IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 208
5392084

	BETWEEN	LISA WALE Applicant
	A N D	ALLIED INVESTMENTS LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Georgina Burness, Advocate for Applicant Chris McDowall, on behalf of the Respondent
Investigation meeting:	27 August 2013 at Christchurch
Submissions Received:	At the investigation meeting
Date of Determination:	7 October 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Lisa Wale, claims she was unjustifiably dismissed by the respondent, Allied Investments Limited, on 26 June 2012. She also claims to have suffered sex discrimination and that she was unjustifiably disadvantaged by virtue of the fact Allied often communicated through her supervisor rather than directly.

[2] Allied accepts it dismissed Ms Wale but contends its actions were justified as she could no longer work rosters she was contractually required to perform. Allied vehemently denies the claim of sex discrimination and says it did nothing untoward with respect to issues behind the disadvantage claim.

Background

[3] Ms Wale worked for Allied as a full time Security Officer. The terms of her employment were stipulated in a written agreement.

[4] Contained therein, and pertinent to this dispute, is the hours of work clause. It reads:

> *The employee shall work as per the employer's roster, to meet the needs of the employer, which operates a 24 hour day, seven day a week business.*
>
> *All employees are required to be available to work a reasonable number of additional hours to meet all operational requirements.*
>
> *The work roster will be set at least one week in advance by the employer and the employee understands that the roster may need to be varied at short notice or the employee may need to be flexible/work extra hours, to meet the needs of the employer's business.*

[5] During the investigation the parties canvassed a number of issues, particularly one involving Ms Wale's decision to have her dog accompany her to work, but these shall not be discussed further as they do not affect the determination of Ms Wale's claims. Those relating to the discrimination and disadvantage claims are discussed when determining those issues. Turning to the dismissal.

[6] Due to various changes in staffing at CPIT, the site at which Ms Wale worked, Allied concluded it had to alter the rosters that had previously applied. One of the changes which led to this decision was the resignation of Mr Robin Masters, Ms Wale's supervisor and domestic partner.

[7] Having resigned Mr Masters developed some rosters *that suited the guards* and forwarded them to Mr McDowall. Mr McDowall responded by advising he did not believe they would work and sent rosters he had prepared.

[8] Staff were advised of the new rosters on Friday 22 June 2012. Ms Wale responded immediately. She telephoned Mr McDowall at approximately 5.25pm and informed him she had concerns emanating from her commitment to full-time study and a desire to have some weekend time to spend with family.

[9] Detailed notes of the conversation taken by Mr McDowall and which Ms Wale accepts are accurate, record amidst other things:

> *Lisa Wale called myself at 1724 to explain she had just been called by Robin to inform her of the new roster, Lisa informed me she could not work any shift at all in the new roster as it clashed with her full time course she was undertaking. I explained to Lisa that she is employed on a fulltime basis and she would be required to work fulltime hours as per site requirements, Lisa stated she was happy with her roster as it allowed her to study and visit her parents in the weekend. She also went on to say that she had discussed it with Robin that she would reduce her hours further by dropping her weekend shift so she did not have to work weekends, I explained to Lisa this was not possible and as a fulltime employee she can not pick and choose the hours she wishes and change them to suit herself and Robin. …*

[10] The two then discussed the merits of study verses work and the possibility of a part time role at another site. More than once during this phase of the conversation Mr McDowall advised Ms Wale she would have to make some choices and he asked she advise her preferences which he would then consider.

[11] Having not received any advice as to Ms Wale's preferences, Mr McDowall sent an email to Mr Masters on 25 June. It reads:

> *Robin can you let Lisa no I am still waiting on her email around which days/shifts is her preference re rostered days on.*

[12] Ms Wale responded approximately 4½ hours later advising

> *… I cannot do the 430 to 1130 shifts and the weekends at all, I would really like to have a life outside of Allied Security. With Robin not working in the weekends now it is the only time we actually get to visit my parents and spend time together.*
>
> *However I am able to do the 1130 to 630 shifts at Sullivan ave but will only do Wednesday, Thursday and Friday lates, the shifts that I have at present.*

[13] Mr McDowall replied the following morning. He says

> *I have considered the request but it doesn't fit with the needs of the client or of allied. I have been able to work it so you do not do the 430pm starts but I cannot accommodate all other requests. We do not want to see you leave but the rosters and staffing must be managed to suit the needs of our client and our business. Can you please confirm whether or not you will be working the issued roster below as per your fulltime employment status. If you are not able to work your rostered shifts we may need to look at terminating your employment which I am reluctant to do.*

[14] The roster followed the above message. Five hours later Ms Wale advised

> *No I can't do these hours. What about the fact that you said there were hours that PEL, instead of just firing me which seems to be the easy way out.*

[15] That led to an e-mail from Mr McDowall telling Ms Wale that as she could not work the hours required *we are obliged to terminate your employment*. She was given two weeks' notice and a temporary roster was implemented so her hours remained unchanged during the notice period.

[16] Ms Wale's response, forwarded some six hours later, was *whatever!!!* along with a request Allied forward a copy of her employment agreement.

Determination

[17] As already said Allied accepts it dismissed Ms Wale. In doing so it also accepts it is required to justify the dismissal.

[18] Section 103A of the Employment Relations Act 2000 (the Act), states 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 could have done in all the circumstances at the time the dismissal ... occurred.*

[19] In applying the test the Authority must consider whether:

(a) Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;

(b) The employer raised its concerns with the employee prior to taking action;

(c) The employer gave a reasonable opportunity for response;

(d) The employer genuinely considered the explanation before taking action; and

(e) Any other appropriate factors.

[20] In essence points 19 (b) to (d) summarise that which has long been accepted. An employer is required to put issues in its mind, allow a response and consider it. Added to this are other statutory obligations with s.4(1A)(c) being particularly

pertinent: refer *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102 where the Employment Court held:

> *The relationship between s.4(1A)(c) and s.103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure that does not comply with s.4(1A)(c) will not be justifiable.*

[21] Section 4(1A)(c) requires an employer who is proposing to make a decision that will, or is likely to have an adverse effect on the continuation of an employees employment give the employee access to relevant information and an opportunity to comment before the decision is made.

[22] I conclude Allied failed to comply with the above requirement. In particular there is no evidence Mr McDowall expressly told Ms Wale a failure to work the roster would result in her dismissal before imposing that sanction.

[23] There is also no evidence he pursued the option of part time employment at another site. A fair and reasonable employer would have done so having indicated it was a possibility as Mr McDowall did during the conversation of 22 June. Furthermore a fair and reasonable employer would have ensured a face to face meeting and not relied on an e-mail exchange which failed to consider all pertinent matters.

[24] Having concluded the dismissal was unjustified I ask whether or not the procedural failures were minor and the result would not have changed if the deficiencies had not occurred (s.103A(5)). The answer is no. Ms Wale may well have been retained had there been further discussion about a change to part time status and a meaningful consideration of the options the parties briefly canvassed but, in any event and as the Court said in *Jinkinson*, the failure to comply with s.4(1A)(c) is an absolute determinant.

[25] The conclusion the dismissal is unjustified raises the question of remedies. Ms Wale seeks wages lost as a result of the dismissal and compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act.

[26] Section 128(2) of the Act provides the Authority must order payment of a sum equal to the lesser of that actually lost or 3 months ordinary time remuneration. Ms Wale produced pay records that show she commenced a new job in the pay period

commencing 23 July 2012 but she cannot tell me exactly when (indeed, she said some three months had elapsed). She was paid by Allied till 10 July. That leaves less than a fortnight unpaid. Some calculation is necessary given the 43 hour week with Allied and uncertainty as to when she started the new job. I conclude she lost approximately $962. The period of loss is less than three months so, pending a possible reduction for contribution, the claim should be awarded in full.

[27] Ms Wale also notes her hours were less than those she enjoyed at Allied but I shall not take that into account given the reasons behind her refusal to work the hours offered by Allied and evidence which strongly indicates the reduced hours at her new employer were by choice. As Ms Wale put it when answering questions, she had other things to do and her studies were her first priority.

[28] Ms Wale seeks $4,000 as compensation pursuant to section 123(1)(c)(i). She initially tendered no evidence in support of the claim and that which was ultimately given had to be prised from her through questioning. The evidence emphasised the effects of a loss of income. This carries little weight given her evidence she sought to tailor her hours to her personal circumstances and that would also have meant a reduction with Allied. The evidence was weak and only warrants a token award. I consider $1,000 appropriate.

[29] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Wale contributed to her dismissal in any significant way. I conclude the answer is yes, she did.

[30] In her written communication with Mr McDowall Ms Wale indicated she had little regard for her contractual obligations and the requirement she work as rostered. Her sentiments, which were clearly enunciated orally during the investigation meeting, was to the effect of ‘my personal circumstances have changed and I wish to dictate when I will be available’. That does not sit well with the employment agreement. Her answers are indicative of a failure to act in good faith and also repeat Allied’s failure; namely non-compliance with the duty s.4(1A) imposes on both parties to be constructive, responsive and communicative. Having considered the evidence I conclude her remedies should be reduced by 20%.

[31] Ms Wale also claims Allied unjustifiably discriminated against her on the basis of gender. The claim was first mentioned when Ms Wale raised her grievance in

a letter dated 3 July 2012. The letter was sent to Mr Damian Black, Allied's sole director and majority shareholder, care of Mr McDowall. It advised:

> *During our client's employment, she was continually discriminated against by you, because of her sex. You have said to her in the past that "females do not belong in the security industry", repeatedly reminded her that you did not hire her, and have constantly ignored her in the workplace …*

[32] Allied's response, sent by Mr McDowall on 30 July 2012, refuted the allegation and asked that Ms Wale supply *exact details of how and when such abuse or discrimination occurred*. Those details were not supplied and the statement of problem filed in the Authority on 18 April 2013 did nothing more than paraphrase the initial allegation with an alteration that substituted *you* with Mr Black's name.

[33] Allied's response to that was

> *… this entire claim is unsubstantiated and false. Miss Wale will be unable to clearly demonstrate how Mr Black undertook any such behaviour to substantiate any claim of problem, given Mr Black had no communication or involvement with Miss Wale during her employment with our firm.*

[34] A month later Ms Burness advised the original accusation *was incorrect in the person that was discriminating against her stating it was Mr D Black but this was in fact Chris McDowall himself*. Mr McDowall denies he did anything improper.

[35] Ms Wale's written evidence in support of the claim was negligible. The situation did not improve when she was questioned about it. It transpires she bases her claim on one comment but was unable to say what was actually said and when. It also appears from Mr Masters evidence the comment referred to in both the initial letter and the statement of problem was allegedly made to him and he later passed it, second hand, to Ms Wale.

[36] There is an obligation on an applicant to establish, prima facie, a case which requires answering. Serious doubts about the claim's veracity arise from the fact Ms Wale was unable to correctly identify the alleged culprit for some time and could not explain the error. I also find the supporting evidence totally inadequate and conclude she has been unable to establish a prima facie case. The claim is dismissed.

[37] Finally there is the claim Ms Wale was treated unjustly in her employment as communication with her was through her supervisor. The claim has two components.

The first relates to normal operational instructions from Mr McDowall and the second to the fact pay slips were sent to Mr Masters e-mail address. Allied's response is operational instructions are normally communicated through the supervisor. The pay issue was an error but it was remedied when Ms Wale raised it.

[38] I do not accept the claim. First Ms Wale accepts her previous supervisor was also a conduit of operational messages (though not as many) and second Mr Masters confirms the approach was quite normal. I cannot criticise Allied for an operating procedure that appears quite normal (most supervisors need to know what their staff are being instructed to do) and about which there is no evidence of harm.

[39] Ms Wale claims the pay slip issue continued for a considerable time and she sent numerous requests it change. Again I take the claim no further. Ms Wale produced no evidence supporting her claim she sent numerous missives about the issue and, in any event, the issue was resolved in the manner Ms Wale sought.

Conclusion and orders

[40] For the above reasons I conclude Ms Wale has a personal grievance as she was unjustifiably dismissed.

[41] As a result the respondent, Allied Investments Limited, is ordered to pay Ms Lisa Wale:

(a) $769.60 (seven hundred and sixty nine dollars and sixty cents) gross as recompense for wages lost as a result of the dismissal; and

(b) a further $800 (eight hundred dollars) as compensation pursuant to123(1)(c)(i) of the Act.

[42] Ms Wale's other claims (sex discrimination and unjustified disadvantage) fail.

[43] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority