

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Sonya Philips (Applicant)  
**AND** AMPT Limited t/a AMPT Studio (Respondent)  
**REPRESENTATIVES** Francis Sabbineni, for Applicant  
Vanessa Kerridge for Respondent  
**MEMBER OF AUTHORITY** Janet Scott  
**INVESTIGATION MEETING** 26 September 2005  
**DATE OF DETERMINATION** 7 October 2005

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

The applicant submits she was unjustifiably dismissed from her employment with the respondent. To remedy her alleged grievance she seeks lost remuneration and compensation pursuant to s. 123 of the Employment Relations Act 2000.

The respondent submits the dismissal was justified. The respondent seeks compensation for customers lost as a result of Ms Phillips' unprofessional conduct during her employment.

**The Evidence**

**Applicant**

Sonya Phillips worked for the respondent as a gym instructor. She commenced employment early in March 2004. She was dismissed on 9 December 2004.

Ms Phillips submits that on 9 December 2004, Vanessa Kerridge (owner and managing director of the respondent) called her into her office, showed her a complaint from a client and said "I'm going to give you automatic dismissal" and terminated her employment without a formal meeting or any semblance of a fair process.

Ms Phillips accepts she received a written warning on 9 August 2004. The only thing that had been discussed with her prior to receiving this warning was a proposal that she attend a customer service course. She said that she had already attended a customer service course and as her employer would not pay for her attendance at the course she declined to attend.

She also said she believed the respondent had given her this warning as an excuse to get rid of her.

Ms Phillips denied receiving counselling or verbal warnings during her employment in relation to her presentation and customer service. In particular she denied talking to customers about her personal life and problems.

### **Respondent**

The respondent's former owner and managing director explained her circumstances. She said she sold the business as a going concern in July 2005 because it was not successful. She is now an unemployed solo mother with three young children and she has a personal debt to IRD of \$40,000. She was at a loss to explain the fact that the company (with her listed as the sole director) remains registered.

Ms Kerridge gave evidence that issues arose with Ms Phillips employment almost immediately after she started. It was submitted:

- Her personal presentation was poor. For example, she was spoken to about wearing inappropriate shoes (heels) at the gym. She was a smoker and her clothes smelled of cigarette smoke at the gym. It was submitted this is inappropriate in a business which promotes health. Clients complained that Ms Phillips presented as depressing and lethargic. This was described as a poor trait for a gym instructor.
- Verbal and written complaints were received regarding Ms Phillips failure to open the gym on time (a number of occasions) and her failure or lateness in keeping appointments for training sessions with clients.
- Clients complained that Ms Phillips constantly talked to them about her personal life and personal problems.
- Ms Phillips' partner would attend at the gym and on occasion slept on the sofa in the crèche.
- Ms Phillips' friends came to the gym and one occasion she was observed by a client smoking out the back with a friend.

It was Ms Kerridge's evidence that these issues were ongoing and that they were repeatedly taken up with Ms Phillips. She said that as she was not at the gym in the early part of the day she had not observed many of the incidents that were giving rise to customer complaints. She said she kept an open mind and on each occasion she received a complaint she would specifically ask Ms Phillips for her side of the story when she discussed the complaint with her. She was frequently left with denials from Ms Phillips and could not therefore reconcile the complaints with explanations from Ms Phillips. However, Ms Phillips was repeatedly counselled and warned in relation to her presentation and customer service.

By August 2004 Ms Kerridge was concerned enough to give Ms Phillips a written warning. She also suggested they look around for free business courses that could assist Ms Phillips to improve her customer service skills.

Ms Kerridge submitted that on 9 December she received a written complaint from a new client who wanted his money back. He had arranged to attend an early morning training session. When he arrived there was no one in reception and Ms Phillips kept him waiting for his session. When she did attend to him she was unhelpful.

Ms Kerridge said she asked Ms Phillips to meet her in her office. She gave Ms Phillips the complaint to read and said here was another complaint and she did not know what to do. They discussed the complaint. Ms Phillips said the man was booked for a 6 a.m. appointment and had arrived early when she was out the back having a coffee. She denied being late for her appointment with the client.

Ms Kerridge said told Ms Phillips she was receiving complaint after complaint about her unprofessional service and she could not afford to retain her as an employee. She said the business was struggling and again it was a matter of a client's word against that of Ms Phillips. It was the last straw for Ms Kerridge who dismissed Ms Phillips without notice.

Ms Kerridge submitted it was ridiculous to suggest she had given Ms Phillips a warning with a view to getting rid of her. She was herself eight months pregnant and it was just before Christmas – an impossible time to be faced with finding new staff. Fortunately another employee was able identify a friend who could start immediately on a temporary basis (subsequently made permanent).

Ms Kerridge estimated she had lost \$15,000 as a result of clients leaving the gym because of Ms Phillips poor service. She asked the Authority to consider compensating her for this loss.

A former client of the gym supported the evidence given by Ms Kerridge. He said he was subjected on a constant basis (i.e. every morning from Monday to Friday) to Ms Phillips talking about her personal life and personal problems. He had himself submitted three complaints to Ms Kerridge on this issue.

## **Issues to Be Decided**

I am required to test the justification for this dismissal in accordance with the provisions of s.103A of the Act (inserted by s.38 of the Amendment Act effective 1 December 2004).

Section 103A Test of Justification reads:

*For the purposes of section 103 (1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

Therefore, it is for the employer to establish, objectively, that in all the circumstances of the case, it was justified in terminating the applicant's employment with immediate effect. (*Auckland District Health Board v X* unreported decision AC 23B/05). The process adopted by the respondent in investigating the concerns it had regarding Ms Phillips employment is relevant to an objective assessment of the circumstances of the dismissal as are the particular features of Ms Phillips employment including her service and her overall employment history.

## **Discussion and Findings**

### **Credibility**

Having met and heard the parties I conclude that Ms Phillips was not a credible witness. While there were serious process failings attending this dismissal I find that Ms Phillips work performance fell well short of the professional standard called for in an industry where personal presentation and good customer service are essential. I find that Ms Phillips' denials of the counselling she received about instances of poor presentation and customer service are simply not credible.

Therefore, where the evidence for the respondent contradicts that of the applicant it is that of the respondent's witnesses that I prefer – particularly in relation to issues of Ms Phillips poor attitude and poor presentation, poor customer service and the extent to which customer complaints were raised with her.

## **Findings**

Despite my negative findings in relation to Ms Phillips credibility it is apparent she was not treated fairly in a number of respects in as far as the employer dealt with the performance issues in question.

While I find that, generally speaking, Ms Kerridge did approach complaints against Ms Phillips with an open mind Ms Kerridge is required, if she is to justify this dismissal, to show that she treated Ms Phillips fairly in the process of addressing performance concerns with her. There are four elements to procedural fairness (See Butterworths Employment Law 1-1510).

**Warning:** The employer must warn the employee of the misconduct (unless it is serious misconduct warranting summary dismissal) and request an improvement in conduct and/or performance. The employee must also be advised at the warning stage that his or her job is “on the line”.

**Investigation:** the employer must carry out a full investigation of all the relevant facts before actually terminating the employee and the result of such an investigation should be communicated to the employee.

The investigation carried out by the employer must be fair and thorough and sufficient to allow the employer to arrive at a reasonable belief that misconduct or poor performance exists such that dismissal is warranted. *Airline Stewards and Hostesses (NZ) IUOW v Air New Zealand Ltd* [1990] 3 NZILR 797. No investigation will be thorough and complete without inquiry of the worker. The employee should also be advised of their right to representation at a disciplinary meeting.

**Reasons:** Reasons for the dismissal must be given to the employee before the dismissal is effected.

**Opportunity to be heard:** Before the dismissal is considered the employee must be provided with a real opportunity to be heard and to offer an explanation to the allegations made. Notice to the employee should also advise how seriously the allegations are viewed and if the worker's employment could be in jeopardy. An opportunity to be heard also implies that serious consideration will be given to the worker's explanations.

Lastly, the respondent was required to consider any other relevant factors including such factors as service, employment history and whether the conduct complained of had in fact destroyed the basic trust and confidence essential to the employment relationship or whether an alternative to dismissal, such as a final written warning, was appropriate in all the circumstances.

On the evidence before me I must find that, while the respondent raised performance concerns with Ms Phillips during her employment, she was never put on unequivocal notice that unless her performance improved her job would be in jeopardy.

In particular I find that the written warning given to Ms Phillips on 9 August was non specific as to the precise concerns the respondent had with Ms Phillips' performance and it also lacked specificity in relation to the expected improvement and the time frame for that improvement to be achieved. Neither did that warning put Ms Phillips on notice that if her performance did not improve her job would be in jeopardy.

In respect to the complaint that led to Ms Phillips' dismissal the respondent erred in that she addressed the complaint with Ms Phillips without a clear statement that the complaint was being treated extremely seriously and Ms Phillips job would be in jeopardy if the complaint was found to be justified after investigation. Neither was Ms Phillips advised of her right to representation.

I accept the respondent did put the complaint to Ms Phillips and did hear her out before making a decision to dismiss her. However, after hearing from Ms Phillips and before taking that decision to dismiss the respondent should have gone back to the complainant to verify his complaint in light of Ms Phillips explanation that she had not in fact been late for the appointment. The respondent should also have considered whether further inquiries of other staff and clients (if appropriate) could have confirmed the validity of the complaint or otherwise.

## **Determination**

Given the failings I have described I must find that Ms Phillips's dismissal was unjustified. She has a personal grievance against the respondent.

## **Remedies**

Section 124 of the Act requires that where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided, 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.

I am satisfied on the evidence before me that Ms Phillips contributed to the events giving rise to the dismissal to a significant extent. I accept the respondent raised performance concerns with her and that she was quite unresponsive to those concerns. Overall I must set the contribution by Ms Phillips at 50%.

## **Lost Remuneration**

Ms Phillips submitted she was out of work for approximately five months. She was stood down by WINZ for three months and suffered serious financial consequences. She seeks to recover three months lost remuneration pursuant to s.123 and s.128 of the Act.

Three months remuneration amounts to \$5,200 gross. This must be reduced by 50%.

**The respondent is directed to pay to the applicant the sum of \$2,600 under this head.**

**Compensation pursuant to s.123(1 ) (c) (i).**

The applicant gave evidence of having suffered hurt and humiliation loss of dignity and injury to her feelings as a result of this dismissal and I accept that dismissal always occasions distress for the dismissed worker.

Without contribution I would have awarded the applicant \$2,000 under this head. Allowing for contribution I direct the respondent to pay half that sum to the applicant.

**The respondent is directed to pay to the applicant the sum of \$1,000 under this head.**

**Respondent's Claim**

The respondent did not appropriately address the concerns/complaints received about the applicant's performance. Had those issues been appropriately addressed in the early stages of the employment then Ms Phillips performance may have improved without the losses which were made over time. If Ms Phillips performance did not improve after appropriate counselling and clear warnings then the respondent would have been in a position to justifiably dismiss Ms Phillips and would she would not have been in employment to distress customers and drive them away.

The losses came about because Ms Kerridge did not face the performance concerns she had with Ms Phillips in a timely and appropriate manner. As a result Ms Phillips can not be held responsible for the commercial losses suffered by the respondent. Ms Phillips contribution has been recognised by a reduction in the remedies awarded to her.

**Costs**

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott  
Member of Employment Relations Authority