

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 336
5364137

BETWEEN

KAREN SCHMIDT
Applicant

AND

PRO-DOSA
INTERNATIONAL LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: M Harrison, advocate for applicant
B Edwards, counsel for respondent

Investigation meeting: 30 and 31 August 2012

Determination: 26 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Karen Schmidt says her former employer, Pro-Dosa International Limited (Pro-Dosa), dismissed her unjustifiably by sending her home on 25 October 2011, and by dismissing her on 31 October 2011 on the ground of her performance and conduct.

[2] Pro-Dosa says there was no dismissal on 25 October and that the 31 October dismissal was justified.

Background

[3] Pro-Dosa manufactures and sells specialist equine formulations to enhance the performance, prevent illness and assist the recovery of horses during competitive sports events. It exports its product as well as selling the product in New Zealand. The product is in the form of a paste dispensed from a tube. The product is manufactured on Pro-Dosa's site.

[4] Ms Schmidt had been employed on a casual basis commencing in 2005. By 2011 her hours of work had increased to some 30 hours per week, although the actual hours were flexible. Her job was to carry out ancillary manufacturing duties including labelling, filling, packing and shrink-wrapping the product, carrying out inventory and other clerical duties associated with the manufacture and despatch of the product, and attending in the office on Tuesday mornings. Attendance in the office was required to provide cover because the part time office manager, Terrance Casey, was not available on Tuesday mornings.

[5] Manufacturing was carried out by a contractor. The timing was dependent on orders received, but was usually carried out on a Sunday unless the following Monday was a public holiday when it would be done on that day. On some weeks there would be no manufacturing and on others manufacturing might occur more than once, but this was rare particularly in the 12-month period prior to Ms Schmidt's dismissal. Whether and when manufacturing was to occur was recorded in a work diary and discussed at staff meetings. The manufacturer would also contact Ms Schmidt to advise when the batches of product in question had been made.

[6] The bulk manufactured product was required to be filled in tubes within 24 hours of manufacture, the tubes were capped to ensure there was no leakage, then boxed, shrink wrapped and placed in cartons for shipping. Tubes were also required to be labelled, but this was done in advance. Accordingly Ms Schmidt's usual work pattern was: to fill tubes on Mondays; work in the office on Tuesday mornings and on filling or packing duties for the rest of the day; and work until Friday or very occasionally Saturday on completing ancillary manufacturing duties as well as follow up cleaning and clerical duties. Because Ms Schmidt had a lifestyle block and had horses of her own to which she would attend, as well as another part time job, her duties were from time to time carried out in the afternoon or at night.

[7] The employment relationship was relatively uneventful until, in mid-2011, Corinne McNamee, Pro-Dosa's managing director, perceived a significant change in Ms Schmidt's behaviour and a deterioration in her performance. In order to facilitate better communication, Ms McNamee advised Ms Schmidt in July 2011 that there would be a staff meeting every Monday morning to discuss the week's work, and

asked that the meeting commence at 9 am. The staff comprised Ms McNamee, Ms Schmidt, Mr Casey and the sales manager Nick Morgan.

[8] Ms McNamee's evidence was that Ms Schmidt did not demur to the suggestion and meetings were planned accordingly. Ms Schmidt said she replied that she would attend when she could. An arrangement of the kind Ms Schmidt said was made is so inherently unlikely in all the circumstances that I prefer Ms McNamee's account, although I regard Ms Schmidt's account as indicative of her attitude.

[9] The start time was subsequently changed to 10 am accommodate Ms Schmidt, because of her frequent lateness. After the change she failed to attend several meetings at all, and was late for one. She did not advise in advance when she would be unable to attend, and did not advise when she was going to be late. As a result, not only were absences and the lateness a cause for concern in themselves, there was also a concern about Ms Schmidt's failure to advise of them.

[10] A further matter arose while Ms McNamee was on a marketing trip in the United Arab Emirates during September and October 2011. A customer in Dubai showed her a recently-received batch of product. Labels had been applied incorrectly, the shrink wrapping was applied incorrectly, and product was spread on the outside of many of the tubes causing hygiene concerns. Ms McNamee said in evidence she believed Ms Schmidt had been grossly negligent and had failed to adhere to the guidelines in the company protocol manual. However the matter was not raised with Ms Schmidt in that way in any disciplinary context.

[11] Ms Schmidt discussed at length in her evidence a problem that occurred when product sent to Australia in or about July or August 2011 became oxidised and was returned. To the extent that the matter was raised in an effort to suggest the state of the Dubai batch was the result of problems with the formula for the product, as shown by the problem in Australia, Ms McNamee denied there was any link between the two. As the formulae differed in a fundamental way the link suggested by Ms Schmidt is unlikely.

[12] When Ms McNamee returned to New Zealand she became aware of more incidents, including Ms Schmidt's very late arrival at the office without notice on a

recent Tuesday morning. In addition Ms McNamee noticed that product manufactured on 10 October had been placed in tubes on 11 October, but the tubes had not been labelled, boxed, or shrink wrapped until late on 15 October. Despite this, Ms Schmidt had recorded 25 hours' work on 12-14 October.

[13] Ms McNamee raised these matters with Ms Schmidt at a meeting on 20 October 2011, although the meeting was not said to be disciplinary. Particular concerns to be discussed were identified in a letter to Ms Schmidt dated 18 October 2011 and were: Ms Schmidt's record of attendance at the Monday morning meetings and her lateness on the recent Tuesday; the failure to attend in a timely way to the labelling, boxing and wrapping of product the previous week; and the need to pay attention to detail to ensure in particular that product did not drip onto the outside of the tubes while they were being filled, as well as ensuring that the tubes were capped properly so leaks did not occur afterwards. The last of these was couched in general terms, but incorporated the concern about the state of the product received in Dubai.

[14] In the interests of keeping Ms Schmidt under closer supervision, Ms McNamee proposed that the matter be resolved by Ms Schmidt returning to more regular hours of work, commencing at either 9 am or 10 am from Monday to Thursday or Friday.

[15] Ms Schmidt provided a written response to the concerns, and the meeting went ahead on 20 October. Her response was that: she was not obliged to attend the Monday meetings; there was good reason for the lateness on the recent Tuesday but she was unable to notify Pro-Dosa of it at the time because there was no credit left in her cell phone account; and she sought further details and supporting documentation in respect of the concerns about the state of the product. Otherwise possible causes of the observed state of the product were discussed at the meeting, including whether there was a problem with the consistency of the product and whether the caps on the tubes were faulty.

[16] Ms McNamee indicated she would investigate some of the product-related matters further. She also provided Ms Schmidt with a phone card to facilitate better communication.

[17] For her part Ms Schmidt gave assurances to the effect that she would attend the weekly meetings, complete her work in a timely fashion, pay attention to detail while completing the work, and communicate with Pro-Dosa if she was going to be late to work.

[18] Monday 24 October 2011 was Labour Day. Ms McNamee arrived at work that day to find the manufacturing room was dirty, and labelling and packing tasks were not completed. She turned away the two manufacturers who were scheduled to work that day, and cleaned the room herself. Because no manufacturing was carried out, there would be only office work for Ms Schmidt to do on Tuesday 25 October. Ms McNamee decided she would pay Ms Schmidt for the Tuesday morning office coverage, but that Ms Schmidt could go home.

[19] Ms McNamee said that when she advised Ms Schmidt of this on 25 October Ms Schmidt became abusive, and threatened to call customers and distributors and tell them there was a problem with the product. Ms McNamee said Ms Schmidt was very intimidating and she was fearful, so she told Ms Schmidt to go home and calm down. To put that concern in context, Mr Casey and Mr Morgan said in evidence that Ms Schmidt had been so volatile in recent months that they, too, found her intimidating. All three said Ms Schmidt's angry demeanour added to the intimidating nature of her conduct. Because the concerns about her behaviour meant Ms Schmidt's threat was taken seriously, Ms McNamee asked for the company's keys and petrol card.

[20] The behaviour of 25 October, as well as a view that Ms Schmidt had not been acting in accordance with the assurances she had given, led Ms McNamee to call a further meeting on 27 October 2011. The meeting was to discuss Ms Schmidt's future at Pro-Dosa. In a letter dated 25 October 2011, which I find was available to Ms Schmidt no later than the commencement of the 27 October meeting, Ms McNamee recorded her concern about Ms Schmidt's work since 20 October and about the incident of 25 October.

[21] In a letter dated 28 October Ms McNamee summarised the discussion which occurred during the meeting.

[22] According to the summary, which was discussed in the evidence and I accept as accurate, Ms Schmidt did not agree she had in effect committed to being prepared for manufacturing every week (whether it occurred on Sunday or Monday) or in any event that she had been told there was to be a change to manufacturing on Mondays. She explained further that the manufacturing room was not ready on 24 October because there was a shortage of shipping cartons for the previous batch so that the batch could not be completed and removed, and that the tubes for the next batch were not labelled because Ms Schmidt did not know which batch was to be prepared next. She was also unaware the necessary labels had arrived.

[23] Regarding the incident on 25 October, Ms Schmidt denied making any threat and said she was concerned about being in trouble over the faulty batch that had been sent to Australia. More generally she admitted she had been sloppy but said the problem was with the consistency of the product.

[24] In her evidence Ms Schmidt denied admitting she had been sloppy, but I consider it likely her denial was influenced by the fact that Pro-Dosa has counterclaimed against her for her alleged negligence in respect of further problems of a related kind and which were identified after her employment had ended. Some of Ms McNamee's evidence was influenced in a similar way but otherwise I found her to be a credible witness, and find it likely the admission was made.

[25] The meeting ended on the basis that the explanations would be considered and a decision about the continuation of Ms Schmidt's employment would be made by 3 November 2011.

[26] In a letter from Ms McNamee dated 31 October 2011 Ms Schmidt was notified of her summary dismissal. Under the heading 'details of the decision to terminate your employment' the letter listed the chain of events since 18 October, including the concerns that had been discussed on 20 October. Ms McNamee said in evidence that the threat made on 25 October was also a factor in the decision to dismiss, although she did not record that matter in the letter because she did not wish to provoke Ms Schmidt into acting on the threat. She also said that all of the matters referred to in the 'details of the decision to dismiss' comprised the reasons for the dismissal.

[27] The letter ended by expressing the rationale for the decision as:

... it was decided that it would be impossible to continue to employ you. This position requires someone who can work unsupervised and can take responsibility for their own job and all the tasks within it. As you well know, I am away most of the time and am unable to give constant direction and supervision to employees. I require responsible trustworthy people to work with me. .

Issues

[28] The issues are:

- (i) was Ms Schmidt dismissed on 25 October;
- (ii) were the conclusions about Ms Schmidt's conduct conclusions a fair and reasonable employer could have reached in the circumstances at the time;
- (iii) was the decision that Ms Schmidt should be dismissed as a result of the conduct one a fair and reasonable employer could have reached in the circumstances at the time;
- (iv) do the answers to (ii) and (iii) mean Ms Schmidt was dismissed unjustifiably;
- (v) if Ms Schmidt was dismissed unjustifiably,
 - has she lost remuneration as a result of the dismissal for which she is entitled to be reimbursed, and if so in what sum;
 - has she suffered injury to her feelings for which she is entitled to be compensated, and if so in what sum;
 - did she contribute to the circumstances of her dismissal so that a reduction in these remedies is warranted.

Was there a dismissal on 25 October

[29] In the 25 October letter Ms McNamee accounted for her action in sending Ms Schmidt home by saying:

'After you made threats towards the company in the form of disclosing confidential information and possibly damaging the reputation of the product and the organization, I decided that the best course of action was to dismiss you from the premises and relieve you of your duties until you could regain a level head.

[30] The use of the word ‘dismiss’ was unfortunate although there was no suggestion that the word was used when Ms Schmidt was sent home, and the reference in the letter to regaining a level head suggests there was no intention to relieve Ms Schmidt of her duties permanently. At the same time I accept that telling Ms Schmidt to go home, and taking her keys and petrol card from her, were actions capable of amounting to a ‘sending away’¹ of Ms Schmidt to the extent that it was arguable Ms Schmidt had been dismissed.

[31] Ms McNamee clarified her intentions later on 25 October, when a friend of Ms Schmidt’s contacted her to ask that Ms Schmidt be given her job back. Ms McNamee advised that Ms Schmidt had not been dismissed, although dismissal was under consideration in the light of Ms Schmidt’s behaviour.

[32] I also take into account that Ms Schmidt’s hours of work were flexible, and that the manufacturing process which to a substantial degree dictated her weekly workload had not occurred. Moreover this was a consequence of Ms Schmidt’s actions. Further, until manufacturing did occur, other than the Tuesday morning work for which she was paid, there would be little or no work for Ms Schmidt in any event.

[33] Then on 27 October the disciplinary meeting occurred. By then Ms McNamee had clarified her meaning; there was a lack of work for Ms Schmidt in the interim in any event; and it could not be said Ms Schmidt had already been dismissed.

[34] For these reasons I find Ms Schmidt was not dismissed on 25 October. At most the action taken that day was a suspension which, even if unjustified, would not attract a remedy in the circumstances.

Were the conclusions about Ms Schmidt’s conduct fair and reasonable

[35] Further to the matters raised at the 27 October meeting, when explaining why she was unaware manufacturing would occur on 24 October Ms Schmidt acknowledged being aware that a contractor would be on-site that day. The contractor had been engaged only recently, and Ms Schmidt told Ms McNamee she understood he was to be on-site for a job interview only. The explanation was not accepted because Ms

¹ *Actors Equity IUOW v Auckland Theatre Trust Inc* [1989] 1 NZILR 463, (1989) ERNZ Sel Cas 247

McNamee herself was aware of how the contractor had been introduced and was able to conclude that there were no reasonable grounds for such an understanding. For my part I consider the explanation opportunistic and unconvincing.

[36] Secondly, it was pointed out that Ms Schmidt had been present at the staff meeting on 17 October when manufacturing was covered. In particular Ms Schmidt was told manufacturing would occur every week until further notice, and that the manufacturing room was to be ready for manufacturing on Sundays even if manufacturing did not actually occur until Monday. Minutes of the meeting were produced and discussed on 27 October.

[37] Finally with reference to the state of the manufacturing room on 24 October, Ms McNamee did not accept the explanation that the tubes for the next batch were not labelled because Ms Schmidt did not know which batch was to be manufactured next. Her reasons were: the manufacturing schedule was printed every week and was available; the plan to manufacture the batch in question (which was destined for France) had been discussed at the previous staff meeting; the labels were received on 17 October, as Ms Schmidt knew because the labels were in French and she had made the notation "French" on them.

[38] Regarding the incident of 25 October, Ms Schmidt denied making a threat, rather she said she was concerned that the batch discussed at the 20 October meeting was one that had been sent back from Australia because its consistency was too thin. She felt she was in trouble for something that was not her fault. However, as Ms McNamee explained to her, the concerns about the state of the product included the Dubai batch but not the batch returned from Australia. Even if misconceived I regard Ms Schmidt's explanation as a possible reason why she was angry that day, but find Ms McNamee was entitled to take the view that the threat she described was made and that it was unacceptable.

[39] All of Ms McNamee's points were put to Ms Schmidt at the time and in the Authority, but Ms Schmidt maintained her denials.

[40] I do not accept the denials. I find the conclusions Ms McNamee reached in respect of Ms Schmidt's conduct after 20 October were conclusions a fair and reasonable employer could have reached in the circumstances at the time.

[41] I address the remaining conduct in the next section of this determination.

Was it fair and reasonable to decide dismissal was the appropriate response

[42] Consistently with Ms McNamee's overall view that it was impossible to continue to employ Ms Schmidt, Pro-Dosa relied in submissions on a general loss of trust and confidence in Ms Schmidt as a result of all of the matters detailed in the letter of dismissal, and a further submission that Ms Schmidt's conduct had deeply impaired or destroyed the employment relationship.

[43] I accept as a matter of fact that the concerns discussed on 20 October were reasonably founded. I also accept that it was important to Pro-Dosa that Ms Schmidt be able to work unsupervised, and that Ms Schmidt had been demonstrating that she could not be trusted to work unsupervised.

[44] However it was not open to Pro-Dosa to dismiss Ms Schmidt for conduct which included the conduct and performance discussed on 20 October, when none of those matters had been raised in a disciplinary context. In particular: there has not been any suggestion that the 20 October meeting was a disciplinary meeting; the meeting was not called and did not proceed as a disciplinary meeting; the concerns about product which have now been emphasised strongly were raised at the time in the context of a request to take more care; and there was no disciplinary outcome.

[45] The only conduct raised in a disciplinary context was that discussed on 27 October. Even if the meeting was prompted by Ms Schmidt's failure to act on her assurances of 20 October regarding the taking of care with product in particular, this does not cure the difficulty.

[46] Ms Schmidt's dismissal was summary. To justify a summary dismissal the conduct relied on must amount to serious misconduct. As a matter of fact and degree the conduct discussed on 27 October did not on its own reach the level of serious

misconduct. It was not in any event suggested that conduct alone did reach that level. In reality the conduct was more in the nature of 'the last straw', coming at the end of several months of deteriorating behaviour.

[47] As a result, I conclude that the decision to dismiss Ms Schmidt summarily was not the response a fair and reasonable employer could have made.

Was the dismissal justified

[48] For the above reasons I find that the summary dismissal was unjustified.

What remedies should be awarded

1. Lost remuneration

[49] Ms Schmidt seeks the reimbursement of remuneration lost as a result of her personal grievance. In the last year of her employment the average number of hours she worked per week was 30.2. At her hourly rate of pay of \$20.25, her average weekly earnings were \$611.55.

[50] I would have found that a fair and reasonable employer could dismiss Ms Schmidt on notice because after a fair and reasonable investigation it had grounds for conclusions that: she had failed almost immediately to act on her assurance regarding product; her explanations of Ms McNamee's observation of the state of the manufacturing room on 24 October were unacceptable; and her threat was unacceptable. On that analysis the only reimbursable loss Ms Schmidt suffered was the loss of payment in lieu of notice.

[51] Further, Ms Schmidt said she has been on a sickness benefit since her dismissal and has not sought work as a result. She was diagnosed with a depressive illness in February 2012, which her doctor recorded was the result of the stress associated with the present proceedings, but she was either evasive or uncertain when asked during the investigation meeting to clarify when and why she was placed on the sickness benefit as well as insistent that no diagnosis of depression was made before February 2012.

[52] I would not in any event be satisfied Ms Schmidt has lost remuneration as a result of her personal grievance rather than as the result of something else, including an inability to work because of any medical condition from which she may have been suffering or a failure to seek work at the end of 2011.

[53] Because I have found the summary dismissal was unjustified I find that Ms Schmidt should at least have received notice of the termination of her employment or payment in lieu of notice. No written employment agreement was produced but bearing in mind the nature of Ms Schmidt's position I conclude that a notice period of four weeks can be implied.

[54] Pro-Dosa is therefore ordered to pay to Ms Schmidt the sum of \$2,446.20 in lieu of notice.

2. Injury to feelings

[55] Aside from the equivocal medical information, there was minimal evidence of injury to Ms Schmidt's feelings.

[56] However I accept there was some injury. Taking into account that at best a dismissal on notice would have been justified and at worst that by her conduct Ms Schmidt contributed significantly to the circumstances of her personal grievance, I conclude that only a modest sum in compensation for the injury to her feelings is appropriate.

[57] Pro-Dosa is therefore ordered to compensate Ms Schmidt for the injury in the sum of \$1,000.

3. Contributory conduct

[58] In setting remedies the Authority must consider the extent to which Ms Schmidt's actions contributed to the situation giving rise to her personal grievance, and if those actions so require, reduce the remedies that would otherwise have been awarded.

[59] I have addressed the matter as set out above.

The counterclaim

[60] Pro-Dosa has counterclaimed against Ms Schmidt, seeking damages in respect of remedial action required after her dismissal as a result of what was said to be her negligence when filling or packing certain batches of product.

[61] The counterclaim was scheduled to be heard together with the personal grievances, but has been adjourned pending the outcome of the personal grievances. Pro-Dosa is to advise the Authority within 28 days of the date of this determination of whether it wishes to proceed with the counter claim.

Summary of orders

[62] Pro-Dosa is ordered to pay to Ms Schmidt the sum of:

- a. \$2,446.20 as payment in lieu of notice; and
- b. \$1,000 as compensation for injury to her feelings resulting from her unjustified dismissal.

Costs

[63] Costs are reserved.

[64] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. 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