

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 158
5403129

BETWEEN

COLLEEN MATTINGLY
Applicant

A N D

STRATA TITLE
ADMINISTRATION LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Tim Oldfield, Counsel for Applicant
Gemma Mayes, Counsel for Respondent

Investigation Meeting: 11 April 2013 at Auckland

Submissions Received: 16 April 2013 from Applicant
22 April 2013 from Respondent
24 April 2013 from Applicant

Date of Determination: 01 May 2013

DETERMINATION OF THE AUTHORITY

A Strata Title Administration Limited's dismissal of Colleen Mattingly was unjustified. It is ordered to pay her:

- (i) \$7,465.38 lost remuneration; and**
- (ii) \$6,000 distress compensation.**

Employment relationship problem

[1] Mrs Mattingly was employed by Strata from 24 October 2008 until her summary dismissal on 24 October 2012. At the time of her dismissal her position was Senior Receptionist. Mrs Mattingly was a salaried employee who worked from 7.30am until 4.30pm Mondays – Fridays.

[2] On Friday 20 October 2012 (the day before Labour Weekend) Strata's Managing Director, Mr Michael (known as Brent) Williams advised some staff that they were able to leave early for the long weekend provided they could manage their workload appropriately. When Mr Williams came to Mrs Mattingly's work station at approximately 3.30pm she asked him if he had "*forgotten to mention something*" and referred to the fact that other staff had left or were leaving early.

[3] Mr Williams said he told Mrs Mattingly that she had to stay and answer the phones until the end of her shift (being 4.30pm). However, Mrs Mattingly left work around 4.10 or 4.15pm in order to attend a doctor's appointment and to collect some medication before the long weekend. Mrs Mattingly says she did not advise Mr Williams of her medical appointment because it had slipped her mind and when she left he was on the telephone.

[4] Mr Williams asked to see Mrs Mattingly when she returned to work on Tuesday 24 October 2012. Mr Williams wanted to discuss his concern about Mrs Mattingly leaving early but he did not tell her that in advance of the meeting. When Mr Williams asked Mrs Mattingly to come into his office he did not intend for their discussion to be a disciplinary meeting. He was trying to ascertain why she had left early when he believed he had told her she had to stay until the end of her shift.

[5] There is a significant conflict between Mrs Mattingly and Mr Williams about what each of them said and did during the meeting. Mrs Mattingly says she told Mr Williams she had needed to see her GP as her blood pressure pills and other medication had run out. Mrs Mattingly claims Mr Williams' response was that it would be better for her health if she no longer worked at Strata. He denies that.

[6] Mrs Mattingly says Mr Williams told her that "*he had had enough*" and that she "*was sacked*" and that "*he wanted her to leave now*". Mrs Mattingly claims her dismissal "*came from nowhere*" and that she could not believe what she had heard. She says she was shocked and very distressed and left the meeting crying.

[7] Mr Williams admits he dismissed Mrs Mattingly in the meeting but says he only did it because she provoked him into it by inviting him three times to sack her.

[8] Mr Williams says that when he attempted to discuss his concerns about Mrs Mattingly leaving the office early the previous Friday he told her that her action

“could give rise to a possible dismissal.” Mr Williams claims Mrs Mattingly responded belligerently to that by saying “*well sack me then*”.

[9] Mr Williams claims he told Mrs Mattingly it was not his intention to sack her but that she needed to realise she could be sacked because the matter was serious. He says Mrs Mattingly repeated “*well sack me then, I don’t care*”. Mr Williams says he asked Mrs Mattingly to reconsider whether that is what she really wanted to happen and that when she responded by saying “*I don’t care, sack me*” he felt he had no choice but to terminate her employment.

[10] Mrs Mattingly is adamant that she never invited Mr Williams to sack her. She says she loved her job and needed the income. She had also booked an expensive Christmas holiday cruise which she had paid for by credit card the week before she was dismissed so she says she would not have suggested to Mr Williams that he sack her.

[11] Mrs Mattingly claims her dismissal was unjustified. She also seeks a penalty for breach of good faith. Her claim of age discrimination was withdrawn before the Authority’s investigation meeting and her claim of disability discrimination was withdrawn during the Authority’s investigation meeting.

Issues

[12] The following issues need to be determined:

- a. Was Mrs Mattingly’s dismissal on 24 October 2012 justified?
- b. If not, what if any remedies should be awarded?
- c. Should a penalty for breach of good faith be imposed on Strata?

Was Mrs Mattingly’s summary dismissal justified?

[13] Justification is to be determined in light of the new justification test in section 103A of the Employment Relations Act 2000 (the Act). This requires the Authority to determine whether “*the employer’s actions, and how it acted, were what*

a fair and reasonable employer could have done in all the circumstances at the time the dismissal [...] occurred.”¹

[14] In applying the test set out above, the Authority must consider the four procedural fairness and natural justice tests set out in section 103A(3) of the Act. The Authority may also consider any other factors it considers appropriate² but it must not determine that a dismissal is unjustified solely because of minor process defects which did not result in the employee being treated unfairly.³

[15] An employer which is considering making a decision which may adversely impact on an employee’s ongoing employment is required under section 4(1A)(c) of the Act to provide that employee with access to information relevant to the decision and an opportunity to comment on it before a final decision is made.⁴

[16] A fair and reasonable employer is expected to comply with its statutory obligations, so a failure to do so is likely to undermine the employer’s ability to justify its actions.

Good faith

[17] I find that Strata did not comply with its good faith obligations under s.4(1A)(c) in the Act. It did not provide Mrs Mattingly with any information about its specific disciplinary concerns so it follows she could not have had an opportunity to comment on information relevant to her ongoing employment before she was dismissed. I find that this failure undermines the justification of Strata’s dismissal of Mrs Mattingly.

Procedural fairness

[18] Mr Williams admits he did not follow a fair or proper process before dismissing Mrs Mattingly. That was a proper concession to make because Strata is unable to meet any of the four tests in section 103A(3) of the Act. Mr Williams started the meeting as an informal discussion and then turned it into a serious misconduct disciplinary issue without ever informing Mrs Mattingly of that.

¹ Section 103A ERA

² Section 103A(4) ERA

³ Section 103A(5) ERA

⁴ Section 4(1A)(c)(i), (ii) ERA

[19] It is clear that Mrs Mattingly's dismissal was procedurally unfair. An informal discussion morphed without warning into a summary dismissal. No specific allegations were put to Mrs Mattingly to respond to, she did not have time to take advice or prepare her response.

[20] Mrs Mattingly did not know her ongoing employment was in jeopardy or that if Mr Williams was unsatisfied with her response to his concerns she could be dismissed. She was not given access to any information relevant to the alleged serious misconduct concern but was instead dismissed on the spot, completely out of the blue.

Section 103A(5) of the Act

[21] Strata submits the procedural deficiencies were minor and caused minimal prejudice or unfairness to Mrs Mattingly because she would have been dismissed anyway, given what it claims is the severity of her behaviour.

[22] I do not accept that submission. That complete lack of any process and the failure to follow even the most basic and well established natural justice and procedural fairness requirements cannot be categorised as minor process errors. The procedural flaws clearly resulted in significant unfairness to Mrs Mattingly. She was called in to a meeting and a few minutes later had been dismissed without having had any opportunity to address her employer's concerns.

[23] I find s.103A(5) of the Act does not preclude a finding of unjustified dismissal.

Substantive justification

[24] Strata claims it was entitled to summarily dismiss Mrs Mattingly because she invited Mr Williams three times to sack her. It says these comments amounted to serious misconduct which fundamentally undermined the employment relationship so that "*dismissal was inevitable and substantively justified*".

[25] I do not accept that submission. There is a serious conflict in the evidence about whether or not Mrs Mattingly made any of the comments Mr Williams attributes to her. The complete failure to investigate that fundamental conflict at all means Strata was not in a position where a fair and reasonable employer could have concluded in all the circumstances that Mrs Mattingly said the words in issue.

[26] Even if Mrs Mattingly had invited Mr Williams to sack her I consider that a fair and reasonable employer could not conclude that such comments amounted to serious misconduct, for which dismissal was the appropriate response, without first engaging in a disciplinary process which complied with its statutory procedural fairness and good faith obligations.

[27] Strata also says that even if it had followed a fair and proper process the outcome would have been the same. It submits the weight of the evidence supports Mr Williams's ultimate conclusion that he had no option but to dismiss Mrs Mattingly on the spot.

[28] I do not accept that. Mrs Mattingly strenuously denies provoking Mr Williams to sack her. She is adamant she never said anything that could be taken or misinterpreted in the way Mr Williams suggests. This is not a situation where Mrs Mattingly clearly engaged in the misconduct at issue. It is by no means certain that Mrs Mattingly would have been dismissed if a fair and impartial decision maker⁵ had embarked on a formal disciplinary process.

[29] I say that because a proper disciplinary process would enable the decision maker to make a fair and reasoned decision about the fundamental evidential conflict that existed. I consider there was a reasonable prospect that if someone other than Mr Williams had become involved in the matter it may have been resolved another way. Mr Williams acted out of anger and frustration which I consider Mrs Mattingly's previous (historical) disagreeable conduct towards him had exacerbated.

[30] I am not satisfied dismissal is an outcome that a fair and reasonable employer could have imposed in all the circumstances. I therefore find Strata is unable to substantively justify Mrs Mattingly's dismissal.

Remedies

Mitigation

[31] An employee has an obligation to mitigate their loss by taking reasonable and appropriate steps to obtain new employment. Failure to do so is likely to break the chain of causation between the dismissal and any remuneration which has been lost.

⁵ Not Mr Williams because he would be Strata's only witness and he was the person who believed he had been provoked into dismissing Mrs Mattingly.

[32] I am satisfied Mrs Mattingly took adequate steps during the three months after her dismissal. Mrs Mattingly was very distressed by her dismissal and understandably took some time to regain her emotional equilibrium before she could get back on her feet and start applying for jobs. Her confidence had been severely impacted by her dismissal.

[33] The Christmas and New Year holiday period can often be a challenging time of the year to be seeking new employment. Mrs Mattingly did obtain some casual paid work over this period through her daughter. Mrs Mattingly was away on her cruise from 23 December 2012 to 12 January 2013.

[34] I accept Mrs Mattingly's evidence that she looked for work on the internet but believed it was difficult for her to find new employment in the current job market because she was only partially computer literate and most advertised positions she saw wanted someone with computing skills.

Lost remuneration

[35] This is not merely a procedurally unjustified dismissal so there is no barrier to Mrs Mattingly recovering lost remuneration provided that any such loss is attributed to her dismissal and not a failure to mitigate.

[36] Three months' ordinary time remuneration for Mrs Mattingly is \$10,625, which I find is less than her actual lost wages. I am not prepared to award more than three months' lost remuneration because I do not consider that Mrs Mattingly took sufficient steps to mitigate her loss after that period. I consider that breaks the chain of causation between her dismissal and any loss she suffered post three months after her dismissal.

[37] I order Strata to pay Mrs Mattingly \$7,465.38 under section 128(2) of the Act being three months lost remuneration of \$10,625 less \$1,634.62 being the two weeks' ex gratia payment she was given upon termination and less the \$1,525 she earned from other employment

Distress compensation

[38] Mrs Mattingly gave evidence that she was extremely distressed by her dismissal. She felt humiliated crying in front of colleagues as she packed her

belongings and left the workplace, and considers she lost dignity due to the way she exited so abruptly.

[39] Mrs Mattingly says her dismissal has had a huge adverse impact on her life. She said she went into a deep depression and her confidence has suffered greatly. She has suffered financial pressure and difficulties as a result of losing her income particularly because she had committed to and paid for her cruise holiday by credit card the week before she was dismissed.

[40] Mrs Mattingly's partner described her as "*almost incoherent*" when she called to advise him of her dismissal and he expressed concern about her "*emotional physical health*". It was clear from Mrs Mattingly's tearful demeanour at the Authority's investigation meeting that she was still very emotional about her dismissal.

[41] Strata is ordered to pay Mrs Mattingly \$6,000 under section 123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she suffered as the result of her unjustified dismissal.

Contribution

[42] Having determined that Mrs Mattingly has a dismissal grievance, s.124 of the Act requires me to consider whether she contributed to the situation that gave rise to her grievance and, if so, reduce remedies accordingly. Contribution denotes blameworthy conduct on behalf of the employee which must be established on the balance of probabilities.

[43] I am not satisfied that Mrs Mattingly engaged in blameworthy conduct by leaving work 15 or 20 minutes early on the Friday before the public holiday weekend in order to see her GP so she could renew her prescription. Strata had previously been accommodating of her health issues and Mr Williams confirmed she would have been allowed to go early had she explained she needed to see her doctor.

[44] Mrs Mattingly should have asked Mr Williams for permission to leave but he was on the phone when she passed his office and she had to catch a train. However, I do not consider that forgetting to raise her medical appointment with Mr Williams is sufficiently blameworthy to require a reduction in remedies. She has already suffered

enough for that omission because it was the catalyst for Mr Williams meeting with her which resulted in her losing her job.

[45] I am not satisfied Strata established on the balance of probabilities that Mrs Mattingly invited Mr Williams to sack her. I was not convinced by Ms Carole Fann's evidence that Mrs Mattingly told her she had told Mr Williams to "*fire her*" because her recollection when giving evidence differed from that recorded in her statement. Mrs Mattingly was also extremely distressed and crying at the time she saw Ms Fann so I query whether she would have been in a state which would have facilitated her giving the speech Ms Fann attributes to her.

[46] In terms of the conflict between Mr Williams and Mrs Mattingly, I consider that the latter gets the benefit of my doubts about exactly what was said. Mr Williams lost control in the meeting. He acted rashly out of anger and frustration so I am not convinced his recall was unaffected by that.

[47] Mrs Mattingly had no reason to goad Mr Williams. She loved her job and was reliant on her income to cover living expenses. She had committed to an expensive holiday which she had paid by credit card the week before. She had no other job to go to and did not want to retire. Mrs Mattingly strenuously denied that she ever asked to be sacked and was adamant she did not want to lose her job.

[48] I am therefore not satisfied on the balance of probabilities that Mrs Mattingly did invite Mr Williams to sack her, either once, twice or three times as has been alleged. I therefore do not consider it appropriate to reduce remedies on the grounds of contribution.

Should a penalty for breach of good faith be imposed?

[49] A penalty may only be imposed if the requirements of s4A of the Act are met. That is not the case here so a penalty is not appropriate for the breach of good faith that occurred.

Costs

[50] Mrs Mattingly as the successful party is entitled to a contribution towards her legal costs. The parties are encouraged to resolve costs by agreement. If that is not

possible then Mrs Mattingly has 14 days within which to file a costs memorandum and Strata has 14 days within which to respond.

[51] The Authority will adopt its usual notional daily tariff approach to costs. The current notional daily tariff of \$3,500 which if necessary will then be adjusted to reflect the particular circumstances of this case.

Rachel Larmer
Member of the Employment Relations Authority