

- [2] In its statement in reply received on 10 March 2009 the Company's director, Mr Ken Thurston, said Mr Pollock was suspended because of complaints from clients, and that – consistent with the provisions of the applicant's employment contract and the Company handbook – he was dismissed for unauthorised absence without notice from his job. In a letter to Mr Pollock's representative dated 24 July 2009 (but not copied to the Authority) – and if I understand it correctly – Mr Thurston explained the termination of Mr Pollock's employment as a result of objections from a major client to him not being exclusively committed to them and the applicant's refusal to give up his (unauthorised) secondary employment.
- [3] Mediation did not resolve the parties' employment problem.

The Investigation

- [4] In a telephone conference on 15 May 2009 the parties, including Mr Thurston, agreed to a one day investigation in Napier on 18 August, commencing at 10.00 a.m. Written confirmation of the agreement, and the investigation details, were copied to the parties.
- [5] No Company representative attended the investigation meeting: no explanation was received for the respondent's absence. At the scheduled commencement time I telephoned Mr Thurston's mobile phone and, as he did not answer, left a message advising of my decision to proceed with the investigation; I also asked that he contact the Authority as a matter of urgency. At the time of this determination Mr Thurston has not made contact directly with the Authority, but I am advised by the applicant's advocate, Mr Tayler, that Mr Thurston has advised his office he was too ill to attend the investigation.
- [6] Given Mr Thurston's agreement to the 18 August investigation, and in the absence of any explanation for his failure to attend, and in the absence of good cause, I was satisfied it was appropriate in all the circumstances to proceed: ss. 160 & 173 and Clause 12 of Schedule 2 of the Employment Relations Act applied.

Mr Pollock's Position Summarised

- [7] By written and oral evidence, Mr Pollock made the following clear to me:
- [8] He had worked for the Company for a number of years and held the position of cool store manager, Hastings.
- [9] Because of his wish "*to get ahead*" (oral evidence), and with Mr Thurston's approval, in the first half of 2008 Mr Pollock purchased and operated his own cleaning business, usually in the mornings from 4 to 7.00 a.m., 5 days a week. After finishing his tasks, and consistent with the provisions of his employment agreement, Mr Pollock would then attend to his employment with the respondent.
- [10] On or about 1 August, and at the Company's request, Mr Pollock took annual leave. On returning from leave on 9 October the applicant says he was advised by Mr Thurston that he had received a complaint from a client about the applicant's second job, that it was not going to work and he – Mr Pollock – was to go home. Mr Thurston also said to Mr Pollock, "*I'll put you on paid leave until I can find you another position in the Company*" (applicant's oral evidence).
- [11] On 24 October Mr Thurston offered the applicant a position in Palmerston North for two months: Mr Pollock says he accepted what was a fixed term arrangement and that it was his intention to return to his Hastings role.
- [12] Mr Pollock arranged with his stepbrother to run his cleaning business for the duration of his time in Palmerston North. Unfortunately, as a result of his difficulties in dealing with the recent death of his mother, and despite agreeing to the applicant's request, Mr Pollock's stepbrother 'went bush' just before the applicant was required to take up the Palmerston North-based job. Mr Pollock said he telephoned Mr Thurston on 28 October, explained his difficulties to him and that he could not make it that day in time for his duties: Mr Thurston said he was "*okay*" with the situation (par 14, applicant's witness statement).
- [13] Mr Pollock was still not able to contact his stepbrother on the following day: he again telephoned Mr Thurston to report he could not make it but should be

there during the afternoon of the following day when, according to the applicant, Mr Thurston replied, 'fuck it, forget about it, you are just doing this to get back at me' or words to that effect (par 16, above).

- [14] As it happened, Mr Pollock's stepbrother was available the following day.
- [15] Mr Pollock wrote to Mr Thurston on 7 November asking for the reasons for his dismissal. The latter telephoned the applicant on or about 20 November and said he could not give the reasons in writing as he did not know what they were, but that they would meet soon to sort matters out: Mr Pollock never heard directly from Mr Thurston again.
- [16] Mr Pollock also said that the job was particularly important to him as, not being academically successful, he had resolved to make a career with the Company and, over a five-year period, had succeeded in working his way up to the position of manager of the cool store.
- [17] Mr Pollock says the impact of his dismissal was "*huge*" (par 21, above) and "*horrendous*" (oral evidence). He said he had been unable to get off his couch, that his relationship broke up and that he no longer lives with his partner or their three children. He had to move out of their rented property, and the effect of a burglary they experienced just after Xmas 2008 when many of his children's presents and other property was stolen was magnified by his severely changed financial circumstances. He described himself as financially ruined with school fees and a scholarship fund in arrears, debts of over \$5,000 and being unable to afford to warrant and register his vehicles. He said he was turning "*a blind eye*" (oral evidence) to the resulting fines and was, despite the urgings of his family and friends, resisting going to the doctor in respect of his (self-diagnosed) depression.

The Company's Position

- [18] As is made clear above, two differing accounts of the reasons for Mr Pollock's dismissal have been provided: the statement in reply claimed it was because of unauthorised absence without notice whereas a subsequent letter to the applicant advised it was because of his refusal to give up secondary employment despite a client's requirement he be available full time. Both

referred to complaints from a client about not having Mr Pollock's exclusive attention.

Discussion and Findings

Unjustified Dismissal

[19] Mr Pollock's evidence was affirmed. In the absence of a Company representative it was not possible to test the parties' competing positions, in particular, that the applicant's absence from the Palmerston North position was initially authorised by Mr Thurston and thereby not in breach of the Company's handbook requirements (that it was unauthorised and for a minimum of two-day's duration) or that Mr Pollock's secondary employment was authorised. However, I have no reason to doubt the credibility of Mr Pollock's evidence.

[20] I am also satisfied from the parties' evidence that the applicant's dismissal was not proceeded by an inquiry of any sort by the Company into the reasons advanced by Mr Pollock for his absence. As a result the Company denied the opportunity to hear that the applicant's stepbrother's departure was in reaction to the murder of his mother.

[21] I therefore conclude that, at the very least, the procedural shortcomings by the Company grossly breach the relevant test set out at s. 103A of the Act: on an objective basis, did the employer's actions and how it acted amount to what a fair and reasonable employer would have done in all the circumstances at the time? Mr Thurston's dismissal of Mr Pollock was abrupt, unaccompanied by any inquiry and thereby arbitrary, and – consequentially – were not the actions of a fair and reasonable employer. These procedural shortcomings alone mean Mr Pollock was unjustifiably dismissed.

Unjustified Suspension

[22] However, I do not accept – on the evidence – that Mr Pollock was suspended as his own evidence suggests that, while not required at work, he was sent home on pay pending a further meeting by the parties in respect of the respondent's concerns. Mr Pollock raised no protest at the time and I am

satisfied his grievance is best addressed in respect of what is entirely clear, namely his grossly unjustified dismissal.

Penalties

[23] I am satisfied that penalties are not appropriate in this instance, first because of my conclusion that Mr Pollock was not unjustifiably suspended and, second, because, while less than ideal, the Company has participated (i.e. been open and communicative) to the extent of undertaking mediation and providing a statement in reply and agreement to the 18 August investigation. In other words, the respondent's responsiveness is neither wilful nor protracted such as to warrant a penalty.

Remedies

[24] Mr Pollock seeks \$15,000 compensation for hurt in respect of his unjustified dismissal. A significant award is warranted in this instance because of the entirely arbitrary nature of his termination and the uncontested evidence of the impact the unjustified dismissal had on the applicant (and his family). In all the circumstances I am satisfied an award of \$12,000 is appropriate.

[25] Mr Pollock seeks 3-months lost remuneration. He gave evidence of mitigating his losses, namely continuing his cleaning business and of finding seasonal work. I accept that an award of 3-months lost remuneration is entirely appropriate in all the circumstances but that it is to be reduced by the amount of his earnings during the same period.

[26] Leave is reserved for the matter to be returned to the Authority if, despite the assistance of IRD evidence, the parties are unable to reach agreement on the quantum to be paid.

[27] Costs are also sought: while reserving this claim so that the parties might reach agreement on the same I note here that they should attempt to settle the matter on their own terms by bearing the following in mind: costs typically follow the event. The investigation took half a day. Mr Pollock could therefore argue strongly for a contribution to his fair and reasonable costs of \$2,000.

Contribution

[28] There is no evidence of Mr Pollock's actions contributing in any way to the situation giving rise to his successful grievance, i.e. the respondent's arbitrary decision resulting in his unjustified dismissal.

Determination

[29] Mr Pollock's claim of unjustified dismissal succeeds and the Company is to pay him the sum of \$12,000 (twelve thousand dollars) compensation for hurt and 3-months lost remuneration less income earned during that period. Leave is reserved for the latter along with costs to be returned to the Authority in the event the parties are unable to agree on the same.

Denis Asher

Member of the Employment Relations Authority