

Acknowledgement

[4] Unfortunately a considerable period of time has passed since the investigation meeting. The situation has arisen as a result of the file being inaccessible for a considerable period due to Christchurch's earthquakes, compounded by workload issues. I appreciate the parties patience and regret any inconvenience suffered.

Background

[5] Ms Sullivan was employed in November 2005 as the manager of a children's wear store operated by Johannink Investments in Eastgate Mall, Christchurch. At the time she entered into a written employment agreement which was subsequently substituted with another in February 2007. The first stipulated hours of work while the second essentially allowed the employer to specify when work would be performed.

[6] As a store manager, Ms Sullivan was responsible to a Retail Supervisor who oversaw the operation of a number of the company's South Island establishments. This position was occupied by Ms Lauraine Stevenson for the majority of Ms Sullivan's tenure. Ms Karla Martin replaced Ms Stevenson in December 2009.

[7] The evidence would suggest that Ms Sullivan's relationship with her employer was troubled and, in this respect, Johannink Investments refers to four warnings it believes it gave Ms Sullivan during her employment.

[8] The first followed a discussion between Ms Stevenson and Ms Sullivan on 18 May 2009 and was confirmed in a letter on 22 May 2009. It covered concerns that Ms Sullivan was ignoring instructions, tardy in respect to housekeeping and failing to properly complete monthly store reports. It concludes:

In light of the above specified issues (and other non-detailed matters that have arisen and been spoken about in the past), we must inform you that we are very concerned about the quality of, and commitment to, your work and will be closely monitoring your performance over the next six to eight weeks.

If there is no sign of noticeable improvement in your standard of work during this time, we will then be forced to review your employment status with T&T.

[9] The second warning was given via a faxed letter dated 11 September 2009. It concerns allegations of unauthorised absence, a tardy approach to banking protocols

and allegations that Ms Sullivan communicates with her managers in an inappropriate, abusive and threatening manner. Concern is also expressed with the fact that some of these outbursts are alleged to have occurred in front of customers. The letter goes on to say:

Koren, none of these issues are new nor are they minor. They simply cannot be tolerated from the company perspective, nor are they fair or tolerable to other company employees. Your performance is also costing the company not just in time but also financially and we simply cannot afford it to continue.

We sincerely hope all issues can be addressed, allowing a return to a pleasant working environment for all, however please let it be heard that if not, we may well terminate your employment if these issues are not immediately addressed.

[10] Johannink Investments says this warning was triggered by a written complaint from Ms Stevenson about the way Ms Sullivan responded when the issue of an unpaid invoice was raised. That complaint had ended with advice from Ms Stevenson that, in her view, *enough is enough* and a demand that action be taken.

[11] The letter of 11 September was followed by some terse exchanges between Ms Sullivan and the company over her resulting suggestion that a payment of three months' wages would secure her resignation. Whilst that did not occur, I note that one of Ms Sullivan's faxed notes has added, by way of a response from Mr Johannink, the comment *do I take this as your resignation? If so accepted pls confirm.*

[12] The third warning, headed 'final', was delivered by letter dated 15 December 2009. It was issued without prior discussion with its author, Mr Johannink, and reads:

Further to a recent visit from Karla Martin and my subsequent meeting with her, as well as a full review of the Eastgate file, store reports together with the mystery shopper report I advise this letter is to serve notice if there are any more reoccurrences of past serious issues your position will be immediately terminated without further notice.

Koren, your offers to "walk for money" received in the past in a threatening manner will not be accepted as the costs endured by my company due to your performance are already high.

Your store is consistently underperforming and your results are not in line with the Eastgate malls overall results. This is not surprising considering the following:

**Clothes displayed in cardboard boxes*

**Advertising, promotional set ups constantly not being followed*

**Lack of merchandising*

**General housekeeping*

**Lack of customer service*

**Abusive communications with Head Office staff often conducted from the public areas of the store and in front of staff members*

*Koren our patience has expired and if we allow such performance to continue the employment of many may be in jeopardy.
Due to the seriousness of your performance and the financial loss incurred it is fully possible we may have to invest in further costly travel to Christchurch during our peak trading time.
Upon our next visit if your store is not being managed in conjunction with Head Office guidelines your position will be terminated forthwith.*

[13] This was followed by a further letter dated 29 December 2009. This letter, prepared and signed by Ms Martin, reads:

On my recent visit to your store on 22.12.09 I found an improvement in general housekeeping and merchandising, the store was set up in line with company expectations, the way it was left post my visit on 7.12.09.

Unfortunately Koren you have let yourself down in the area of communication. After the phone conversation on 28.12.2009 in regards to you accepting a collect call on the business phone line from a family member, I once again need to bring to your attention the issue of communication between yourself and members of head office. To be hung up on not once but twice and to be verbally ABUSED including being told "I was just as bad as the rest of them" is not acceptable behaviour.

As stated in the FINAL WARNING you received dated 15.12.2009 the following behaviour will not be accepted and we reserve our rights as outlined in that correspondence including reason to terminate employment without further notice:

Abusive communications with head office staff often conducted from public areas of store and in front of staff members.

Koren in the FINAL WARNING you received the consequence of such behaviour was made very clear. This is an absolute FINAL WARNING and please follow correct procedures and manners to avoid us the need to terminate your employment. We are prepared to let this occasion slip as maybe the pressure of xmas got the better of you but please do understand that such slips will never be tolerated again.

[14] Ms Sullivan responded to the allegation of abusive behaviour by stating:

I deny that I have a history of abusive outbursts to senior staff. It seems he [Mr Johannink] is trying to justify my dismissal.

[15] Ms Sullivan goes on to say:

I accept I had 4 warnings but they were not really warnings. There was no disciplinary procedure followed and no disciplinary hearing. I never put my side of the story. Most of them were simply faxes out of the blue. Only for the first one I received the original copy and none were signed.

[16] It is Ms Sullivan's position that the relationship between herself and the company was perfectly sound prior to the settlement of an alleged personal grievance

from one of her (Ms Sullivan's) staff who had been dismissed by Mr Johannink after an altercation between the staff member and Ms Sullivan. The matter was settled during the course of an Authority investigation and Ms Sullivan alleges that the company appeared to hold her responsible for the outcome. She says her relationship with Ms Stevenson deteriorated from that point and that it was Ms Stevenson who became rude and aggressive. Indeed, Ms Sullivan states that the discussion that led to the first warning occurred on the steps of the Authority's premises as she and Ms Stevenson were leaving.

[17] In addition, there is evidence of Ms Sullivan raising concerns of her own with one example being a fax she sent to Mr Johannink on 16 March alleging that Ms Stevenson had been abusive to her, was constantly changing instructions and criticising her along with an observation that *I don't deserve to be treated like this from nobody*. There is also considerable correspondence over Ms Sullivan's use of leave and, in particular, she takes issue with the number of times that various requests for leave were declined.

[18] The event that brought matters to a head occurred on 23 February 2010. That day there was a stock take of the Eastgate store and Ms Martin attended.

[19] Ms Sullivan states that she felt quite sick that day but, notwithstanding that, chose to attend and assist with the stock take. She claims that she advised Ms Martin of her illness and complains that Ms Martin ignored her state and allocated inappropriate labour-intensive tasks. Ms Martin denies being advised of the illness.

[20] At around 3.30 that afternoon, Ms Martin asked Ms Sullivan to discuss the staff roster - a document prepared by Ms Sullivan as part of her duties. In particular, Ms Martin, who had initially seen the roster the previous day, was concerned about the fact that Ms Sullivan appeared to be frequently replacing Saturday shifts with Monday ones. Shift swaps had been discussed before as Johannink Investments has a negative view of the practice which was, in this store, a frequent practice given Ms Sullivan's view such exchanges were part and parcel of a normal operation. Ms Martin says she intended asking whether the swaps had been authorised by anyone from the head office as had been previously instructed and that she asked that the discussion occur in a back room as *due to the way Koren had spoken to me in the past ... I didn't want to be abused in public*.

[21] Ms Martin states that that when she raised the issue:

Koren immediately raised her voice and started to yell at me ... She proceeded to tell me that she didn't have to put up with this "shit" anymore and that she would start looking for another job today. I remained calm even though I felt physically threatened by Koren and explained that it was entirely up to her as to what she wanted to do. Koren then said to me "actually get someone else to do my f...ing job, right here right now". At this point Koren threw the rosters book at me and stormed out. Koren got her belongings and left the store.

[22] Ms Sullivan states that she was not well and therefore reacted badly when approached by Ms Martin over the rosters, the fact that Ms Martin appeared to have made a number of alterations, and what she considered an instruction that shift swaps were now prohibited. She goes on to say:

Ms Martin was negative in the way that she approached me, being abrupt. I accept that I threw the rosters on the floor. I said I was sick and in my frustration I said, "f..k you, I am going!". I picked up my bag and left. I left crying and very upset.

[23] Ms Sullivan goes on to say that at approximately 4.30 pm Ms Martin left a voicemail message on her cellphone stating that if she (Ms Sullivan) set foot on the premises Ms Martin would call security and that she (Ms Martin) was sending someone to collect Ms Sullivan's keys.

[24] When questioned about this comment while giving oral evidence Ms Sullivan stated that Ms Martin had preceded it with a comment that she (Ms Sullivan) had resigned and that the resignation had been accepted.

[25] Ms Martin says:

At 4.30pm I rang Koren and left her a voicemail on her phone. I accepted her resignation as this was certainly not the first time she had attempted to resign from her position therefore this had obviously been a thought through process for her and not just something she said in the heat of the moment, she followed through with this resignation by walking out during her shift and not returning. I said I would have someone collect the store keys from her as I didn't want her coming back into the store as I still felt physically threatened by her after what had just happened and her actions also left the staff member feeling very uneasy and afraid of what may happen if she was to see Koren.

[26] Ms Martin goes on to say:

Koren phoned me back in the store after receiving my voicemail and once again yelled and cursed at me, at this point and only this point did she tell me she was not well and had just been to the doctor who

had given her a medical certificate. As I was in the store and it was full of customers I didn't respond to her yelling I simply said thanks for calling and hung up the phone.

[27] Ms Sullivan accepts that she made the call but claims that she did so in response to Ms Martin's message. She says that Ms Martin said that she had found another staff member to replace Ms Sullivan and that she (Ms Sullivan) responded by advising that she had not resigned.

[28] Ms Sullivan responded to this conversation by then attempting to bypass Ms Martin and speak directly to Mr Johannink. She was initially unable to do so and left a number of messages asking that Mr Johannink contact her. Mr Johannink accepts that a number of calls were made and characterises them as getting more urgent and intense. He says they referred to the fact that Ms Sullivan had been sick and should not have been at work that day and that she was already consulting a lawyer.

[29] He got the messages and responded at about 6.45 that afternoon.

[30] About that conversation, Ms Sullivan says:

I said to him that there had been a misunderstanding. I told him that I had not resigned and that I was not intending to resign. I told him that I needed the job but that I had been sick that day. I asked if I could have a sick day and return to work the next day. It was during this call he told me to take the next day off as sick leave and he could talk to Ms Martin.

[31] Mr Johannink's view of the conversation is somewhat different. He states:

Korens recollection of the call is incorrect, or a total fabrication. When I managed to get a word in edgeways between having my company, staff and myself abused and threatened, I was very non committal and advised I would discuss with Karla soonest and reply tomorrow. I did not instruct Koren to take a sick day. I am no lawyer but do know when someone has already commenced legal proceedings against you (as Koren advised she had) it is best to say nothing until you have all the facts to hand.

[32] When questioned orally, Mr Johannink described the conversation as *colourful*. He said that the fact Ms Sullivan was sick was the only point they agreed on but that his response had simply been if you're sick, you're sick and that he had not mentioned sick leave per se.

[33] Mr Johannink and Ms Martin then discussed the day's events though there is disagreement about when this occurred. Ms Martin says the evening of 23 February, while Mr Johannink says the 24th. Irrespective of when this occurred, it led to a final phone conversation between Mr Johannink and Ms Sullivan at approximately 3.45 pm on Wednesday, 24 February. About that, Ms Sullivan states:

I said I had not resigned. Darrin said I had. I said if that was the case I needed four weeks notice. I said I would turn up for work at 9am. Darrin said if I stepped foot on the property I would be sacked. He also said if I set foot on the premises that he would call security. I was too scared to go back in case that happened.

[34] Mr Johannink's recollection is that:

As promised I called Koren the next day. I did advise Karla was clear Koren had resigned without notice. I never said to Koren if she returned to the premises she would be sacked, but did advise, as again my company staff and I were the target of unbelievable foul abuse that this form of communication had been discussed formally and informally with her many times, with final warnings issued on more than one occasion. The call finished with Koren advising she would return to work at 9.00 the next day. Koren never arrived.

[35] When questioned about this, Mr Johannink stated that while he had no recollection of Ms Sullivan clearly stating she had not resigned, he did agree that she advised she was returning and that amounted to the same thing. He also accepted that he told Ms Sullivan that he had, on the information gleaned from Ms Martin, concluded that she had resigned. He added he was of the view that notwithstanding the discussion that afternoon, Ms Sullivan effectively confirmed the resignation by not coming into work on the 25th. That absence led to Ms Sullivan's final pay being prepared that day (25 February) and her job was subsequently advertised on 6 March.

Determination

[36] Whilst there are a significant number of factual disagreements, I conclude that there is sufficient consistency and/or admission by one or other of the parties to reach a conclusion without recourse to a credibility finding.

[37] The issue to be determined are:

- a. Was Ms Sullivan dismissed?
- b. If so, was the dismissal justified?

- c. If not (and it is concluded she resigned), was her resignation tendered in circumstances that amount to a constructive dismissal.

[38] A dismissal is a sending away and is confirmed by an act of finality. In this case the employer was responsible for two such acts. There was Mr Johannink's advice that he was accepting Ms Sullivan's resignation and there was the preparation of the final pay.

[39] Johannink Investments position is that both were a reaction to an earlier act which brought the relationship to an end, namely Ms Sullivan's resignation of 23 February.

[40] If there is one piece of common ground, and notwithstanding a disagreement over who triggered the event and who behaved inappropriately, it is that the conversation between Mesdames Martin and Sullivan on 23 February was heated.

[41] It is well accepted that a purported resignation tendered in such circumstances must be treated with extreme caution. In *Boobyer v Good Health Wanganui* 24 February 1994 Chief Judge Goddard, EMC, Wellington WEC 3/94; W17/94 it was observed that:

In the absence of a clear and unambiguous resignation, an employer is not entitled to seize on words not intended or capable of amounting to a resignation especially where the employee makes it clear the resignation was not intended

[42] In *Kostic v Dodd EMC Christchurch CC*, 11 July 2007 Judge Couch, when addressing a 'heat of the moment resignation', observed that in the absence of an express resignation:

A fair and reasonable employer would not take at face value what was said in such circumstances. Rather, such an employer would allow a cooling down period and then discuss with the employee what had occurred.

[43] The parties agree that Ms Sullivan never expressly said 'I resign'. They also agree that she had made it clear before Mr Johannink advised, during the conversation of 24 February, that he was of the view she had resigned that:

- a. He knew the conversation in which the alleged resignation had been tendered was heated; and

- b. There were issues about the legitimacy of that purported resignation given Ms Sullivan's express advice that she intended to return to work. In this regard I note Mr Johannink's statement that the conversation he had with Ms Sullivan on the evening of 23 February had *set up warning bells*.

[44] These is a situation clearly analogous with that discussed in *Kostic v Dodd*, and I must conclude that an employer with the knowledge Mr Johannink had by the afternoon of 24 February should not have simply accepted that a resignation had been tendered. In such circumstances a fair and reasonable employer would have allowed a cooling down period and then discussed the matter with the employee.

[45] Mr Johannink accepts he didn't. He concedes he never questioned Ms Martin's conduct during the discussion but simply accepted her view of what had occurred. He also accepts that he never discussed the issue in any depth with Ms Sullivan but puts this down to an inability to do so given what he says was her unacceptable conduct during the two conversations he had with her. That is, in itself, a damning admission in that it again confirms an element of heat which would mitigate against immediate acceptance of the alleged resignation.

[46] I must conclude that Mr Johannink seized the opportunity to be rid of Ms Sullivan. In this respect I note the history outlined by the company and various answers Mr Johannink gave. For example he observed he, the supervisors and staff had had enough of Ms Sullivan and when asked by Ms Tucker why not wait and clarify the issues the answer was *No chance*.

[47] Given the above I must conclude this was a dismissal. It was affected by Mr Johannink's advice, during the conversation of 24 February, that he was accepting the resignation in circumstances where a fair and reasonable employer would not have done so.

[48] If the dismissal was not affected at that point, it occurred when the final pay was prepared. Mr Johannink says this occurred as Ms Sullivan did not return as she had advised she would. I dismiss this as a justification for the following reason. There is, in my view, some correlation between what occurred here and the rules that apply when an employer claims an employee has abandoned their employment. There is, in the later scenario, a requirement that the employer attempt to confirm whether or

not abandonment (read cessation or resignation) has actually occurred. I consider that in these circumstances and given the information available to Mr Johannink he should have attempted to confirm the situation before simply acting.

[49] The conclusion this was a dismissal means the respondent is required to justify the dismissal. Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, that the question of whether a dismissal is justifiable

... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[50] That test is used as the cause of action arose prior to the present test coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect.* Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[51] Having just said that the test of justification applicable as of 1 April 2011 is not that to be applied here, I believe it appropriate that it be referred to. I do so given a view that the new tests content, or at least subsections (b) to (d) inclusive, succinctly codify that which case law has, for many years, considered the basic requirements of a fair process. The new provision requires that:

(3) In applying the test in subsection (2), the Authority or the court must consider—

...

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[52] There was no compliance with the above requirements – no raising of concerns, no discussion or real attempt to ascertain Ms Sullivan's views about what had occurred and therefore no consideration of those views. Mr Johannink simply accepted Ms Martin's view of events and acted upon those.

[53] In such circumstances I must conclude that the dismissal was unjustified.

[54] The conclusion Ms Sullivan's dismissal was unjustified means a consideration of remedies is required. The statement of claim advised that she sought lost wages along with an unspecified amount as compensation for humiliation etc (s.123(1)(c)(i) of the Act).

[55] Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration, though this is tempered by a requirement that the employee attempt to mitigate their loss.

[56] Ms Sullivan obtained part time employment in the hospitality industry on 25 April though earned just under half the amount she had enjoyed while at Johannink Investments. She claims the full loss until 24 April and the residual balance since that date. She left that job in early September and claims that this is because she finds it hard to keep up employment as she gets distressed and upset when anything small went wrong.

[57] Upon questioning it transpired that the residual loss was less than it initially appeared as the hours initially worked with the new employer subsequently reduced. Initial earnings were far closer to the amount earned while with Johannink and it can not be held accountable for the new employer's decision to reduce Ms Sullivan's hours. When I consider this, a total lack of evidence about attempts to mitigate the loss and the fact her assertion she was unable to maintain and find employment is undermined by the fact she did for some considerable time, I conclude it is appropriate to limit the award to the date upon which some alternate employment was obtained (namely 25 April). On the information I have the loss incurred for the period 26 February to 24 April would appear to be in the order of \$5,053.25 gross. There shall be an order for that amount.

[58] Ms Sullivan also claims compensation under s.123(1)(c)(i). Such a claim must be evidenced. Ms Sullivan claims that she had suffered financial stress, her health has suffered and she was extremely distressed and emotional. There is, however, little evidence supporting these bald statements other than a note from her bank advising that the financial issue was temporary and subsequently addressed and a medical certificate advising persistent anxiety and depression which commenced well before these events and which requires medication. While the certificate asserts the condition was the result of the respondent's actions (namely their alleged harassment

and intimidation of Ms Sullivan over a prolonged period) it states that the condition arose well before the dismissal. In other words there is little or no evidence supporting a claim of compensation for harm attributable to the dismissal. That said, Ms Sullivan has been dismissed in unjustifiable circumstances and some harm must emanate from that. I consider an award of \$3,000 appropriate.

[59] Finally, the conclusion Ms Sullivan has a personal grievance and that remedies are appropriate means I must consider whether or not she contributed to the situation in which she found herself (s.124 of the Act).

[60] It is here I must comment on her accusation of harassment and Johannink's counter assertions about the inappropriateness of her behaviour over a considerable period of time. I must conclude from both the documentary evidence, answers given during the investigation and my observations of her demeanour, reactions and conduct during the investigation meeting that there is likely to be some substance behind the employer's assertions. That said, and while these issues clearly influenced the alacrity with which Mr Johannink accepted the purported resignation, it is difficult to conclude that Ms Sullivan contributed in a material way to the company's failure to approach this manner in a fair and proper way (and here further comment must be made that it is difficult to take account of warnings that were themselves issued without regard to proper process).

Orders

[61] For the reasons given the following orders are made:

- (i) The respondent, Johannink Investments Limited, is to pay to the applicant, Ms Koren Sullivan, the sum of \$5,053.25 (five thousand and fifty three dollars and twenty five cents) as reimbursement of wages lost as a result of Ms Sullivan's unjustified dismissal; and
- (ii) The respondent is to pay the applicant a further \$3,000.00 (three thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[62] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event that Ms Sullivan wishes to seek costs, she is required to file her application within 28 days of this determination. A copy shall be served on Johannink Investments who is to file any response within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority