

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 195/08
5094986

BETWEEN MELANIE MCKENNA
Applicant

AND LEATHERS HOLDINGS
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: John Coyle, for Applicant
Gaye and Tai Leathers, for Respondent

Investigation Meeting: 16 May 2008

Determination: 28 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms McKenna was employed as a sole charge sales assistant at the respondent's Manukau City shop from November 2006 until her dismissal in early June 2007. Ms McKenna says her dismissal was unjustified and seeks remedies to compensate her for lost wages and hurt feelings suffered as a consequence of her dismissal.

[2] The respondent says Ms McKenna received adequate training and support to perform her job to an acceptable standard and that she was repeatedly warned about the negative impact her absences and poor performance was having on the shop. The respondent says it does not doubt Ms McKenna's sick leave was genuine but feels her conduct contributed to the need to take that sick leave, that the sick leave taken was excessive and could no longer be supported by such a small business. For these

reasons the respondent says Ms McKenna's dismissal on three weeks notice was justified in all the circumstances.

[3] At the investigation meeting I received evidence from Ms McKenna, her mother and Mr and Mrs Leathers.

When was Ms McKenna dismissed?

[4] On Friday 8 June 2007 Ms McKenna telephoned Mrs Leathers to advise she needed the next three days off on sick leave because her jaw was infected. Ms McKenna had already had 10 days sick leave since the end of December 2006 mainly due to ongoing problems with her teeth. These problems had now culminated in a serious infection.

[5] Ms McKenna says Mrs Leathers then told her she (Mrs Leathers) had had enough and she (Ms McKenna) had until the end of the month to find another job.

[6] Mrs Leathers said she lost her cool and told Ms McKenna she had had enough but that she did not formally dismiss Ms McKenna until she came into the shop the next working day with a medical certificate.

[7] I find it is more than likely that Mrs Leathers dismissed Ms McKenna during the telephone conversation of 8 June 2007. Ms McKenna was clear she had been dismissed. Mrs Leathers was not so certain.

Was Ms McKenna's dismissal justified?

[8] Mrs Leathers said she lost her cool because she had formed a view Ms McKenna had a poor attitude to her work and her unreliable attendance was impacting on the running of the shop. Mrs Leathers said Ms McKenna had been repeatedly warned about poor performance and attendance, that she was on a final warning at the time of her dismissal and the situation could no longer continue.

[9] At the investigation meeting Ms McKenna said Mrs Leathers had spoken with her a couple of times about poor sales and the shop being untidy and that she had once raised with her that her time off work was impacting on the business.

[10] Attached to the statement in reply is a document titled *Individual Employment Agreement*. The parties to this document are marked as Ms McKenna and the respondent. Mrs Leathers said she prepared this document with the intention of giving it to Ms McKenna to sign but could not recall doing so. She said she later found it in a drawer in the shop.

[11] Ms McKenna said she had never seen the document. Mrs Leathers accepted this was probably the case.

[12] The document is not binding on the parties. Ms McKenna never saw it and it was never executed. It has some relevance because it sets out the proposed terms of Ms McKenna's employment and its contents were known to Mrs Leathers who prepared the document. The document contains a detailed disciplinary and dismissal process. Mrs Leathers did not follow this process when warning or dismissing Ms McKenna. If she had then issues between the parties may have had a different outcome.

[13] Mrs Leathers did not have a detailed recollection of the discussions with Ms McKenna which she says amount to warnings. She could not recall if she told Ms McKenna that her employment was in jeopardy. The discussions were not recorded in writing and copied to Ms McKenna. There was no evidence Ms McKenna received prior notice of these disciplinary meeting or if she had an opportunity to bring a support person with her. There was no evidence Mrs Leathers sought an explanation from Ms McKenna for the actions that caused her concern.

[14] I find that Mrs Leathers did talk to Ms McKenna about concerns she held about Ms McKenna's performance of her duties and her attendance. These discussions were in the nature of counselling and cannot be considered disciplinary warnings because of the flaws set out above. Mrs Leathers knew what the disciplinary process was because it is set out in detail in the proposed employment agreement she prepared for Ms McKenna.

[15] At the time of her dismissal Ms McKenna was not on a final warning and had not received any disciplinary warnings during her employment with the respondent.

[16] Ms McKenna's dismissal was not justified. There was no fair process. This failure renders the respondent's claim that it had substantive grounds for the dismissal vulnerable. It did not raise its concerns directly with Ms McKenna and did not give her a fair opportunity to provide an explanation or give due consideration to any explanation. In the absence of such it cannot say, with certainty, that it had reasonable grounds to believe Ms McKenna's continued absences for sick leave would continue or that Ms McKenna had contributed in some way to the need to take those absences.

Contribution

[17] Parties to employment relationships must deal with each other in good faith. It is an aspect of good faith that information relevant to the effective discharge of employment obligations is raised and discussed.

[18] During the course of the investigation meeting Ms McKenna said her dental health was compromised by a chronic illness from which she suffers. I accept this was the first the respondent had heard of this. Ms McKenna also advised during the investigation meeting that her relationship with her fiancé was under significant strain during her employment and this was impacting on her child care arrangements and her work.

[19] While I appreciate these are private matters they are matters which impacted on Ms McKenna's ability to discharge her duties. There is no evidence that she raised these issues with Mrs Leathers either by way of explanation for her excessive sick leave or in response to the performance and attendance concerns Mrs Leathers raised. Ms McKenna ought to have and the failure to do so is conduct which contributed to the events giving rise to her personal grievance and is a factor to be weighed in the consideration of the remedies Ms McKenna seeks.

Remedies

[20] Ms McKenna seeks compensation for hurt and humiliation consequent to her dismissal and lost wages. She said the dismissal had caused a lot of financial and personal stress, had knocked her self esteem and she lays the demise of her relationship at its door. She said she has attempted but failed to find alternative employment

[21] This is a case where it is appropriate to take a global approach to remedies. Taking into account the three weeks notice Ms McKenna received from the respondent at dismissal and Ms McKenna's contribution to the circumstances of her dismissal I order the respondent pay Ms McKenna \$2500 to compensate the effects of that dismissal.

Costs

[22] Costs are reserved. At the investigation meeting Mr Coyle advised Ms McKenna's costs total \$2000. The parties should try and resolve this issue themselves. If they cannot Ms McKenna may file and serve, within 14 days of the date of this determination, evidence supporting her costs claim and advise what level of contribution to those costs she believes it is appropriate for the respondent to meet and the reasons why. The respondent should file any reply within a further seven days.

Marija Urlich

Member of the Employment Relations Authority