he did indeed swear when he relayed the news to Ms Lelieveld that she was dismissed.

[17] Ms Lelieveld was shocked and upset at this message. She says she received another call after she got home that night but decided not to answer the phone. She hoped it would blow over and thought it was better to leave things lie till the next morning. However, on her way to work the next day she received a call from Dessie Cox to confirm she was dismissed and to leave the key at the shop with the other worker.

[18] There were numerous discussions over the following weeks between Ms Lelieveld and Mrs Cox and with Mr Cox. They are not relevant to the issue that I must decide. Suffice it to say there was no meeting of the minds between the parties.

Legal Test

[19] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new s.103A.

For the purposes of s.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.

[20] 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....***

[21] The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06). It was held there that the effect of s. 103A is to separate out the employers actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective of what a fair and reasonable employer would have done in all the circumstances. At paragraph 144 the Court said in respect of the case before it.

*“The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. **It must however show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct.** The employer is not required to conduct a trial or even a judicial process but **there are some fundamental requirements of natural justice which***

are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her." (Emphasis mine)

[22] The Court also noted that the objects of the Act including the object of good faith must inform any objective assessment of what a fair and reasonable employer would do in all the circumstances.

Discussion and Findings

[23] The hearing into this matter was characterised by amnesia. Ms Lelieveld could not remember the details of the period when she was being paid under the table. Mrs Cox was however able to provide that detail.

[24] Ben and Chris Morrison and Ms Tulitt were suffering collective amnesia in respect of the events of the night of 20 September 2007. However from their evidence in total I have arrived at a view of what happened that night.

[25] I find that from the time that Ms Tulitt informed her partner, Chris Morrison, of Ms Lelieveld's concerns about the relationship between Mr Cox and his mother he dwelt on this information and was worried about it. And the issue was at the forefront of his mind on the day of the wedding after the four young people discussed it that morning. The issue continued to percolate in Chris Morrison's mind as the day progressed and alcohol was consumed.

[26] Then Ms Tulitt reported to him the information received from Doreen Lelieveld during their discussions at the wedding reception. This added to Chris Morrison's anxiety.

[27] Ms Tulitt too admitted to being angry about this and when Dessie Cox got into an argument with his sister about taking his father home, Ms Tulitt intervened. Whatever, was said between Ms Tulitt and Mr Cox in this setting led Chris Morrison, who was standing nearby, to assault Mr Cox.

[28] When order was restored Mr and Mrs Cox asked Ben Morrison what had led to Chris Morrison assaulting Mr Cox. Ben Morrison revealed the nature of the discussions between Ms Lelieveld and Ms Tulitt earlier in the year and at the wedding reception earlier in the evening.

[29] Mr Cox's response to this news was to summarily dismiss Ms Lelieveld by way of a telephone message left on her cell phone.

[30] It was the evidence of Mr and Mrs Cox that they were justified in dismissing an employee who through slander and defamation had brought her employer into disrepute and undermined the trust and confidence essential to the employment relationship. Mrs Cox, too, was still very upset that Ms Lelieveld had had such a destructive effect on their wedding day.

[31] The question for the authority is "*was the respondent entitled to come to the conclusion that Ms Lelieveld's conduct amounted to serious misconduct which destroyed the essential trust and confidence necessary to the employment relationship*"?

[32] The answer to that question must be "*No, this dismissal was unjustified.*"

[33] Ms Lelieveld was accorded none of the steps required to shown by the employer that it has acted reasonably and with regard to the principles of natural justice. Ms Lelieveld was not put on notice of the allegations against her. She was not advised of her right to representation in a fair disciplinary process where she had the opportunity to provide an explanation in relation to the allegations and of course there was no sign here of the employer making enquiries with an open mind. Mr Cox did not even inquire of Chris Morrison the reasons for his actions. Nor, of course, was there a careful evaluation of the results of a proper inquiry (including the explanation provided by the worker) to determine whether or not serious misconduct had occurred.

[34] **Determination**

[35] The employer's actions in dismissing Ms Lelieveld were the antithesis of those of a fair and reasonable employer in all the circumstances at the time. Ms Lelieveld was unjustifiably dismissed and she has a personal grievance against her former employer.

Remedies

Contribution (s.124)

[36] In setting remedies in this matter I am required to consider whether the actions of the employee contributed to the situation that gave rise to the personal grievance

and if those actions so require reduce the remedies that would otherwise have been awarded accordingly.

[37] I find that the incidents (described by Ms Lelieveld to the Authority) were of a nature to raise genuine concerns in her mind and, on the telling, in the minds of Ms Tulitt and Mrs Cox's sons. However, there was no evidence to support a finding that Ms Lelieveld was speaking to others about these matters.

[38] It was impolitic of Ms Lelieveld and Ms Lauren Tulitt to rehash these concerns at the wedding reception and for Ms Lelieveld to describe the more recent incident. However, I find that she was not responsible for the state of mind that absorbed Chris Morrison that evening. Nor did she play any part in Ms Tulitt "poking her nose" into the argument between Mr Cox and his sister and it was not her who assaulted Mr Cox. I cannot, therefore, find that Ms Lelieveld contributed to the events that led to her personal grievance.

Lost remuneration (s.123 (1) (b))

[39] Ms Lelieveld obtained a new position on 12 December 2006 at a better rate of pay. By my calculation she has lost 11.5 weeks remuneration and *I direct the respondent to pay to Ms Lelieveld the sum of \$6,808 gross to remedy her for the remuneration she has lost as a result of her dismissal.*

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

[40] This was an arbitrary and unfair dismissal that left Ms Lelieveld shocked and upset. *I direct the respondent to pay to the applicant the sum of \$5,000 net under this head.*

Arrears of wages

[41] *By my calculation Ms Lelieveld is owed \$809.28 gross in arrears of wages and holiday pay due to her.* PAYE needs to be deducted from this sum and from the net figure that results there may be a deduction of \$160 net to reimburse the respondent for an outstanding loan it made to Ms Lelieveld. The respondent is directed to pay to Ms Lelieveld the sum remaining after these calculations as arrears of wages and holiday pay owing to her.

Costs

[42] Costs are reserved. The parties are to file submissions by 30 September 2008 to allow costs to be set.

Janet Scott

Member of the Employment Relations Authority