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PROHIBITING PUBLICATION OF CERTAIN
INFORMATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 103
3031173

BETWEEN ADELE RIDDLE
Applicant

A N D HILTON HAULAGE LIMITED
PARTNERSHIP
Respondent

Member of Authority: Peter van Keulen

Representatives: Kevin Murray, advocate for the Applicant
Amy Keir, counsel for the Respondent

Investigation Meeting: 27 and 28 November 2018

Submissions Received: 28 November 2018 from the Applicant
28 November 2018 with further information received up to
5 December 2018 from the Respondent

Date of Determination: 26 February 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Adele Riddle worked as a tanker driver at Hilton Haulage Limited Partnership from September 2012 until 23 September 2016.

[2] In September 2016, Hilton Haulage conducted a disciplinary process with Ms Riddle over alleged misconduct at work. In response to that process and specifically because of concerns Ms Riddle had about how Hilton Haulage was handling the process, she resigned.

[3] Ms Riddle resigned before Hilton Haulage had made a final decision on the disciplinary matters although it had indicated its preliminary view to Ms Riddle, being that the alleged behaviour had occurred, it amounted to serious misconduct and dismissal was the appropriate sanction. Despite Ms Riddle's resignation Hilton Haulage completed the disciplinary process by confirming its decision to dismiss Ms Riddle for serious misconduct.

[4] Because of this dismissal and because she was suspended during the disciplinary process, Ms Riddle raised a personal grievance for unjustified dismissal and for unjustified action causing disadvantage.

[5] Hilton Haulage denies that its actions during the disciplinary process, including its decision to suspend Ms Riddle, were unjustified. It also says that there was no dismissal because, notwithstanding its decision to dismiss Ms Riddle and the written confirmation of dismissal, Ms Riddle had resigned prior to this rendering the dismissal meaningless. In the alternative it says, if the dismissal had effect, it was justified.

Non-publication

[6] Before I set out my analysis of the issues and my conclusion on the claims, there is an aspect of non-publication to address.

[7] The underlying allegations in the disciplinary process conducted in respect of Ms Riddle involve employees who were not involved in my investigation and therefore they did not have an opportunity to address any aspects of their own behaviour, which may have been part of the decisions made by Hilton Haulage.

[8] For this reason, I believe it is appropriate to protect those employees' identities by way of non-publication orders. Therefore, pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication:

- (a) The name of the employee who complained about Ms Riddle's behaviour, which gave rise to the first allegation of misconduct against Ms Riddle. I shall refer to this employee as BEI in my determination.
- (b) The name of the employee who was subject to the alleged comments made by Ms Riddle that BEI complained about. I shall refer to this employee as DGZ in my determination.
- (c) The name of the employee who complained about Ms Riddle's behaviour, which gave rise to the second allegation of misconduct against Ms Riddle. I shall refer to this employee as EPR in my determination.
- (d) The name of the employee who was subject to the alleged comments made by Ms Riddle that EPR complained about. I shall refer to this employee as MDU in my determination.

Issues

Unjustified dismissal

[9] The first issue for Ms Riddle's unjustified dismissal claim is did Hilton Haulage dismiss Ms Riddle?

[10] If there was a dismissal then the second issue is whether the dismissal was justified and this involves two broad aspects:

- (a) Did Hilton Haulage follow a fair disciplinary process in coming to the conclusion to dismiss?
- (b) Was the decision to dismiss substantively justified?

Unjustified disadvantage

[11] The issues for the unjustified disadvantage grievance are:

- (a) Did Hilton Haulage cause disadvantage to Ms Riddle's employment or a condition of her employment; and
- (b) If so, was Hilton Haulage's action justified?

Did Hilton Haulage dismiss Ms Riddle?

[12] There are four events relevant to the issue of whether Hilton Haulage dismissed Ms Riddle or not:

- (a) In a meeting on 22 September 2016 conducted as part of the disciplinary process, Scott Crampton, the CEO of Hilton Haulage who was the decision maker in respect of the allegations and the possible sanction that might be imposed upon Ms Riddle, advised Ms Riddle that it was Hilton Haulage's "intention to terminate" Ms Riddle's employment.
- (b) After Mr Crampton had advised Ms Riddle of Hilton Haulage's intention, Ms Riddle handed Mr Crampton a letter of resignation that stated "You have left me no option but to resign from this toxic environment so I hereby give you two weeks notice from today."
- (c) Following the disciplinary meeting on 22 September Hilton Haulage sent an email to Ms Riddle, which stated, "we do not accept your resignation as it was provided at the last minute and only after we had provided you with our intention to dismiss you."
- (d) The following day Hilton Haulage then concluded the disciplinary process, deciding that Ms Riddle had acted as alleged, that this was serious misconduct, and summarily terminating her employment as of 23 September.

[13] I am satisfied that Mr Crampton did not dismiss Ms Riddle in the meeting on 22 September 2016. When he advised Ms Riddle that it was Hilton Haulage's intention to dismiss her he was advising of Hilton Haulage's preliminary decision. In evidence he explained that, but for Ms Riddle's resignation and her walking out of the meeting, he would have continued to explain to Ms Riddle that she would have an opportunity to consider this

preliminary decision and make submissions or comments on it before he reached a final decision.

[14] It follows therefore that Ms Riddle was still employed when she handed Mr Crampton her letter of resignation. A resignation is a unilateral act by an employee; it does not require acceptance or rejection by an employer. So long as the resignation is unequivocal, the employee has not attempted to resile from it or the resignation was not made in the heat of the moment (which may cast doubt whether the employee actually intended to resign) then it must stand.

[15] In this case, Ms Riddle's resignation was unequivocal; she did not attempt to resile from it; nor was it made in the heat of the moment. Hilton Haulage's purported rejection of the resignation is of no consequence.

[16] However, the resignation was on two weeks' notice, which means Ms Riddle was still employed for the period of notice, being up until 6 October 2016. So, Hilton Haulage did dismiss Ms Riddle when it decided to summarily end her employment for serious misconduct on 22 September 2016.

Did Hilton Haulage follow a fair disciplinary process?

[17] As there has been a dismissal, the onus now shifts to Hilton Haulage to satisfy me that the dismissal was justified. The first issue on the justification is whether in coming to the decision to dismiss, Hilton Haulage followed a fair process.

[18] Sections 4(1A) and 103A of the Act are relevant to the issue of whether Hilton Haulage conducted a fair disciplinary process. The matters for me to consider are:

- (a) Did Hilton Haulage investigate the allegations of serious misconduct sufficiently;
- (b) Did Hilton Haulage outline the allegations, explain the possible implications of a finding of serious misconduct and give all of the information it had that was relevant to the alleged serious misconduct, to Ms Riddle for her to consider and respond to;

- (c) Did Hilton Haulage give Ms Riddle a reasonable opportunity to respond to the allegation of serious misconduct including specifically any information it did provide, before it made its decision to dismiss;
- (d) Did Hilton Haulage consider properly any explanation given by Ms Riddle before it made its decision to dismiss;
- (e) If there was a failing by Hilton Haulage in any of the steps above, does that render the disciplinary process unfair?

Did Hilton Haulage investigate the alleged misconduct and the relevant circumstances, properly?

[19] In September 2016, Hilton Haulage received two complaints about Ms Riddle's conduct at work. The events underlying the complaints were not connected but the behaviour was similar and potentially amounted to bullying behaviour toward other employees.

[20] The first incident was a complaint from BEI that she overheard Ms Riddle making disparaging remarks about DGZ in the staffroom.

[21] BEI made her complaint to Laurie Harrington, the Daily Transport Manager, on 5 September 2016. She provided Mr Harrington with a written statement that set out that on 3 September 2016 she heard Ms Riddle say three things about DGZ:

- (a) How DGZ had made a mistake at work, by collecting milk from the wrong farm and had gotten away with it.
- (b) That DGZ's husband had come to his senses and kicked DGZ out of the house. And, that DGZ had a new boyfriend.
- (c) That DGZ was claiming to be under stress, hence why she was making mistakes at work.

[22] Mr Harrington then forwarded the complaint to the Hilton Haulage HR team asking for advice on how to proceed with it.

[23] On 12 September 2016, before Mr Harrington had taken any further steps in respect of BEI's complaint, DGZ resigned citing constant bullying and harassment from Ms Riddle as

the reason for her resignation, with the comments made on 3 September 2016 being the final straw.

[24] Then on 13 September 2016, Mr Harrington received a second complaint about Ms Riddle's behaviour. This complaint was set out in an email from EPR. EPR advised that he overheard a telephone conversation, which was on speaker phone, where Ms Riddle was aggressive and derogatory about MDU. In the short call, Ms Riddle swore, including swearing about MDU and showed no respect for either the employee on the call with her or EPR when he interrupted the call and told Ms Riddle to stop being abusive and stop swearing.

[25] Mr Harrington then spoke to the other employee on the call with Ms Riddle, who confirmed that Ms Riddle had been aggressive and abusive and had sworn generally and specifically in respect of MDU. Mr Harrington recorded this in a file note.

[26] Later on 13 September 2016, Mr Harrington then investigated the first complaint by speaking to the other employees who were in the staffroom at the relevant time. Only one employee was prepared to speak to Mr Harrington about what had been said. That employee confirmed that Ms Riddle appeared to be discussing DGZ and that Ms Riddle was discussing personal matters about DGZ.

[27] So, by the end of 13 September 2016, Mr Harrington had received two detailed complaints, in writing, about Ms Riddle's behaviour. He had spoken to the complainants, and then for both complaints, he had spoken to employees who were present at the time of the alleged incidences and those employees confirmed the events. He had also received DGZ's resignation, which was in response to DGZ's view that she was bullied and harassed by Ms Riddle.

[28] Mr Harrington then discussed the information he had received through his investigation into the two complaints with HR. A decision was made to start a disciplinary process with Ms Riddle by inviting her to an investigation meeting to understand what she said about the two incidences.

[29] I am satisfied that Hilton Haulage investigated the alleged misconduct, including the circumstances that gave rise to the alleged misconduct, adequately before it decided to proceed with a disciplinary process.

[30] However, this conclusion does not completely resolve this aspect of my analysis of the process. This is because Hilton Haulage conducted the disciplinary process in two stages, first it held an investigation meeting with Ms Riddle and then it held a second disciplinary meeting with her. So there remains an issue about what further investigation Hilton Haulage undertook after it had received Ms Riddle's first responses to the allegations. I will consider those steps further below.

Did Hilton Haulage provide relevant information and explain the allegation and the disciplinary consequences to Ms Riddle?

[31] Whether Hilton Haulage provided the relevant information to Ms Riddle is complicated by the two-stage process it adopted and by the fact that when it commenced the disciplinary process it did not have BEI's permission to disclose her identity as the complainant in the first incident.

[32] This means it did not provide all of the relevant information to Ms Riddle in advance of the first meeting.

[33] However, what Hilton Haulage did was set out its concerns in writing. In a letter dated 14 September 2016, it invited Ms Riddle to the investigation meeting and it set out why. In this regard the letter set out:

- (a) The two things Ms Riddle was alleged to have done and when, including details of what was said by setting out specific parts of BEI's complaint (but not identifying her as the complainant) and providing a copy of EPR's email complaint.
- (b) Why Hilton Haulage thought it might be serious misconduct – that is because the allegations if correct would be intimidating behaviour and verbal abuse of others in the workplace.
- (c) The consequences of Hilton Haulage concluding that Ms Riddle did act as alleged – that is, the behaviour might be deemed serious misconduct, which then meant a possible outcome was disciplinary action which in turn could lead to dismissal.

[34] Applying a critical scrutiny of the information provided it is easy to suggest there are faults in Hilton Haulage's approach. For example, Ms Riddle should have been advised that the complainant for the first allegation was BEI and she should have been given the written complaint or that any corroborating information including any written notes of the discussions should also have been disclosed.

[35] Notwithstanding these possible criticisms, I think Hilton Haulage had provided sufficient information to Ms Riddle.

[36] Two key aspects inform my view.

[37] First, in terms of conducting a fair process, the test for justification set out at s 103A of the Act requires an employer to raise its concerns with an employee. Further, the duty of good faith at s 4 of the Act requires an employer to provide an employee with access to information relevant to the pending decision. So there is no statutory requirement to provide all relevant information.

[38] Then, both of these obligations are coupled with further obligations relating to giving an employee an opportunity to comment on the concerns and/or information before a decision is made. So, the requirement to provide information needs to be read in the context of giving the employee an opportunity to respond to it. My assessment is about whether the information supplied was sufficient for Ms Riddle to be able to comment on the allegations.

[39] Second, Hilton Haulage had not yet decided this was a disciplinary matter and it was providing Ms Riddle with an opportunity to comment on the allegations as part of its investigation. So, less was probably required of it in terms of its preliminary work.

[40] The information supplied by Hilton Haulage was sufficient to enable Ms Riddle to comment in a meaningful way in Hilton Haulage's investigation. At the end of the day, Ms Riddle knew what the allegations were and she knew whether she had said the things she was quoted as having said, so could respond to them.

Did Ms Riddle have an appropriate opportunity to respond to the allegations of serious misconduct and the information provided?

[41] Hilton Haulage invited Ms Riddle to attend the investigation meeting and she did so. I have read the transcript of the investigation meeting; I am satisfied that Ms Riddle had an appropriate opportunity to respond to the allegations.

Did Hilton Haulage consider Ms Riddle's response properly before it made its decision?

[42] Following the investigation meeting, Hilton Haulage did consider what Ms Riddle said and consequently it revisited the information it had received to complete its investigation.

[43] Mr Harrington, with input from the HR team, decided there was a basis to proceed with the disciplinary process by conducting a disciplinary meeting.

[44] So, at this point the four aspects of determining if a process is fair or not, become relevant again. My analysis of Hilton Haulage's compliance with these requirements in terms of the disciplinary meeting and the decision, follows.

[45] Hilton Haulage undertook further investigation in response to comments made by Ms Riddle in the investigation meeting. I am satisfied that Hilton Haulage made appropriate further enquiries in response to Ms Riddle's comments in the investigation meeting; this fortifies my conclusion that Hilton Haulage properly investigated the allegations.

[46] Hilton Haulage then provided all of the relevant information it had relating to the allegations to Ms Riddle. This included both written complaints (it having received consent from BEI to provide the complaint to Ms Riddle), all of the additional statements and the notes it had on the statements made by other employees on both incidences as well as a transcript of the investigation meeting.

[47] Hilton Haulage set out clearly, again, what the allegations were, why if substantiated the incidences could be serious misconduct and that an outcome of the disciplinary meeting could be a sanction up to and including dismissal.

[48] Having been provided with all of the information and an explanation of the concerns, the possible finding of serious misconduct and the outcome, Ms Riddle was invited to attend the disciplinary meeting to provide any further comments she had.

[49] As with the investigation meeting, I have had the benefit of reviewing a transcript of the disciplinary meeting. I am satisfied that Ms Riddle did have an opportunity to provide her comments on the issues.

[50] And, it is clear to me from the evidence I heard that Mr Crampton, the decision maker in respect of any possible finding of serious misconduct and any sanction, did consider all of Ms Riddle's comments. Having done this he concluded that the incidences had occurred as alleged, that they amounted to serious misconduct and the preliminary decision was to dismiss Ms Riddle subject to any further comments she might have on dismissal or other sanction.

[51] Given all of the above, I am satisfied that Hilton Haulage carried out a fair disciplinary process.

Was Hilton Haulage's decision substantively justified?

[52] The matter I must consider on the question of substantive justification is whether dismissal was a decision a fair and reasonable employer could have come to in light of:

- (a) The gravity of the misconduct, including any effects of it; and
- (b) The circumstances of the misconduct and/or any mitigating factors.

[53] In concluding that Ms Riddle's behaviour amounted to serious misconduct Mr Crampton decided that:

- (a) Ms Riddle did speak about DGZ as BEI stated in her complaint. As such, Ms Riddle spoke in a derogatory and abusive way about DGZ.
- (b) Ms Riddle was aggressive and derogatory about MDU. Ms Riddle swore when talking about MDU and she showed no respect for either the employee on the call with her or EPR when he interrupted the call. This amounted to behaviour that was intimidating and aggressive and was verbal abuse of other employees.

[54] There is no doubt that the effects of Ms Riddle's behaviour toward DGZ were severe. Ms Riddle's comments about DGZ were relayed back to DGZ and she resigned because of the comments, and because of what DGZ perceived to be ongoing bullying by Ms Riddle.

[55] There was no evidence about the effect of Ms Riddle's outburst about MDU.

[56] So, Mr Crampton concluded that Ms Riddle had acted in a manner that was derogatory and abusive of other employees, and aggressive and intimidating. The effect of this behaviour included causing DGZ to resign.

[57] Mr Crampton then turned to consider this behaviour against the standards expected by Hilton Haulage. In this regard the Hilton Haulage Disciplinary & Procedural Fairness Policy has a list of behaviour that might amount to serious misconduct which includes:

- (a) Intimidation of and/or threatening behaviour towards another employee, customer, supplier or management.
- (b) Fighting and/or verbal abuse of another employee, customer, supplier or management on Company or customers' premises, or when attending Company functions.

[58] Based on his conclusion of the severity of the behaviour measured against the expected standards in the policy (to not verbally abuse other employees and not intimidate other employees), Mr Crampton concluded that Ms Riddle's misconduct was serious misconduct.

[59] There are also two aspects of the circumstances of Ms Riddle's behaviour that are important:

- (a) There had been a history of poor relations between DGZ and her partner and Ms Riddle and her husband. The main point of antagonism appeared to be between DGZ and Mr Riddle but the respective partners had been drawn into the ongoing difficulties. As Mr Riddle also worked for Hilton Haulage and as the relationship difficulties started to manifest in issues at work, Hilton Haulage had intervened. The result of the work undertaken by Hilton Haulage between all of the parties was a memo of understanding setting out expected behaviours. Ms Riddle had agreed to abide by the memo of understanding in regard to her interactions with DGZ.

(b) More generally, Hilton Haulage had been concerned for some time about how its employees based at the plant Ms Riddle worked at, interacted with each other and worked together. Hilton Haulage had worked through these issues, working on employee behaviour and addressing teamwork and morale, including having a Respectful Workplace Seminar for all employees. So there were recognised expectations in terms of standards of respect, teamwork and professionalism that Hilton Haulage had introduced and continued to monitor and promote.

[60] So, not only was Ms Riddle's behaviour serious misconduct in terms of the severity and in terms of Hilton Haulage's policy, it was behaviour that was contrary to the standards Ms Riddle was expected to meet and had agreed to meet. In light of this, Mr Crampton concluded that dismissal was the appropriate sanction.

[61] My objective assessment of Mr Crampton's analysis leads me to the conclusions that the decision to categorise Ms Riddle's behaviour as serious misconduct and then the decision that dismissal was the appropriate sanction, were decisions that a fair and reasonable employer could have come to in all the circumstances and the dismissal was justified.

Unjustified disadvantage

Did Hilton Haulage act in a manner that caused disadvantage to Ms Riddle's employment or a condition of her employment?

[62] Placing Ms Riddle on suspension was an act that caused disadvantage to her conditions of employment.

Were Hilton Haulage's actions justified?

[63] The question of whether a suspension is justified turns on the procedural fairness and the circumstances of the alleged behaviour in the context of the employment.

[64] Not every instance of suspension requires the employee to be told of the pending suspension with a view to the employee commenting on the proposal before a decision is made to effect a suspension or not¹.

[65] If there is some valid reason why the employee's view on a proposed suspension should not be sought before a decision is made then an employer cannot be said to have acted unfairly.

[66] In this case there was no consultation and I am not satisfied that the circumstances of this case warranted immediate suspension without consultation with Ms Riddle.

[67] The suspension may have been substantively justified but Hilton Haulage's failure to consult over it and the unilateral imposition renders the suspension an unjustified action, which caused disadvantage.

Remedies

[68] As Ms Riddle was unjustifiably disadvantaged in her employment, I may award any of the remedies provided for under s 123 of the Act; Ms Riddle seeks compensation and reimbursement.

Reimbursement

[69] I can award Ms Riddle reimbursement for the earnings she has lost as a result of her unjustified action personal grievance pursuant to s 123(1)(b) of the Act.

[70] As Ms Riddle was paid during her suspension, she has not lost any remuneration because of her grievance and I will not award her any lost remuneration.

Compensation

[71] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act. This is about compensating Ms Riddle for the humiliation, loss of dignity and injury to feelings she suffered because of the unjustified suspension.

¹ *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587

[72] What I must consider is the effect of unjustified suspension on Ms Riddle – i.e. identify the harm caused to her and the loss she suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed and then where that corresponds to the spectrum of quantum awarded as compensation².

[73] Ms Riddle did not give any direct evidence of how Hilton Haulage’s decision to suspend her without consulting her over the suspension impacted on her. I do however accept the unjustified suspension had some impact and I glean that impact from Ms Riddle’s evidence about the disciplinary process. I attribute some of the shock, stress and anxiety Ms Riddle suffered from the disciplinary process to the unjustified suspension.

[74] When assessing where Ms Riddle’s compensable loss and harm sits on the spectrum of loss and harm, and the spectrum of compensation, I have considered the recent decisions of the Employment Court, which provide guidance on the assessments³.

[75] I assess the level of harm and loss to be at the lowest end of the spectrum and consequently the compensation also to be at the lower end of the spectrum. I quantify the compensation payable to be \$2,000.00.

Contribution

[76] As I have awarded remedies to Ms Riddle, I must now consider whether she contributed to the situation that gave rise to her grievance.⁴

[77] When assessing if Ms Riddle’s actions contributed to the situation that gave rise to her grievance I am looking for a causal link between her actions and the situation that gave rise to the unjustified action. If I am satisfied that there is a link, then I must consider whether the behaviour was culpable or blameworthy, which would require a reduction in remedies.⁵

[78] I am not satisfied that Ms Riddle contributed to the unjustified suspension in a culpable or blameworthy way and no reduction needs to be made for contribution.

² *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

³ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁴ Section 124 of the Act.

⁵ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

Conclusion

[79] Hilton Haulage did not unjustifiably dismiss Ms Riddle.

[80] Hilton Haulage acted unjustifiably causing disadvantage to Ms Riddle's employment by suspending her without consultation. In satisfaction of this personal grievance Hilton Haulage must pay Ms Riddle \$2,000.00 without deduction pursuant to s 123 (1)(c)(i) of the Employment Relations Act 2000.

Costs

[81] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[82] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority