

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 14  
5450864

BETWEEN                    KELLY SOMERVILLE  
   Applicant  
  
AND                            LDK INVESTMENTS  
   LIMITED  
   Respondent

Member of Authority:     Christine Hickey  
  
Representatives:            Jannah Stringer, counsel for Applicant  
   Laurence Griffith for Respondent  
  
Investigation Meeting:     26 November 2014 at Christchurch  
  
Submissions:                Submissions at the meeting  
   Further evidence received from the respondent on 30  
   November 2014  
  
Determination:              9 February 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.     Kelly Somerville was unjustifiably dismissed.**
- B.     Within 28 days of the date of this determination LDK Investments Limited must pay Kelly Somerville:**
- (i) \$576.00 gross lost wages;**
  - (ii) \$777.60 gross being unpaid wages and unpaid holiday pay for the notice period in her individual employment agreement;**
  - (iii) \$11,000 compensation for humiliation, loss of dignity and injury to her feelings; and**
  - (iv) The filing fee of \$71.56.**
- C.     Legal costs are reserved.**

**Employment relationship problem**

[1] Kelly Somerville was employed by FR8 Base Limited (Fr8 Base) as administrator for the freight forwarding company. She began work on 4 November 2013 and signed an individual employment agreement (IEA) on 27 January 2014.<sup>1</sup>

[2] After a meeting on 4 February 2014 Ms Somerville finished work entirely. She claims she was unjustifiably dismissed that day.

[3] By way of remedy Ms Somerville claims lost wages and compensation. She also says she was not paid the two weeks' notice period she was entitled to under her IEA.

[4] Laurence Griffin was the director of FR8 Base which on 1 August 2014 changes its name to LDK Investments Limited (LDK). He was effectively the owner/operator of the business when Ms Somerville was employed and dismissed.

[5] Mr Griffin has sold the freight business but agrees that LDK is the company which employed Ms Somerville.

[6] Mr Griffin denies that Ms Somerville was unjustifiably dismissed and says that her epilepsy and what she told LDK about her epilepsy when she was interviewed justify her dismissal. He also says she did not perform her role as well as LDK expected and required.

[7] After the investigation Mr Griffin agreed that Ms Somerville was owed some pay and provided some written evidence which allowed me to calculate the amount owed by way of unpaid wages for the notice period.

[8] Ms Somerville, her husband James Somerville and Mr Griffin gave affirmed evidence at the investigation meeting.

**Issues**

[9] The main issue for determination is whether Ms Somerville was unjustifiably dismissed. If she was I will also need to consider what remedies she is entitled to.

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<sup>1</sup> LDK does not seek to rely on a right to dismiss Ms Somerville under a 90-day trial period. There was trial period expressed to be for 90-days in Ms Somerville's IEA. However, it was not expressed so as to be effective to remove Ms Somerville's right to bring a personal grievance.

### **Was Ms Somerville unjustifiably dismissed?**

[10] Section 103A of the Employment Relations Act 2000 (the Act) sets out the requirements in determining whether a dismissal is justified as follows:

*(1) For the purposes of section 102(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

*(2) The test is whether the employer's action, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[11] In applying that test I need to consider:

- whether, having regard to the resources available to LDK it sufficiently investigated the allegations against Ms Somerville before dismissing or taking action against her; and
- whether LDK raised the concerns that it had with Ms Somerville before dismissing or taking action against her; and
- whether LDK gave Ms Somerville a reasonable opportunity to respond to its' concerns before dismissing or taking action against her; and
- whether LDK genuinely considered Ms Somerville's explanation (if any) in relation to the allegations against her before dismissing or taking action against Ms Somerville; and
- any other factors I think appropriate.

[12] In addition, I must not determine a dismissal to be unjustifiable solely because of defects in the process followed by LDK if the defects were minor and did not result in Ms Somerville being treated unfairly.

[13] If an employer has not complied with any of the four tests set out above the dismissal will be an unjustified one.

[14] Mr Griffin for LDK says that Ms Somerville's dismissal was justifiable for the following reasons:

- She was not honest in her reply when she was asked at her interview how her epilepsy would affect her work. He says Ms Somerville told him her seizures were usually at night and very seldom during the day. However, she had two

seizures at work during the day; one in the first month and one on 3 February 2014.

- He had OSH and health and safety concerns for Ms Somerville.
- Ms Somerville and her husband could not come up with any suggestions how to allay his concerns in the meeting on 4 February 2014 and in that meeting Mr Griffin said Ms Somerville had *gone cold on me*.
- Ms Somerville was not up to speed on the tasks required of her after the first three months.
- He considered that the mistakes were likely due to her inadequately controlled epilepsy or to the medication not being adequate or not taken properly.

[15] Ms Somerville's dismissal was unjustified for the following reasons.

[16] I do not accept that Ms Somerville lied or misled LDK when she was asked at her interview how much her epilepsy could affect her work. Ms Somerville is simply unable to predict when her seizures might occur despite being on the appropriate type and amount of medication. It remains the case that the seizures are unpredictable even though Ms Somerville told Mr Griffin that she is more likely to have a seizure if she is *hormonal*. She did not misrepresent the state of her health to LDK. She expressed her opinion based on her previous employment experience that her epilepsy should not interfere with her work.

[17] Mr Griffin submitted that he had acted in good faith by giving Ms Somerville work, despite her epilepsy, and therefore he should not be disadvantaged by Ms Somerville's personal grievance being successful. However, it is not the case that the law holds employers who employ people with health issues or disabilities to a lesser standard than other employers. The same test of whether a dismissal was justifiable or not must be applied to LDK as to any employer.

[18] Mr Griffin did not let Ms Somerville know there were any allegations about the quality or accuracy of her work at her performance review on 27 January 2014. He did not raise such concerns with Ms Somerville until the meeting on 4 February 2014 during which she was dismissed.

[19] LDK is a reasonably small business but it is not so small that it could not have carried out an investigation into the allegations it put to Ms Somerville that her work

was sub-standard and likely caused by her inadequately controlled epilepsy. For example, there was no objective way of knowing what, if any mistakes were made by Ms Somerville in the accounts system and which were made by the other user of the system, Mr Griffin's daughter, as they both used the same log-in to the system. Mr Griffin was aware of that meeting and yet relied solely on what his daughter told him were Ms Somerville's errors. Who had made the errors was not investigated. Because Mr Griffin's daughter had been employed for longer he assumed she would not have made any mistakes, without investigation, and so attributed all mistakes to Ms Somerville.

[20] There was no investigation into how Ms Somerville's epilepsy affected her ability to do her job, if at all.

[21] Ms Somerville had a seizure at work on 3 February 2014 and then had another during the night. Mr Somerville told LDK that she would need a sick day to recover by sleeping on 4 February. However, LDK raised its allegations of performance problems and a problem with Ms Somerville's epileptic seizures at a meeting called at very short notice. Ms Somerville was at home recovering from her seizures when Mr Griffin spoke to Mr Somerville on the phone suggesting a meeting that morning. There was inadequate notice and not all of LDK's concerns were signalled to Ms Somerville in advance of the meeting. Ms Somerville had no opportunity to be represented if she had wished to be. Not only that but Mr Griffin and LDK were aware that Ms Somerville was impaired after her seizure the previous day.

[22] Ms Somerville was not given a reasonable opportunity to respond to the LDK's concerns before it made a decision to dismiss her, which was made during a brief break in the meeting on 4 February 2014. Mr Griffin expected Ms Somerville to come up with solutions to allay his concerns about her epilepsy there and then or to reassure him that she would do so *shortly*, although she had no prior notice of the concerns or of the meeting and had no opportunity to seek advice or professional support.

[23] Because Ms Somerville was not given a reasonable opportunity to respond LDK could not have taken her explanations into account when making its decision to dismiss her. Mr Griffin agrees that in the two performance examples that Ms Somerville was presented with that she acknowledged some fault for she offered

to remedy the errors. However, she was not given that opportunity and Mr Griffin explained that by saying he *decided it wasn't a good idea* to allow her to fix the errors.

[24] How LDK acted in considering its concerns about Ms Somerville's epilepsy and her performance and ultimately dismissing her on the basis of those concerns was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. That being the case I now need to consider remedies for Ms Somerville.

### **Remedies**

#### *Unpaid notice period*

[25] Ms Somerville was dismissed with immediate effect on 4 February 2014. She should have received two weeks' notice (clause 12.1 (ii) of Ms Somerville's IEA). However, she was not paid past 10 February, which meant she was not paid for a two week period.

[26] Mr Griffin's email of 30 November 2014 suggests that LDK should pay Ms Somerville only for 11,12,13 and 14 February. However, she should also be paid for Monday, 17 February which means she will then have been paid for two full weeks' pay, in lieu of notice.

[27] LDK must pay Ms Somerville \$720.00 gross plus holiday pay of 8% on that amount (\$57.60), which would have been paid in her final pay had she received the correct final pay; a total of \$777.60 gross.

#### *Lost wages*

[28] Section 123(1)(b) of the Act allows me to provide for the reimbursement by LDK of the whole or any part of wages Ms Somerville lost as a result of her grievance.

[29] Section 128(2) of the Act provides that I must order LDK to pay Ms Somerville the lesser of a sum equal to her lost remuneration or to 3 months' ordinary time remuneration.

[30] Ms Somerville claims one week of lost wages from the date of the notice period she should have been paid for until she got a temporary work contract which

she began on 24 February 2014. Since she has now been paid for the Monday of that full week (17/2/14), she is now due a further 4 days of pay. Ms Somerville worked 40 hours per week at \$18 per hour. Therefore for four days she should be paid \$576.00 gross. That was the only week she lost wages as a result of her unjustified dismissal. She did not earn any other income that week. She acted speedily and was fortunate to be able to mitigate her loss almost immediately.

### *Compensation*

[31] Ms Somerville seeks \$15,000 in compensation for humiliation, loss of dignity and injury to her feelings.

[32] Ms Somerville's evidence about her humiliation, loss of dignity and injury to her feelings was compelling and supported by equally compelling evidence from Mr Somerville.

[33] Ms Somerville was impaired in her clarity of thinking and her energy on 4 February and became very upset in the meeting when she started crying as she realised for the first time that her job was in jeopardy.

[34] I accept Ms and Mr Somerville's evidence that Mr Griffin mainly spoke to Mr Somerville rather than her during the disciplinary meeting on 4 February. For example, Mr Griffin asked Mr Somerville if Ms Somerville was taking the correct dosage of her medication. Ms Somerville felt belittled by Mr Griffin's tendency to talk to her husband and not to her directly.

[35] Since the dismissal Ms Somerville's evidence is that she feels embarrassed about her epilepsy; a condition she has had since she was 10 years old. She did not feel embarrassed previously. She now feels she needs to apologise to people if she has a seizure in front of them. She now feels *especially down* after having a seizure.

[36] Ms Somerville's confidence was affected and she questioned her abilities as an employee and her ability to accurately use a computer. She developed panic attacks which she had not previously suffered from.

[37] After the dismissal Mr Griffin contacted the Epilepsy Foundation and mentioned Ms Somerville by name and discussed what had happened. He was apparently seeking some advice or support as an employer. The Epilepsy Foundation

staff member who he had talked to contacted Ms Somerville to let her know that Mr Griffin had done so. Ms Somerville felt upset and embarrassed that Mr Griffin had shared what she considered to be personal information with the Foundation staff without her permission.

[38] After Ms Somerville's dismissal and in response to Ms Stringer's raising a personal grievance Mr Griffin wrote that he wanted Ms Somerville to forfeit her two weeks' notice pay. He also wrote that he agreed he would:

*...put a GOOD word around if I can help in any way in finding a more suited (sic) job as you are well aware this industry is small and people talk.  
... would like this to be an amicable departure without fallout but will defend any action if that arises.*

[39] Ms Somerville took the reference to a small industry and one in which people talk as a threat to stop her gaining her notice pay and proceeding with her personal grievance. Mr Griffin denies it was meant that way but I accept that email was an aggravating feature of the unjustified dismissal that increased Ms Somerville's loss of dignity and injury to her feelings as a result of the unjustified dismissal.

[40] In all the circumstances I consider compensation of \$11,000 to be reasonable.

#### *Contribution*

[41] Having determined Ms Somerville has a personal grievance s.124 of the Act requires me to consider whether she contributed to the situation which gave rise to her dismissal and if so reduce remedies accordingly.

[42] Ms Somerville did not engage in any blameworthy conduct, so remedies are not to be reduced on the grounds of contribution.

#### **Costs**

[43] Costs are reserved. Legal costs are usually paid by the unsuccessful party to the successful party. Ms Somerville has been successful in her claims.

[44] The parties are invited to agree on the matter of costs. If they are unable to do so the party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

[45] In order to assist the parties I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The daily tariff is \$3,500 per day and the investigation meeting took half a day. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey  
Member of the Employment Relations Authority