

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 87
5433389

BETWEEN JAN MAZZOLA
 Applicant

A N D TILE TRENDS LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Warwick Reid, Advocate for Applicant
 Kerry Single, Advocate for Respondent

Investigation Meeting: 27 February 2014 at Tauranga

Submissions Received: 27 February 2014 from Applicant
 4 March 2014 from Respondent

Date of Determination: 12 March 2014

DETERMINATION OF THE AUTHORITY

- A. The dismissal of Ms Jan Mazzola by Tile Trends Limited (Tile Trends) was unjustified. Ms Mazzola has a personal grievance.**
- B. Tile Trends is ordered to pay Ms Mazzola the sum of \$10,000.00 compensation pursuant to s123(1)(a) of the Employment Relations Act 2000(“the Act”) for humiliation, loss of dignity and injury to feelings suffered by her as a result of her unjustified dismissal.**
- C. Tile Trends is ordered to pay Ms Mazzola the sum of \$7280.00 gross being reimbursement of three months wages lost by Ms Mazzola as a result of the dismissal pursuant to s128(2) of the Act.**
- D. Costs are reserved.**

Employment relationship problem

[1] Tile Trends Limited (Tile Trends) is in the business of importing, distributing and retailing tiles and associated products. Tile Trends operates its business from a number of locations throughout New Zealand, including Tauranga where the applicant Ms Jan Mazzola was employed.

[2] Ms Mazzola was employed by Tile Trends in October 2003 as a retail sales person. Ms Mazzola's duties included sales, general sales administration, stock control, retail store maintenance, cleaning and other such duties. During her employment with Tile Trends, Ms Mazzola did not receive any verbal or written warnings in respect of her employment. There was an incident in September 2012 involving Ms Mazzola's behaviour at a work function, which led to a complaint by the Tauranga Branch Manager, Ms Cherie Sullivan. Ms Mazzola was spoken to about her conduct on that occasion and the matter was resolved. However, the incident and the complaint soured the relationship between Ms Mazzola and Ms Sullivan.

[3] In early July 2013, Mr Digovich, the retail manager of Tile Trends based in Wellington, received complaints from 2 tilers about Ms Mazzola's attitude to work and performance and claiming that she was giving a disproportionate amount of tiling work to her boyfriend, Mr Kevin Langford. Mr Digovich became concerned that Tile Trends would lose business. Mr Digovich met with one of the tilers, took his complaint and then requested Mr Kerry Single, an employment advocate to conduct an investigation into the complaints.

[4] During the course of the investigation, Mr Single and Mr Digovich became frustrated by what they believed to be delays and obstruction of the investigation by Ms Mazzola and her representative, Ms Rachel Rolston. At the investigation meeting held by Mr Single with Ms Mazzola and Ms Rolston on 14 August 2013, Ms Mazzola was dismissed.

[5] After her dismissal, Ms Mazzola raised a personal grievance, claiming her dismissal was unjustified and seeking remedies including compensation for the resulting hurt and humiliation suffered by her and the loss of wages.

[6] Despite attempts by the parties to settle their grievance including mediation assistance, no resolution was reached and the matter proceeded to an investigation by the Authority.

[7] Ms Mazzola seeks a determination that her dismissal was unjustifiable, seeks compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to feelings, reimbursement for lost wages pursuant to s.128(2) of the Act, compensation for loss of future earnings under s.128(3) of the Act together with costs and disbursements.

[8] Tile Trends resists Ms Mazzola's claims and says in all the circumstances the dismissal was justified.

Issues

[9] The Authority must determine the following issues:

- (a) Was Ms Mazzola's dismissal on 14 August 2013 unjustified;
- (b) If the dismissal was unjustified, what remedies (if any) should be awarded;
- (c) If remedies are awarded, should there be a reduction on the grounds of Ms Mazzola's contribution (if any) and by what extent?

First issue

Was Ms Mazzola's dismissal on 14 August 2013 unjustified?

[10] Ms Mazzola was dismissed by Tile Trends on 14 August 2013. The letter confirming Ms Mazzola's dismissal states:

... We have been attempting to fully investigate concerns that the company have surrounding your manner and attitude towards management and clients, which they believe is below that which they expect, and that attempts to informally discuss these concerns with you have not been successful.

This is having an effect on Clients and Management to such a degree that there are clients who will not come into the store when you are there or only want to be attended to by the Store Manager.

We have received a formal written complaint plus a number of other verbal complaints and comments regarding your manner and general lack of enthusiasm towards assisting Clients and Management.

These have been put forward to you in summarized form for your comments but you have advised through your Advocate that you will only respond if full reports are provided. You have been advised that they cannot all be provided and that there is enough information

provided in the summaries contained in the correspondence regarding these matters for you to respond in a manner that would have assisted us to decide whether to take further action or not in the process that was being undertaken.

Your failure and refusal to involve yourself with this process has not assisted us.

The seriousness of these concerns is such that there is a general loss of trust and confidence that the Employer has in you to generally fulfil and dutifully achieve the objectives as set out in Schedule A of your IEA.

As such, the Company advises that they are terminating your employment as of the 14th August 2013 with no requirement for you complete any notice period, and Company will pay you the 4 weeks in lieu of notice plus wages up until the 14th August 2013 plus any outstanding holiday entitlements ...

[11] Tile Trends claims the dismissal was justified because serious concerns were being investigated by it and Ms Mazzola and her representative Ms Rachel Rolston were not engaging in the process. As a result of the concerns and the failure to engage, it lost trust and confidence in Ms Mazzola to do her job.

[12] Justification is to be determined in accordance with the test in s.103A of the Act. This test requires the Authority to assess Tile Trends' "*actions and how it acted*" to determine whether the decision to dismiss Ms Mazzola and the process it followed were "*what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred*"¹.

[13] Ms Mazzola signed a written employment agreement with Tile Trends on 4 December 2004. On 3 December 2012, Ms Mazzola was provided with a new individual employment agreement which included a disciplinary process in clause 16 and provision for termination of employment in clause 18. A code of conduct was attached to the employment agreement as Schedule B which included a list of the types of behaviours which could constitute misconduct and serious misconduct and the consequences thereof.

[14] Ms Sullivan asked Ms Mazzola to sign and return the employment agreement, but for various reasons, including the unavailability of her representative at the time, never did so. At the Authority's investigation meeting, it was accepted by

¹ Section 103A of the Act

Ms Mazzola that the terms and conditions contained in the unsigned employment agreement of December 2012 were those she considered herself to be bound by.

[15] Mr Digovich says he was aware that for some time there were problems in Tauranga with Ms Mazzola, particularly in 2012 when Ms Sullivan complained about her. Mr Digovich accepted that this issue was resolved and no disciplinary warning was issued to Ms Mazzola. Mr Digovich says that even though no warnings were ever issued to Ms Mazzola during her employment, he had occasion to speak with her on a number of occasions about her attitude and performance.

[16] On one such occasion Mr Digovich says he worked through a role play involving a “*Mrs Jones*”, a pretend customer who wished to purchase a large quantity of tiles. Mr Digovich was disappointed by Ms Mazzola’s failure to offer the customer a discount in such circumstances. Mr Digovich felt Ms Mazzola should have known better given the length of time she had been employed by Tile Trends.

[17] Ms Sullivan said that for approximately three years prior to Ms Mazzola’s dismissal, she noticed changes in Ms Mazzola’s attitude to work and in her performance. Ms Sullivan says she spoke to Ms Mazzola on a number of occasions about these matters, but no notes were taken. Mr Digovich and Ms Sullivan both accept that no warnings were issued in relation to any matters concerning Ms Mazzola’s performance, attitude or product knowledge during the course of her employment. Both Mr Digovich and Ms Sullivan say there was one off training provided to Ms Mazzola “*on the job*” but no formalised or structured training.

[18] It is my finding that Ms Mazzola was spoken to by both Mr Digovich and Ms Sullivan about work in general. These discussions were carried out in the normal course of running a business and were not directed at any aspect of Ms Mazzola’s performance. The discussions were about such matters as resolving customer queries about products, how to upsell product and circumstances in which to offer discounts for example. The discussions were not held in the context of raising disciplinary issues with Ms Mazzola about her performance.

[19] On 13 June 2013, there was an ASA Waterproofing meeting at the Armitage hotel in Tauranga attended by a number of local tilers, including Mr Bridger, Mr Ian Goodger and Mike from “*Mike’s Tiles*”. Ms Sullivan attended on behalf of Tile Trends. The meeting was informal and more of a catch up of the tilers over “*a few*

beers". At the meeting, Mike told the other tilers that Ms Mazzola was favouring her boyfriend Mr Langford by giving him most of the tiling work and not them.

[20] The tilers became angry about this. Mr Goodger spoke with Ms Sullivan who told him to put a complaint in writing to Mr Digovich which he did by email on 8 July. The email complains about Ms Mazzola's "*indifference and unwillingness to get up and help people and her attitude*". The email finishes by informing Mr Digovich that Mr Goodger had passed the comments to Ms Sullivan and was asked by her to put them in writing.

[21] Mr Bridger also spoke with Ms Sullivan about the matter and was told by her that she had witnessed Ms Mazzola giving work to Mr Langford. In fact this was not correct. Ms Sullivan accepted at the Authority Investigation meeting that she could not see which names Ms Mazzola identified to customers when referring them to tilers. Ms Mazzola says she did not favour Mr Langford. Ms Mazzola said she referred customers to 2 or 3 tilers on the list of tilers and if there were small jobs Mr Langford was one of the tilers that customers were referred to. Ms Mazzola said this was because the other tilers including Mr Goodger and Mr Bridger would not take on small jobs. Ms Sullivan knew about this.

[22] Mr Bridger was angry after being told by Mike that Ms Mazzola was giving work to Mr Langford and not to the other tilers such as himself. Mr Bridger rang Mr Digovich within a week or two of the meeting at the Armitage hotel and complained about Ms Mazzola. Following the complaint, Mr Digovich asked Ms Sullivan to take notes about any issues she had with Ms Mazzola and any complaints received.

[23] Both Mr Digovich and Ms Sullivan complained that Ms Mazzola had not been performing in her role for quite some time. However, they did not inform Ms Mazzola of this nor did they go through a warning process as required by clause 16.2 of the employment agreement which may have rectified the situation if indeed Ms Mazzola was not performing. I find that apart from one incident in September 2012, no performance issues were raised with Ms Mazzola and no warnings ever issued to her in accordance with clause 16.3 of the employment agreement.

[24] Following the ASA Waterproofing meeting in June 2013, Mr Goodger and Mr Bridger both spoke to Ms Sullivan about Ms Mazzola and subsequently

complained to Mr Digovich. This was because Mr Bridger and Mr Goodger believed Ms Mazzola was referring work that should be referred to them, to her boyfriend Mr Langford.

[25] Following receipt of the complaints, I find Mr Digovich asked Ms Sullivan to take notes about Ms Mazzola and any issues with her performance. Ms Mazzola was not aware of the complaints or that notes were being taken about her by Ms Sullivan.

[26] Mr Digovich arranged to meet Mr Bridger to discuss the complaint when in Tauranga for business on 9 July. In his witness statement Mr Digovich says he had received complaints about Ms Mazzola from trade clients in mid 2013 and that:

9. *This came to a head when I received a letter from one of our longstanding trade clients who wrote expressing a number of concerns that he had with the performance and lack of knowledge that Jan had been displaying.*

[27] Mr Digovich's witness statement does not accurately portray what occurred.

[28] On 9 July, Mr Digovich met with Mr Bridger at McDonald's in Tauranga and took notes of his concerns about Ms Mazzola. Mr Bridger typed up the concerns as a letter of complaint, emailed it to Mr Bridger who amended it where necessary. I find that Mr Digovich assisted Mr Bridger in formulating a letter of complaint about Ms Mazzola which was then used by him to instigate an investigation into her performance and behaviour.

[29] Ms Sullivan met with the other tiler who complained about Ms Mazzola, Mr Goodger. Ms Sullivan assisted Mr Goodger by handwriting a letter of complaint about Ms Mazzola on 23 July. The formal investigation process into these complaints by Mr Single on behalf of Tile Trends commenced on 26 July.

[30] On Friday 26 July, Mr Single came into Tile Trends showroom and asked to see Ms Mazzola in Ms Sullivan's office. Ms Mazzola had no idea what the meeting was about and was shocked when she read the letter along with the attached complaint handed to her by Mr Single.

[31] The letter of 26 July 2013 was a formal notification to Ms Mazzola to attend an investigation/disciplinary meeting. The letter commenced by informing Ms Mazzola that Mr Single was representing Tile Trends pursuant to the Act and acting with the authority of the retail manager, Mr Digovich. The letter goes on to inform Ms Mazzola that there was an investigation into *“a concern that your manner and attitude towards management, and clients is below that which we expect and that attempts to informally discuss these concerns with you have not been successful”*. The letter refers to a formal complaint from a client but does not name the complainant and invites Ms Mazzola to attend a formal meeting so that the concerns could be discussed and explanations given. The letter invites Ms Mazzola to have a support person and says *“if, after investigation, it is ascertained that the concerns have foundation, disciplinary action may result in the termination of your employment”*.

[32] Ms Mazzola obtained the assistance of Ms Rolston who was not able to meet Mr Single in the timeframe required and who requested further information from Mr Single in an email to him dated 30 July. Ms Rolston requested details of the *“informal discussions”* referred to in the letter of 26 July, details of the complaint attached to the letter of 26 July and of the other complaints referred to.

[33] Mr Single was of the view that sufficient information had been provided to Ms Mazzola including the written complaint and Ms Mazzola was instructed by him to attend a further investigation/disciplinary meeting on 9 August so that the complaints could be discussed in full.

[34] A meeting was held on 9 August during the course of which the complaint by Mr Bridger (who Ms Mazzola had recognised as the complainant), was discussed. At that meeting, Ms Mazzola responded to and refuted the allegation that she was favouring Mr Langford by giving him work which should be going to other tilers. There was also a lengthy discussion between Mr Single and Ms Rolston about information which Ms Rolston had asked to be provided before the meeting which had not been.

[35] On 11 August 2013, Mr Single sent a letter to Ms Rolston which set out further details in relation to the complaint by Mr Bridger and in relation to other concerns about Ms Mazzola’s product knowledge, performance and attitude. The letter for the first time during the investigation process referred to a *“loss of trust and*

confidence” by Tile Trends in Ms Mazzola. Paragraph 15 of the letter of 11 August states:

At this point we must advise that there is a general loss of trust and confidence in your client’s actions in generally failing to dutifully achieve the objectives as set out in Schedule A of her IEA in that she has not provided exceptional customer service that keeps customers returning, and that she has not known the expected application to assigned tasks in a manner that would enable her to achieve any assigned goals or targets. There is also a tendency that has become prevalent during discussion with others that indicates that your client’s behaviour is not appropriate towards the beneficial enhancement of sales and enduring customer relationships.

[36] The letter concluded by informing Ms Mazzola that Tile Trends may terminate her employment if the investigation ascertained that the concerns which had been put to her, had foundation.

[37] Ms Mazzola was a long standing employee of some 9 years and had never received any warnings. The concerns referred to in the letter and which were being investigated were not in the category of conduct or behaviour which may fundamentally undermine the employment relationship and for which dismissal may be appropriate². The concerns related to Ms Mazzola’s performance and should have been dealt with in accordance with the processes contained in Ms Mazzola’s employment agreement, they were not.

[38] A further meeting was held on 14 August 2013. At this meeting, Ms Mazzola was told there were further complaints about her including that clients were not coming into the Tile Trends store because she was working there. The details of who were complaining and why, were not made available to Ms Mazzola and to Ms Rolston eventhough Mr Single had written reports of the complaints. A relevant part of the transcript is as follows:

Kerry Single (KS) Rachel Rolston (RR)

KS – There are clients who aren’t tilers, public clients, who aren’t tilers, who will not come in here to see Jan.

RR – Right can I have their names?

KS – No, I’m not giving you their names, because I don’t have all their names.

² *BP Oil NZ Ltd v. Northern Distribution Workers’ Union* [1989] 3 NZLR 580

RR – Can I have any complaints from them?

KS – I'm not giving you all the complaints from and you've actually got some of them in their last letter.

RR – Are any of these people actually writing in? Are there written reports of these complaints?

KS – They don't all have to write in.

RR – Okay, are there written reports from management on these complaints?

KS – Yes I've got some written reports.

RR – Can I have those please?

KS – No, you can't have them because I've given you the proceeds of those reports in that letter.

RR – No, I'd like to see the complaints. The reports, please. ...

RR – I would like you to provide me with all these reports from all these complaints.

KS – No

RR – No? Fine. We're done here.

KS – You've been provided with enough information ...

[39] The meeting deteriorated and Ms Mazzola and Ms Rolston departed. Following the conclusion of the meeting, Ms Rolston and Ms Mazzola were requested to return at which time Ms Mazzola was informed that her employment was terminated, she was to be given four weeks' notice and was not required to work the period of notice. A letter followed confirming the dismissal on the grounds of a “*general loss of trust and confidence...*”

[40] Tile Trends formed the view that Ms Mazzola and Ms Rolston were not engaging in the investigation and that this alleged lack of engagement along with the serious concerns about Ms Mazzola's performance being investigated meant that Tile Trends had lost trust and confidence in Ms Mazzola. I do not accept that a fair and reasonable employer could have come to such a conclusion.

[41] Tile Trends did not comply with its obligations under s.103(A)(3) of the Act which relate to basic procedural fairness and natural justice requirements.

[42] Ms Mazzola was seeking information and documents from Tile Trends in order to respond to allegations being made against her and which if found to be substantiated could mean the loss of her employment. In the early stages of the investigation Ms Mazzola was not provided with full details of the complaint and the complainant's name and details were blacked out. Ms Rolston on Ms Mazzola's behalf asked for more information so that complaints and concerns about Ms Mazzola's conduct could be responded to. However, Mr Single resisted the requests believing sufficient information to respond to the complaints had been provided. At the meeting of 14 August at which Ms Mazzola was dismissed, details of further complaints emerged but Mr Single refused to provide information so that Ms Mazzola could reply. Mr Single also refused to provide Ms Mazzola and Ms Rolston the "*management reports*" detailing concerns that he was referring to. How could Ms Mazzola respond to concerns when she was unsure of all the details of such concerns?

[43] Ms Mazzola was entitled to provision of the information being taken in to account by Tile Trends when investigating her conduct and performance. Further, if Tile Trends was in possession of "*management reports*" detailing complaints about Ms Mazzola these should have been provided to her, this in my view is a basic requirement of procedural fairness.

[44] The investigation being undertaken by Tile Trends was disciplinary in nature and each notice of meeting concluded by informing Ms Mazzola that if the concerns about her had foundation then "*disciplinary action may result in the termination of [her] employment.*" Sections 4(1A) ad 4(1B) of the Act state:

4(1A) The duty of good faith in subsection (1) —

- (a) Is wider in scope than the implied mutual obligations of trust and confidence; and*
- (b) Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
- (c) Without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected —*

- (i) *Access to information, relevant to the continuation of the employees' employment, about the decision; and*
- (ii) *An opportunity to comment on the information to their employer before the decision is made.*

4(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.

[45] There was never any suggestion that the information and documents being withheld during Tile Trends' investigation were confidential and therefore subject to s4(1B) of the Act. The statutory duty of good faith contained in s4(1A) of the Act in my view imposed an obligation on Tile Trends to provide the information sought by Ms Mazzola.

[46] Applying the test of s103A of the Act, I find that the dismissal of Ms Mazzola in the overall circumstances known to Tile Trends at the time it made that decision, was not what a fair and reasonable employer could have done. The way in which Tile Trends acted, the way in which it conducted its investigation together with its failure to comply with its statutory obligations, lead to the unjustified dismissal of Ms Mazzola. The answer to the first issue is that Ms Mazzola was unjustifiably dismissed and has a personal grievance.

Second Issue

If the dismissal was unjustified, what remedies (if any) should be awarded?

[47] Ms Mazzola gave evidence about the distress that she suffered when dismissed by Tile Trends. She felt the way in which she had been dismissed was "callous" and stated she had never felt so "*belittled and humiliated as when I had to go back out and empty my personal belongings from my desk in front of [Liz Sullivan]*". Ms Sullivan did not get up from her desk to say goodbye.

[48] I consider that an award of \$10,000.00 compensation pursuant to s.123(1)(c)(i) of the Act appropriate to compensate Ms Mazzola for the humiliation, loss of dignity and injury to feelings she suffered as a result of her dismissal.

[49] Ms Mazzola has been working at Tile Trends for some ten years and has had difficulty obtaining another job. As she says, she is not young and her chances of re-

employment are slim. Ms Mazzola has not kept a record of the jobs applied for but says she has been looking for work continuously but has been unsuccessful.

[50] Ms Mazzola seeks reimbursement of the sum of \$7,280.00 gross being three months lost wages pursuant to s.128(2) of the Act. I award Ms Mazzola reimbursement of the sum of \$7,280.00 gross for lost wages.

[51] I am not satisfied that a further amount pursuant to s.128(3) of the Act should be awarded.

Third Issue

If remedies are awarded, should there be a reduction on the grounds of Ms Mazzola's contribution (if any) and by what extent?

[52] Having determined Ms Mazzola has a personal grievance, s.124 of the Act requires me to assess whether she contributed to the situation which gave rise to her grievance and, if so, reduce remedies accordingly. Contribution denotes blameworthy conduct by the employee which must be proved on the balance of probabilities.

[53] I do not consider Ms Mazzola engaged in blameworthy conduct. Ms Rolston on her behalf requested further details about allegations concerning her performance and about complaints made against her so that they could be addressed. Before she was able to obtain the further details, Ms Mazzola was dismissed.

[54] I do not consider remedies should be reduced on the grounds of contribution.

Costs

[55] Ms Mazzola as the successful party is entitled to a contribution towards her actual costs.

[56] Ms Mazzola has 14 days to file a memorandum in the Authority as to costs. Any costs claim must be supported by proof of the costs incurred.

[57] Tile Trends has 14 days from the date of receipt of Ms Mazzola's memorandum as to costs within which to file a memorandum in response.

Anna Fitzgibbon
Member of the Employment Relations Authority