

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 73  
5432450

BETWEEN            WENDY SIMKIN  
                                 Applicant

AND                    PAUL GILLESPIE trading as  
                                 CLEAN AND GLEAM SERVICES  
                                 Respondent

Member of Authority:    G J Wood

Representatives:        Eleanor Connole for the Applicant  
                                 Paul Gillespie on his own behalf

Investigation Meeting:    10 June 2014 at New Plymouth

Submissions Received:    10 June 2014

Determination:            15 July 2014

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**DETERMINATION OF THE AUTHORITY**

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[1] Mr Gillespie owns a cleaning business known as Clean and Gleam Services, which is based in New Plymouth. Ms Simkin was employed by him on 3 June 2013 as a cleaner, being paid \$15.50 per hour gross. While Mr Gillespie denies actually dismissing Ms Simkin, it is clear from his evidence that that was the actuality of the totality of their communications.

[2] Ms Simkin was returning to Mr Gillespie's employment after spending a significant period in the South Island. Her employment, however, only lasted for three weeks. During that period Ms Simkin's hours were quite variable, but a rough average would be 35 hours per week.

[3] Work was allocated by Mr Gillespie by the placement of a list of jobs to be done on the wall in his office each evening. On 24 June, however, Mr Gillespie omitted to put the name of one significant client on the list. Following this omission

none of the cleaning staff either noticed the omission or, if they did, informed Mr Gillespie about it. Accordingly, the client's premises were not cleaned.

[4] The client rang Mr Gillespie the next morning indicating that he could lose the contract as a result. As it happened, Mr Gillespie managed to retain the client, but immediately questioned his staff by phone as to why none of them had informed him of that client's omission from the list of premises to be cleaned.

[5] His discussion with Ms Simkin, whom he had known over a long number of years, was not a positive one. I accept that both were inclined to use loud and colourful language and that Mr Gillespie was upset with Ms Simkin for not having informed him that the client's name was missing. Mr Gillespie did not accept Ms Simkin's explanation and the discussion was fractious, resulting in one or the other hanging up the phone.

[6] Soon thereafter Ms Simkin discovered that she had not been paid. She texted Mr Gillespie to ask why she had not been paid and there was a further telephone discussion, which is central to the claim of unjustified dismissal. The issue was not about whether Ms Simkin would be paid, but rather that she had expected to be paid in the morning and Mr Gillespie had not done so.

[7] Despite Ms Simkin's denial, I accept that she told Mr Gillespie that if she did not get paid she would send someone round to visit him and she later communicated to him that *wouldn't be nice*. As a result Mr Gillespie decided that he had had enough of Ms Simkin and therefore sent her a text. It was to the effect that she was to go away; that he wanted nothing to do with her; that she knew she had to do the work at the client's premises and that she almost cost Clean and Gleam that job. The text message concluded by stating that she was not *welcome here ever*.

[8] Ms Simkin quite correctly took the totality of these communications to mean that she was dismissed.

[9] Section 103A of the Employment Relations Act 2000 (the Act) deals with justification for dismissal. The test is whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The Authority must consider

- whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing the employee; and
- whether the employer raised the concerns that the employer had with the employee before dismissing the employee; and
- whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing the employee; and
- whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing the employee; and
- any other factors the Authority thinks appropriate.

[10] The Authority must also not determine a dismissal to be unjustifiable solely because of defects in the process followed by the employer, if the defects were minor and did not result in the employee being treated unfairly.

[11] While Mr Gillespie does not agree, any threat made in these circumstances could be seen as equivocal and therefore necessary of further investigation by an employer. For example, the threat may not have been a threat at all, but merely an observation. Alternatively, it may have not been raised in a serious manner. It may also have been a comment made in the heat of the moment and regretted immediately afterward, or be subject to some other type of innocent explanation.

[12] In these circumstances how Mr Gillespie acted were not actions open to a fair and reasonable employer. There was a need for Mr Gillespie to take stock and to have investigated the issue of the "threat", before making a decision to dismiss Ms Simkin. This need not have involved a detailed or lengthy investigation, but one was nevertheless required in all the circumstances.

[13] Such failings do not accord with the tests set out above. They are not minor because Ms Simkin was denied the opportunity to explain the comments she had made, and particularly to explain them in an environment that was not charged with

emotion, as were the events on the day. This meant that she was treated unfairly. On these grounds along the dismissal must be found to be unjustified.

[14] It is also necessary to address the substance (what the employer did), as well as the procedure adopted. Again this was not a decision open to a fair and reasonable employer. While Ms Simkin's actions were unreasonable, they need to be put in the context of someone who expected to be paid and had not been paid, and where Mr Gillespie appeared to be blaming Ms Simkin, at least in part, for what was his error.

[15] Both parties were upset and made comments they should regret. However, given the tempestuous and colourful relationship between the parties, going back many years, Ms Simkin's actions were not sufficient to justify dismissal in substance as an option open to a fair and reasonable employer, as assessed by an objective observer.

[16] I therefore determine that Ms Simkin was unjustifiably dismissed both in substance and procedure.

[17] Ms Simkin seeks \$5,000 in compensation and three months wages amounting to \$7,052.50 (35 hours per week for 13 weeks at \$15.50 per hour). I accept that Ms Simkin has mitigated her loss by enrolling with WINZ as a job seeker and door knocking every day to try and get new work.

[18] Subsequently Ms Simkin was unable to find further work for more than three months and this appears to have had significant financial and personal consequences for her. However, her evidence in support of the claim for humiliation, loss of dignity and injury to feelings was not compelling and was not supported by any independent evidence. In these circumstances, I consider that the amount of \$3,000 would ordinarily be payable.

[19] Given the short length of the employment and the volatile communications between Ms Simkin and Mr Gillespie it was unfortunately not likely that the employment would have lasted for three months. In all the circumstances I set the period for lost remuneration at 8 weeks, namely \$4,340.

[20] However, I also must assess the degree to which Ms Simkin's behaviour contributed towards the situation that gave rise to the personal grievance. In this case there was fault on both sides, but primarily on Mr Gillespie's behalf. In particular,

given Mr Gillespie's failure to put in place any proper procedure for investigating his concerns, the greater predominance of fault lies on his side. A deduction of compensation by 25% is therefore appropriate, giving a result of \$2,250 in compensation and \$3,255 in lost remuneration.

[21] However, as Ms Connole accepted, such a result must be tempered by Mr Gillespie's ability to pay any award. I accept the evidence from Mr Gillespie's accountant that Mr Gillespie's financial situation is dire. He faces the prospect of being bankrupted by Inland Revenue should he be unable to reach agreement with it over outstanding amounts for GST, income tax and PAYE. If Mr Gillespie is bankrupted, Ms Simkin may well receive no moneys, as the IRD would have priority on any assets. The Authority would not be supporting successful employment relationships if the effect of its determination was to drive an employer out of business, at least not an employer like Mr Gillespie, who may not be perfect, but who has no track record to suggest that it is not in the interests of justice that he be allowed to continue to run his business, apparently his sole form of income.

[22] It would be inappropriate in principle to reduce lost remuneration simply because an employer could not afford to make payment. However, I am prepared to reduce the amount of compensation payable to Ms Simkin, to take into account Mr Gillespie's inability to pay, by \$1,000, leading to a compensation payment of \$1,250.

[23] I therefore order the respondent, Paul Gillespie, to pay to the applicant, Wendy Simkin, the sum of \$1,250 in compensation under s.123(1)(c)(i) of the Act and \$3,255 in lost remuneration under s.123(1)(b) of the Act.

#### **Costs**

[24] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**