



associated with her are the shareholders. Ms Meredith is also the subject of the allegations associated with the disadvantage grievance.

### **Incidents amounting to discrimination or bullying**

[4] According to a letter of grievance dated 24 November 2008, Ms Nafai was disadvantaged, discriminated against or bullied in that Ms Meredith:

- a. reduced the overtime made available to Ms Nafai, and gave it to another employee, in response to a request for payment of overtime Ms Nafai made on 19 September 2008;
- b. informed Ms Nafai that, if she did not agree to a reduction to three days' work per week, she would be made redundant;
- c. refused to allow Ms Nafai to take a break on her return from calling on customers;
- d. refused to advise Ms Nafai that her pregnant daughter needed her at home so the daughter could visit the doctor; and
- e. generally bullied Ms Nafai on a day to day basis.

#### 1. Loss of overtime

[5] Relevant provisions in the parties' employment agreement were as follows:

“Hours of work

Your normal hours of work will be from 8 00 am to 4.30 pm Monday to Friday, with an unpaid half-hour lunch break and paid 10 minute breaks for morning and afternoon tea.

Business may require us to extend working hours in some weeks and reduce hours in other weeks. You agree to adjust your working hours as required, after consultation with you and after reasonable notice has been given to you.

...

Extended hours/overtime

You are required to work extended hours or overtime. When you are required to work extended hours or overtime you will be paid at your normal hourly rate or take time in lieu.”

[6] On average, up to about September 2008 staff worked no more than two or three hours of overtime per month. However during the later part of 2008 business

slowed, so that any general reduction in overtime simply reflected the reduction in work available and applied to all staff members. Further, at a staff meeting on or about 28 September 2008 Ms Meredith informed the staff there would be no overtime unless she had approved it first.

[7] Despite this, Ms Nafai alleged that any reduction that applied to her was a response to a request for payment she made on 19 September 2008. She described a conversation between herself and some of her colleagues on that date, in which all were grumbling about perceived failures to pay overtime owed to them. Their concerns were brought to Ms Meredith's attention by another staff member. Neither Ms Nafai nor anyone else formally made a claim for monies owing in that respect, and it appears the underlying issue concerned arrangements for recording time for the purpose of calculating time off in lieu of overtime. The perceived failures to pay reflected confusion over that matter.

[8] While Ms Meredith may have expressed concern about the way in which the issue was brought to her attention, there was no evidence that Ms Nafai was targeted for bullying as a result of it. I do not accept she was so targeted. Nor do I accept that the requirement announced on 28 September was directed at Ms Nafai, nor that it was the result of the 19 September conversation.

[9] Finally, the allegation that Ms Nafai's overtime was given to another employee seemed to concern a single incident. Even if the opportunity to work overtime on the relevant occasion could be described as an entitlement of Ms Nafai's, I am not satisfied that the offer of the opportunity to the other employee was unjustified. Finally, I do not accept that any of the above matters amounted to bullying of or discrimination against Ms Nafai.

## 2. Threat of redundancy

[10] Ms Meredith said in evidence that during October 2008 business was quieter and she was looking at ways of operating the business more cost effectively. It was common ground that she met with the staff in or about early November 2008 to advise that she was considering a reduction in staff hours, and that redundancies were possible if reductions could not be achieved.

[11] According to Ms Meredith, Ms Nafai and two others volunteered to reduce their hours of work to three days per week. The resulting arrangements were confirmed in letters to each of the three employees, dated 12 November 2008. Ms Nafai signed the letter addressed to her, thereby indicating her agreement.

[12] Almost all of the employees who gave evidence, including Ms Nafai, misunderstood the law of redundancy. There was nothing unlawful in Ms Meredith's raising with the staff the need to cut costs, and the implications for their continuing employment if costs could not be cut. Nor was there anything unlawful in her seeking agreement to reductions in hours of work. If anything, Meredith had a duty to explore steps of that kind and the information she conveyed should not have been viewed as a threat in the sense Ms Nafai contends. Further, Ms Nafai's characterisation of Ms Meredith's actions as a requirement that she reduce her own hours or be made redundant did not reflect an accurate understanding of Ms Meredith's obligations, and contained an indication that the possible reduction in hours of work was directed at her personally when that was not the case.

### 3. Refusal of break

[13] The usual daily routine for sales staff largely comprised the completion of a customer service 'run', in which staff visited customers for purposes including to re-stock customers' on-site first aid kits.

[14] Ms Nafai said that on one occasion she was already at the office premises drinking coffee with a colleague when she asked Ms Meredith if she could have her tea break. Ms Meredith told her that she could not, and that she should still be out on the road. Ms Nafai was annoyed because the colleague was not treated similarly. However the colleague in question gave evidence that, because of her schedule that day, she had been instructed to take her break then to ensure she had one. Ms Nafai's annoyance was not well-founded.

[15] Otherwise the reference to a refusal to allow a break was not supported by details. Ms Meredith denied refusing Ms Nafai permission to take a break, saying instead that it was important to her to ensure that staff took their breaks. I accept that evidence.

#### 4. Refusal to pass information from pregnant daughter

[16] On one occasion Ms Nafai's daughter, who was pregnant at the time, telephoned the CFAS offices at or about 2 pm. She spoke to the office manager, Rebekah Takoa-Auna, asking that her mother be advised that she was needed at home to look after her grandchildren as the daughter had a medical appointment. Ms Nafai was still completing her run at the time, and Ms Takoa-Auna referred the request to Ms Meredith. Ms Meredith advised that a message would be given to Ms Nafai on her return to work at 3 pm, and suggested that Ms Nafai's daughter attempt to contact Ms Nafai on her cell phone. No such attempt was made.

[17] When Ms Nafai returned to the office at or about 3 pm Ms Meredith advised of the call and suggested Ms Nafai phone her daughter. Ms Nafai was angry that she had not been made aware of the call earlier, and there was an exchange about whether CFAS should have called her herself. In the event, Ms Meredith allowed Ms Nafai to go home immediately.

[18] It is overstating matters to say any of this amounted to a refusal to pass on information, or that it amounted to a form of bullying. At worst, the incident involved a failure in communication.

#### 5. Day to day bullying

[19] Several other incidents and allegations were discussed in the evidence. I do not detail them here because I do not consider the matters raised disclosed any discrimination or bullying. They disclosed no more than that that Mesdames Nafai and Meredith had a personality clash, that Ms Nafai was opinionated and unwilling to submit to her employer's instruction, and that she was often not in possession of accurate information when she formed her opinions or made her accusations.

### **Events leading to dismissal**

#### 1. Background

[20] A staff social club function was arranged for Saturday 22 November 2008. The staff met at a leisure centre at mid-afternoon before going on with their families to a barbeque at Ms Meredith's home. Although Ms Nafai had withdrawn from the social club, she was present during the afternoon and later attended the barbeque.

[21] Her conduct at the barbeque was the ground for her dismissal. She was drunk, and there was a general consensus among the witnesses that she was loud and offensive. More particularly, however, the conduct which led to her dismissal was:

- a. calling another employee a 'f- dickhead';
- b. commenting on the similarity between a sausage and a penis;
- c. saying to a business associate of Ms Meredith's that she would 'cut his f- dick off';
- d. saying to Ms Meredith that she was a 'f- bitch' and 'I hate you', and asking Ms Meredith 'why are you such a f- bitch to me?'.

## 2. The disciplinary procedure

[22] According to Ms Meredith, the feedback she received from the staff the following Monday morning was that Ms Nafai's conduct had ruined their evening. For her part, she considered Ms Nafai's conduct unacceptable regardless of how drunk she was. By letter dated 24 November 2008 Ms Nafai was asked to attend a disciplinary meeting in respect of her inappropriate language, and the comments made to Ms Meredith.

[23] Meanwhile, on Sunday 23 November Ms Nafai had telephoned Ethel Wolferstan, the sales manager and her former sister-in-law. According to Ms Wolferstan, Ms Nafai said she could not recall what she had done at the barbeque. Ms Wolferstan told her she had sworn at Ms Meredith and Ms Meredith's business associate. Ms Nafai's account of the conversation was that she asked Ms Wolferstan whether she had done anything to upset Ms Meredith, and was told that she had sworn at the boss. There was a discussion to the effect that Ms Nafai would telephone Ms Meredith and apologise for her actions, which she duly did.

[24] I did not find persuasive Ms Nafoi's attempt to portray these and a number of other exchanges with Ms Wolferstan as a reaction to the bullying to which Ms Meredith was subjecting her, and Ms Wolferstan's acknowledgement of the bullying. Ms Nafoi telephoned Ms Wolferstan because she was concerned about the way in which she might have behaved. Ms Wolferstan confirmed in effect that her conduct had been unacceptable. Ms Wolferstan's suggestion that Ms Nafoi 'watch out' or 'be careful' reflected the likelihood that the behaviour would have repercussions.

[25] The disciplinary meeting went ahead on 26 November. Ms Nafoi attended with her representative. The meeting was conducted by a consultant engaged by CFAS. At the start of the meeting Ms Nafoi produced the letter of grievance dated 24 November, but was advised the meeting had a particular purpose and her grievances would be addressed at another time.

[26] Although it was common ground that Ms Nafoi's conduct on 22 November was the subject matter of the meeting, there was a conflict in the evidence concerning the extent to which the conduct was particularised. Ms Meredith said she gave her account of Ms Nafoi's comments to her, and raised the language Ms Nafoi had used to the other employee and to the business associate. Ms Nafoi's response was to deny doing anything wrong, and to accuse Ms Meredith of wanting to get rid of her.

[27] Ms Nafoi said she was told only that there had been complaints about the language she had used at the barbeque. She denied saying she had done nothing wrong. She believed the complaints concerned what she had said to Ms Meredith.

[28] There was no hint of apologetic behaviour in any of the evidence about the meeting, and it was common ground that Ms Nafoi accused Ms Meredith of lying. As a result of this accusation, and Ms Nafoi's view that CFAS had 'no evidence', Ms Meredith agreed to obtain statements from the other employees present on 22 November. She did so on 26 and 27 November.

[29] Much was made of the fact that additions were made to some of the resulting handwritten statements. However Ms Meredith said the additions were sought because more detail was required of the language Ms Nafoi had used. The authors of the statements gave evidence, which I accept, confirming that the additions were their

own and were obtained for that reason. Overall, the statements and the evidence confirmed both the specific allegations and the general unease caused by Ms Nafai's conduct.

[30] There was also a concern about precisely when a statement from Ms Wolferstan had been obtained, but I accept Ms Wolferstan prepared her statement on the date shown on it. I consider it likely that Ms Nafai had not expected an account of the kind Ms Wolferstan provided, believing Ms Wolferstan would be more supportive of her. I accept, too, that because of the personal connection Ms Wolferstan had a particular wish not to be involved in Ms Nafai's dispute and sought to distance herself from it.

[31] The statements were not provided to Ms Nafai prior to the decision to dismiss. Ms Meredith said this was because the parties had agreed the statements would be obtained and a decision would then be made. It was common ground that no arrangement was made for the provision of the statements, and I understood it to be common ground that Ms Nafai and her representative were simply informed at or about the end of the 26 November meeting that a decision would be made when the statements had been received. It is likely that the 'agreement' of Ms Nafai and her representative was inferred from their apparent acquiescence in this procedure.

### 3. The decision to dismiss

[32] Ms Meredith concluded that Ms Nafai's behaviour had been so bad she could no longer have any trust and confidence in Ms Nafai. She was also concerned about Ms Nafai's denial of any wrongdoing. Ms Meredith telephoned Ms Nafai to advise of the decision to dismiss.

[33] By letter dated 28 November 2008 the immediate termination of Ms Nafai's employment was confirmed.

### **Whether Ms Nafai was disadvantaged or bullied**

[34] I do not accept that the facts as I have found them disclose bullying, harassment or discrimination on Ms Meredith's part.

[35] I do not accept Ms Nafai's claim that she has a personal grievance in these respects.

### **Whether the dismissal was justified**

[36] The test for the justification for a dismissal is whether dismissal was the action a fair and reasonable employer would have taken in all the circumstances at the time.

[37] By the conclusion of the Authority's investigation meeting I did not understand Ms Nafai to be disputing the substance of the allegations about her conduct on 22 November. At best she sought to minimise the conduct, and to characterise it as joking between colleagues at a function. Although there was some risqué joking and other drunken behaviour on the part of certain other staff members present, I do not accept Ms Nafai's view of her own conduct. In that it was excessive and personally abusive, it was in a different category from that of other staff members and it caused tension and discomfort.

[38] I do not accept that the decision to dismiss was motivated by a wish to 'get rid' of Ms Nafai. I find that CFAS had reasonable grounds to conclude that Ms Nafai's conduct amounted to serious misconduct.

[39] However Ms Nafai and her representative should have been provided with copies of the other employees' statements prior to the decision to dismiss, and given an opportunity to comment on them. I say this even though I consider it likely that Ms Nafai was so defiant at the time she believed the statements would show Ms Meredith was lying and there was no more to be said. That attitude simply reinforced Ms Meredith's view that Ms Nafai was unrepentant, a view she had reason to hold whether or not Ms Nafai had expressly denied any wrongdoing.

[40] CFAS was not entitled to infer an agreement by Ms Nafai that it could proceed without providing copies of the statements to her or offering her any opportunity to comment. Had it made express offers to provide the material and hear comments on it, with the offers being expressly rejected, it might have been justified in proceeding as it did. Since that was not the evidence, I find the failure was a significant flaw in the dismissal process.

[41] I have considered whether the failure to provide the statements and allow an opportunity to address them was sufficient to vitiate the justification for the dismissal. That matter must be addressed with reference to the circumstances at the time. While I acknowledge Ms Nafai's defiant attitude, it was unwise of CFAS to proceed as it did. The failure to provide Ms Nafai with the statements at the time meant she did not have an opportunity to view her conduct as her colleagues saw it, and to reconsider her response. That was a fatal flaw in the employer's investigation of Ms Nafai's conduct.

[42] For that reason I find that dismissal was not the action a fair and reasonable employer would have taken. The dismissal was unjustified.

### **Remedies**

[43] I have not accepted Ms Nafai's claims that she has a disadvantage grievance, so there are no remedies available to her in that respect.

[44] Ms Nafai has also sought the reimbursement of remuneration lost, and compensation for injury to feelings, as a result of the personal grievance on the ground of unjustified dismissal.

[45] Section 124 of the Act obliges the Authority, in deciding the nature and extent of the remedies to be provided in respect of a grievance, to consider the extent to which the employee's actions contributed to the situation which gave rise to the grievance and, if those actions so require, reduce the remedies that would otherwise be awarded accordingly. Because of the view I have taken of the facts, I turn directly to considerations under that provision.

[46] I do not accept the submission that, had the statements been provided to Ms Nafai before the decision to dismiss was made, there would have been no breach of process and Ms Nafai's claim would not have come before the Authority. The nature and content of Ms Nafai's claims, the way in which she gave evidence, and her refusal to accept she was at fault in any respect mean I consider it very unlikely she would have been satisfied with advice that there was no procedural flaw in the

decision to dismiss and in turn no ground on which to proceed. I would consider any assertion to the contrary to be opportunistic.

[47] Thus in evidence in the Authority Ms Nafai maintained her denial of any wrongdoing, even with the benefit of the statements. Moreover, when she was asked in evidence what comment she would have made on the statements had she received them before the decision to dismiss was made, Ms Nafai said she would have called the authors liars. That response did not enhance her credibility, and nor did it otherwise advance the merits of her grievance. The accounts of Ms Nafai's conduct as the witnesses recalled it were not lies. They amounted to a view of events which Ms Nafai refused to accept.

[48] Accordingly the provision of the statements to Ms Nafai before the decision was made to dismiss would not have affected the decision. I find further that not only was Ms Nafai's conduct at the 22 November barbeque unacceptable in itself, but it was made more serious by the refusal to acknowledge wrongdoing as well as the underlying hostility to Ms Meredith and refusal to accept her authority.

[49] The extent of Ms Nafai's contributory conduct is such that I reduce the remedies I would otherwise have awarded to the point that I make no award.

### **Costs**

[50] Costs are reserved.

[51] The parties are invited to agree on the matter. If they seek a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority