

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 229
5305707

BETWEEN MALAMA TALITIMU
Applicant
AND JAG DEO LAL T/A JAG LAL
LAWYERS
Respondent

Member of Authority: Robin Arthur
Representatives: Paul Craggs for the Applicant
Gary Harrison for Respondent
Investigation Meeting: 1 February 2011
Determination: 30 May 2011

DETERMINATION OF THE AUTHORITY

- A. Jag Lal's decision to dismiss Malama Talitimu, and how he made that decision, was unjustified.**
- B. Mr Lal is ordered pay Ms Talitimu remedies of seven weeks wages and \$5000 compensation for hurt and humiliation, with both reduced by 20 per cent to mark her contributory conduct.**
- C. Costs are reserved.**

Employment Relationship Problem

[1] Malama Talitimu worked for Jag Lal's law practice for just over three years. On 22 February 2010 Mr Lal dismissed her from the position of client services officer because she had not got him to check and sign the paperwork for an immigration application on behalf of a client in time for it to be despatched by what Mr Lal understood was the required deadline.

[2] Around 9am on 22 February – a Monday – Ms Talitimu went into Mr Lal’s office for what she called “*the morning briefing*”. Only they were in the practice offices at the time as the accounts administrator Vanessa Gabriel was away for the day.

[3] Mr Lal told Ms Talitimu he was “*pissed off*” that the application for permanent residence for a client (referred to in this determination as Mr P) was not signed off and sent by courier to the Immigration Service on Friday, 19 February.

[4] An argument then developed. Ms Talitimu insisted Mr Lal had instructed her not to complete the application until Mr P had paid some overdue legal fees for earlier immigration work. Mr Lal insisted he had reminded Ms Talitimu on three occasions during that week, including once on 19 February, of the need to lodge the application.

[5] Although the two do not agree about everything said in that discussion, they do agree Ms Talitimu said she would take some of the blame because she could have reminded Mr Lal about Mr P’s file on Friday afternoon. She had gone into his office around 4.30pm and asked whether there was anything else she needed to do before leaving work. Mr Lal had said “*no, have a good weekend*”. Ms Talitimu then left work for the day.

[6] When Mr Lal asked if Ms Talitimu was blaming him, she replied yes, he was partly to blame. Mr Lal was annoyed by that suggestion and told Ms Talitimu he was worried Mr P would sue him if the Immigration Service would not accept the application after the deadline.

[7] Mr Lal agrees he then told Ms Talitimu she was “*fired*”. Ms Talitimu responded by saying “*fine. I’m going*”. She returned to her work area and sorted out some files before packing up and leaving the premises around 10am.

[8] Shortly after this Mr Lal discovered the Immigration Service had miscalculated the deadline and Mr P’s application could be filed as late as 19 March.

[9] The following day Ms Talitimu and Mr Lal met again at his offices at the

instigation of George Mein, a friend of Mr Lal's. The meeting did not change the situation as they were both at cross purposes – Mr Lal thought Ms Talitimu was there to apologise while Ms Talitimu thought Mr Lau would apologise to her. The meeting ended with Mr Lal saying the reason for her dismissal was “*serious misconduct*”.

[10] He confirmed this decision in a letter to Ms Talitimu dated 25 February 2010. It stated that Ms Talitimu's “*omission*” to make the necessary arrangements for Mr P's application to be filed by the close of business on 19 February fell within the terms of the following clause of her employment agreement:

In the event of serious misconduct, serious non-observance of the terms of your employment or serious neglect of your duties you may be dismissed without notice. Examples of serious misconduct include (but are not limited to):

- *Conduct that affects or in our reasonable opinion is likely to prejudicially affect our interests or which may bring us into disrepute;*
- *Insubordination or failure to follow a lawful instruction;*
- and*
- *Serious neglect of duty.*

[11] After referring to the test of justification at s103A of the Employment Relations Act 2000 (the Act), Mr Lal's letter concluded: “*I regret that our relationship had to be terminated peremptorily, but you left me no option*”.

[12] Ms Talitimu raised a personal grievance for unjustified dismissal and lodged a statement of problem in the Authority. After Mr Lal lodged a statement in reply the matter was referred to mediation but was not resolved and an Authority investigation was then required.

The investigation

[13] For the purposes of the investigation Ms Talitimu, Mr Lal, Ms Gabriel and Mr Mein lodged written witness statements. Each witness attended the investigation meeting and, under oath, confirmed those written statements and answered questions from the Authority member and the representatives. The representatives had an opportunity to provide closing submissions.

[14] As permitted under s174 of the Act this determination does not record all the

evidence and submissions received. Rather it sets out findings of fact and law, expresses conclusions on the matters for determination, and specifies orders made.

Issues

[15] In deciding whether Ms Talitimu was unjustifiably dismissed as she claimed, the Authority had to consider whether Mr Lal's decision to dismiss Ms Talitimu, and how that decision was made, was what a fair and reasonable employer would have done in all the circumstances at the time – that is the test of justification set by s103A of the Act as it was at the date of her dismissal.

[16] In applying that objective standard, the matters for resolution were:

- (i) whether Ms Talitimu's actions or omissions regarding Mr P's application were serious misconduct; and
- (ii) whether Mr Lal fairly investigated the circumstances before deciding to dismiss Ms Talitimu?

No serious misconduct

[17] I find a fair and reasonable employer would not, in all the circumstances at the time, have concluded Ms Talitimu committed serious misconduct on 19 February. I do so for the following reasons.

[18] Firstly, there were reasonable grounds for Ms Talitimu to be unclear about Mr Lal's intentions and instructions whether to lodge Mr P's residence application. On the one hand, accepting Mr Lal's account on this point, he had mentioned to Ms Talitimu on three occasions in that week the need for the application to be sent by 19 February. On the other hand, Ms Talitimu knew that Mr Lal had told Mr P the application could not be made unless Mr P paid outstanding legal fees for earlier immigration work along with a part payment of the fee for the residence application.

[19] Some three months earlier Mr Lal had sent Mr P an email calling him a "*most unreliable client*" and threatening debt recovery proceedings for outstanding fees.

[20] On 15 February Mr Lal told Ms Talitimu that Mr P's application was not to be

filed until Mr P had paid \$200 towards his outstanding fees. On 16 February Mr Lal spoke by telephone with Mr P and accepted an instalment of \$100. However on 18 February Mr Lal wrote to Mr P demanding immediate payment of outstanding fees and a further \$500 towards the residence application. The letter suggested that without the money the application would not be lodged because it ended with the sentence: “*I look forward to receiving these to file the application*”. In his oral evidence Mr Lal described this as trying to force Mr P to pay his bill. Ms Talitimu knew about that letter because, as she recalled, she typed it. Accordingly, rather than a unequivocal instruction to Ms Talitimu, there was genuine room for misunderstanding about what Mr Lal intended to have happen with the file,.

[21] Secondly, Mr Lal knew on the afternoon – or should have known – that Mr P’s application was not yet signed off and despatched. That is because the procedure in his practice was for all applications of this type to be brought to him so he could sign the covering letter shortly before the courier arrived. According to his own evidence he had spoken to Mr P by telephone on 16 February and written to him on 18 February about fees, and had mentioned the application deadline to Ms Talitimu three times that week. Despite this he forgot or overlooked that he had not been asked at any time on Friday, 19 February to sign off Mr P’s application. It appears not to have come to his mind when Ms Talitimu came to him around 4.30pm on Friday afternoon to check if there was anything else she needed to do before leaving the office.

[22] In those circumstances, the blame for not meeting the believed deadline cannot rest solely at Ms Talitimu’s feet. I note in reaching that conclusion that Mr Lal acknowledged Ms Talitimu had no previous instance of missing a deadline for an application of this type. A fair and reasonable employer who had made the mistake or oversight that Mr Lal did, would have concluded there was a shared responsibility for the situation which fell short of serious misconduct.

No fair investigation by Mr Lal

[23] The means by which Mr Lal went about raising his concerns with Ms Talitimu, and making the dismissal decision, was also below the standard of a fair and reasonable employer.

[24] Having raised the subject with her in the Monday morning meeting on 22 February, he should have given her an opportunity to prepare a considered response to the allegation that she was guilty of serious misconduct by not doing more on 19 February to have Mr Lal sign the necessary correspondence and despatch it. She should also have had the opportunity to engage a representative to assist her in that discussion and response, if she wished to do so.

[25] Neither did Mr Lal consider any alternatives to dismissing her. He accepted in answer to questions during the Authority investigation that he did not consider giving her a warning. Instead, during a heated discussion, he announced she was “*fired*”, an outcome of which she was given no advance warning. Mr Lal had sent an angry email to Ms Talitimu’s work email address at 5.53pm on 19 February but there is some doubt that she had read it before she met with Mr Lal on 22 February. Even if she had read the email, which is possible, it did not warn her that her job was in jeopardy, only that she had “*messed up this case*”, that Mr Lal was concerned the client could sue him and that he was “*bloody pissed off*”.

[26] When he met Ms Talitimu on 23 February Mr Lal had an opportunity to rescue himself from those serious procedural flaws. He did not do so.

[27] I reject Mr Lal’s submission, relying on *Airline Stewards IUW v Air New Zealand*, that the present case was one where the facts were so clear, instant dismissal was justified.¹

[28] Rather it was one where investigation would have provided some additional information relevant to the seriousness of the situation. Within an hour or so of having dismissed Ms Talitimu, Mr Lal realised the supposed 19 February deadline for Mr P’s application was an error – the number of months had been miscalculated in an Immigration Service letter and the application could be filed as late as 19 March. Mr Lal promptly corresponded by email with an Immigration Officer who, before midday on 19 February, advised there was unlikely to be a problem with processing Mr P’s application and Mr Lal had it sent by courier that day.

[29] While it is the seriousness of the conduct rather than the consequences of the

¹ [1990] 23 NZLR 549 at 553.

employee's omissions that must be assessed in a disciplinary inquiry for misconduct, the information about the mistaken deadline was a relevant part of the context but not considered by Mr Lal because he had already fired Ms Talitimu.²

[30] Even if Mr Lal had a genuine concern about the prospect of a negligence action against him by Mr P, that was dispelled within two hours of his abrupt and heated dismissal of Ms Talitimu. And when – three days later – Mr Lal wrote Ms Talitimu a letter giving the reasons for her dismissal, he knew or should have known the following assertion he made was either untrue or not very likely: “*This failure has left me exposed to a claim in negligence from my client, and a potential award of damages*”.

[31] By properly notifying Ms Talitimu of a disciplinary meeting and then listening to her explanations, Mr Lal would also have had more opportunity to consider the role that his own ‘mixed messages’ about filing the application had played in the situation and alternatives to dismissal. On his own evidence there is nothing to suggest Mr Lal genuinely did either.

[32] I do not accept Mr Lal’s proposition that the Authority should view his actions differently because of the prospect Ms Talitimu may well have left the job anyway because she was interested in going to work in Australia. While I accept the evidence of Mr Mein and Ms Gabriel that Ms Talitimu had talked about that idea, there was nothing to confirm she had any real plans to do so. In any event she was entitled to leave on notice rather than by an abrupt, unjustified dismissal.

Remedies

[33] Ms Talitimu has a personal grievance for unjustified dismissal that requires remedies.

Lost wages

[34] Seven weeks after her dismissal Ms Talitimu started a new job as a legal secretary in Katherine in the Australian Northern Territory on AUD\$23 an hour,

² *Angel v Fonterra Co-operative Group* [2006] ERNZ 1080 at [78].

significantly higher than her NZD\$19 hourly rate with Mr Lal. Her claim for lost wages is limited to those seven weeks. I am satisfied she made reasonable endeavours during that time to mitigate her losses by seeking new employment, which were clearly successful. Under s123(1)(b) of the Act I order Mr Lal to pay Ms Talitimu lost wages for seven weeks.

Compensation for hurt and humiliation

[35] I accept Ms Talitimu's evidence that she was humiliated and her feelings were injured by Mr Lal's abrupt ending of what she regarded as three years of loyal service. However Ms Talitimu also appeared to be a resilient person who quickly dealt with that difficult experience. Accordingly I consider a modest award of \$5000 in compensation under s123(1)(c) is adequate remedy for the injury to her from the dismissal and how it was carried out by Mr Lal.

Contribution

[36] Under s124 of the Act the Authority must consider where remedies awarded should be reduced because of blameworthy conduct by Ms Talitimu which contributed to the situation giving rise to her grievance.

[37] Throughout Ms Talitimu accepted she would take "*part of the blame*". She had done all the necessary work on Mr P's file so that there was a covering letter and application ready for Mr Lal to sign off. However she accepted that she could have reminded Mr Lal late on Friday 19 February to look at the application and approve it so it could be sent before she left for the day. She accepted not doing so was a mistake or oversight on her part. It was a proper and mature concession.

[38] Ms Talitimu had not taken all the care she could have done given her responsibilities and it should be marked by a 20 per cent reduction in the remedies awarded to her. She was not responsible however for the highhanded manner in which Mr Lal went about dismissing her and for that reason the reduction for contribution is not set at any higher level.

Costs

[39] Costs are reserved. The parties are encouraged to agree any issue of costs between themselves. If they are not able to do so, Ms Talitimu should lodge and serve a memorandum as to costs within 28 days of the date of this determination if she wants the Authority to determine costs. Mr Lal would then have 14 days from the date of service to lodge a reply memorandum. No application will be considered outside this timetable without prior leave. If the Authority were required to determine costs, it would most likely be on the current notional daily rate of \$3000, subject to any relevant information in the parties' memoranda and the application of the principles discussed in *PBO v DaCruz* [2005] ERNZ 808.

Robin Arthur
Member of the Employment Relations Authority