

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Wilhelmina Millar (Applicant)
AND Re/Max New Zealand Limited (Respondent)
REPRESENTATIVES Mark Ryan, Counsel for Applicant
Stephen Langton, Counsel for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 18 February 2005
SUBMISSIONS 28 February 2005, 8 March 2005.
DATE OF DETERMINATION 11 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Re/Max New Zealand Limited provides “head office” support for Re/Max franchises around the country. Ms Millar was its National Accounts Administrator from January 2003 until December 2003 when Operations Manager, Mr Cozens called her into a meeting and dismissed her. The reason given was that she had given a third party confidential information about the financial situation of a Re/Max franchise as well as making comments of a personal or derogatory nature about its staff. She says that this dismissal was procedurally and substantively unfair.
2. Mr Cozens is himself no longer with the respondent and did not give evidence to the Authority. Mr Langton conceded that there is no evidence that Ms Millar was given advance notice of the allegations against her, was advised that her job could be in jeopardy or was invited to bring a support person along to the meeting. He concedes that it is open to the Authority to find that the dismissal was unjustified on procedural grounds.
3. However Re/Max says that Ms Millar was guilty of serious misconduct and the dismissal is capable of being substantively justified. In saying this, Mr Langton relies on two specific clauses of Ms Millar’s employment agreement. Clause 11 prohibits her from disclosing information concerning the respondent, its business affairs, property, client/customer records and related documentation. Clause 12 provides for dismissal for serious misconduct including breach of obligations of confidentiality or bringing the company into disrepute. Mr Langton says that Ms Millar has breached the confidentiality of a franchise holder and brought both the franchise holder and Re/Max New Zealand Limited into disrepute.

4. The respondent further relies on Section 124 of the Employment Relations Act 2000, which sets out:

“124 Remedy reduced if contributing behaviour by employee

Where the Authority or the Court determines that an employee has a personal grievance, the Authority or the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,-

consider the extent to which the actions of the employee contributed towards 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.”

5. On behalf of Re/Max Mr Langton says that the Authority should take into account Ms Millar’s contribution to the situation that gave rise to the personal grievance and that this contribution was 100%.
6. Ms Millar’s dismissal was clearly procedurally unfair. The issues for the Authority to determine are therefore:
- Whether the conduct attributed to her did occur and if it did, whether it amounted to serious misconduct;
 - if so, whether this was a contribution to the situation that gave rise to the grievance, and
 - what remedies may be appropriate.

Did the alleged conduct occur and if so, did it amount to serious misconduct?

7. In September 2003 Ms Millar was warned about alleged abusive behaviour towards other staff and (following complaints from franchisees) about failing to keep confidential information about franchises. Ms Millar denied both allegations against her.
8. On 3 December 2003 Ms Millar was contacted by Steven Rose, an IT engineer who was assisting a new franchise with switching over to the Re//Max mail system. He did not know her and had not spoken to her before but had been advised that she was the correct person to explain what internet/e-mail configuration his client needed and give him the necessary ISP and account details.
9. Mr Rose gave evidence at the Authority investigation meeting. He was a credible and disinterested witness and I accept his evidence in its entirety. He told me that he talked to Ms Millar for half an hour. She gave him the information he required but then:
- “suddenly seemed to go off on a tangent, and started to hint at financial issues ...and [the franchise] not having the finances to be looking at installing a server at this point in time. The conversation then turned to bad-mouthing staff in the [franchise] office. In particular she talked about ‘the fat slag out the front’ referring to a girl who was pregnant at the time. She also referred to another girl at the office as ‘the blonde slut.’ I was to say the least shocked-I had no idea where her outburst had come from. ...She did not just make one comment—it was a lengthy outburst.”
10. Mr Rose knew the franchisee reasonably well. Later that day or the next he called in to talk to him. Without giving details he cautioned him that Ms Millar did not appear discreet and advised him to be careful about what information he shared with her.
11. The franchise holder was concerned and relayed this to Mr Cozens. Mr Cozens asked Ms Millar if she had spoken to Mr Rose and what she had said. She confirmed that she had

given Mr Rose information he needed about account details and requirements. At his request she also gave Mr Cozens the telephone number for Mr Rose.

12. Mr Cozens contacted Mr Rose, and pressed him for the detail of what Ms Millar was alleged to have said. Mr Rose recounted what is set out at paragraph [8.]
13. Mr Cozens then called Ms Millar into his office. He asked Ms Millar again what she had said to Mr Rose and she reiterated that she gave him an overview of the required set up. In response to questions from Mr Cozens she denied making comments of a personal or derogatory nature or revealing anything about the Respondent's financial situation.
14. Mr Cozens told Ms Millar that he believed Mr Rose and reminded her that franchisees had complained about her previously. He told her that she was dismissed as of that day, Thursday 4 December.
15. Because Mr Cozens was not at the Authority's investigation meeting, Ms Millar's evidence is the basis of paragraphs [13] and [14.] She also told me that she denies making the derogatory comments attributed to her by Mr Rose. She does not dispute that Mr Rose is a truthful and honest witness but says that her recollection of the events is likely to be more reliable since he admits he did not keep any notes of their telephone call conversation and it is now over a year later.

Determination

16. Having accepted Mr Rose's account of what he heard I am satisfied that the alleged conduct did occur.
17. To speak of a franchise and its staff in this way to a third party was a breach of confidence which risked impairing the franchise holder's reputation in his local business community. It was a very serious matter which upon being reported to the franchise holder was likely to damage his confidence in the quality and confidentiality of the service provide by Re/Max.
18. Ms Millar's conduct was an abuse of the position of trust that she held. She should have known it was entirely unacceptable from someone in her role. In my view it did amount to serious misconduct.

Was this a contribution to the situation that gave rise to the grievance?

19. In the present case I am satisfied that the actions of the applicant contributed to the situation which gave rise to the grievance in a similar fashion to that described by the Court of Appeal in *Ark Aviation Ltd v Newton* [2001] 1 ERNZ 133. At paragraph [43] of that decision it was stated:

“The present case is one where the employer has dismissed the employee for misconduct without having conducted a fair and reasonable inquiry into its legitimate concerns. ...In our view, matters of which an employer was aware at the time which, directly or indirectly, impacted on its decision to dismiss may be shown to be actions contributing to the situation, or fault on the part of the employee resulting in the dismissal. They will then form part of the ‘situation which gave rise to the personal grievance’... There is no threshold...that requires such knowledge or awareness to derive exclusively from a sound process, provided it is of sufficient substance to be the basis for legitimate concern at the time of dismissal.”
20. The evidence shows that Ms Millar's conduct was a matter of which Re/Max was aware at the time of dismissal and which impacted upon the decision to dismiss. In my view it was also undoubtedly an action which contributed to the situation that gave rise to the grievance.

Remedies

21. I am satisfied that the remedies to be awarded to Ms Millar should be reduced for contributory conduct. However I am not satisfied that the level of contribution should be set at 100%. The principal reason for this is simply the fact that the respondent was not able to provide me with any direct evidence from its decision maker about the dismissal itself. On the evidence I do have the procedural faults are serious. In such circumstances I am not able to say that a fair process would unquestionably have resulted in Ms Millar's justifiable dismissal.
22. After considering all the circumstances I set the level of contributory conduct at 50%.
23. Ms Millar did not work for six months after her employment ended and says she was unable to do so because of stress related ill health brought on by the dismissal. She originally sought an award to cover her loss of earnings for the entire 6 month period however at the Authority hearing it was established that she had income protection insurance. This covered her losses from 9 February 2004 until 24 May 2004 when she received a medical clearance and resumed paid work. She therefore amended her claim to cover just the period from the termination of her employment (4 December) to the date her income protection cover began (9 February 2004.)
24. I accept that Ms Millar was unable to work and without income for two months as a result of her dismissal. She is therefore entitled to 50% of two months salary. At the time her employment ended her salary was \$47,000.00. 50% of two months salary therefore amounts to \$3,916.66. RE/Max is ordered to pay this amount to her pursuant to s.123 (b) of the Employment Relations Act 2000.
25. Ms Millar has also suffered considerable distress as a result of the dismissal as evidenced by the collapse of her health. In all the circumstances if there had been no question of contributory conduct I consider an appropriate level of compensation in this case would have been \$7,000.00. Therefore after a 50% reduction for contributory conduct I set the award for hurt and humiliation at \$3,500.00.

Costs

26. I leave it to the parties to attempt to resolve this issue however in the event that they cannot they have a period of 28 days in which to request that I determine it.

Summary of Orders

27. Re/Max New Zealand Limited is ordered to pay to Ms Millar the following sums:
 - \$3,916.66 pursuant to s.123(b) of the Employment Relations Act 2000, and
 - \$3,500.00 pursuant to s.123(c) (i) of the Employment Relations Act 2000.

Y S Oldfield
Member of Employment Relations Authority