Determination Number: AA 365/06
File Number: 5040544

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Hayley Waugh (Applicant)
AND	H.B. Holdings Limited t/a Dive HQ Tauranga (Respondent)
REPRESENTATIVES	Mark Nutsford for Applicant Darren Brickley for Respondent
MEMBER OF AUTHORITY	Vicki Campbell
INVESTIGATION MEETING	20 November 2006
DATE OF DETERMINATION	4 December 2006

DETERMINATION OF THE AUTHORITY

[1] Ms Hayley Waugh commenced employment with H.B. Holdings Limited t/a Dive HQ Tauranga ("Dive HQ") on 2 November 2005 as a retail assistant. She had previously completed her dive instructors course with the Respondent and was waiting to receive her certificate of competency. Ms Waugh was subject to an individual employment agreement which had been reduced to writing.

[2] Ms Waugh says her employment continued seemingly without fault. She says she never received any warnings about the way in which she carried out her duties. Ms Waugh was dismissed on 17 February 2006 as a result of her performance and at the end of a three month probationary period. Ms Waugh claims the dismissal was unjustified.

[3] The respondent denies Ms Waugh's dismissal was unjustified.

[4] I am required to scrutinise Dive HQ's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was 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 or action occurred.

[5] To resolve the problem, it is necessary to scrutinise how concerns about Ms Waugh's work performance developed and the actions taken by Dive HQ to address those concerns. I will then determine, on an objective basis whether the company's actions, and how the Dive

HQ acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

Terms of employment

[6] The written employment agreement contains provision for a three month probationary period in the following terms:

> Employment is subject to a trial period of three months during which time the employee will be entitled to whatever training, supervision, support and resources during this period as may be deemed necessary by the Employer, and will be advised at the performance [sic] in relation to the standards required of them. The Employer will clarify the standards required with reference to the Employee's position description.
>
> The Employer may extend the trial period to enable the Employer to conduct additional performance reviews. Notice of the extension of the trial period and the length of the extended trial period will be given to the Employee in writing before the completion of the initial trial period.
>
> One week's notice of termination of employment may be given after three investigation/disciplinary meetings (which will have followed each performance reviews), and issued two written warnings and then after the final performance review the Employer considers that the Employee has failed to meet the required standards.
>
> Where the Employer terminates the agreement under this clause the Employer may elect to pay one week's wages in lieu of notice.
>
> On successful completion of this the probationary period, the Employer will give written confirmation to the Employee of the Employee's position with the Employer.

[7] The law surrounding termination of employment during or at the end of a trial period is set out by the Court of Appeal in *Nelson Air Limited v New Zealand Air Line Pilots Association (Inc)* [1994] 2 ERNZ 665. There are less stringent procedural requirements in the case of an employee on a trial period, but this does not release an employer from its obligation to act fairly. At 669, the following refers:

> Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end.

[8] Mr Brickley's evidence, which I accept, is that during the trial period he spoke to Ms Waugh many times about issues relating to her performance.

[9] It was common ground that on 9 December 2005, Mr Brickley issued Ms Waugh with a verbal warning after he had received a complaint from a teacher that Ms Waugh had conducted herself in an unprofessional manner. Ms Waugh was assisting with a Deep Water Survival Program at Te Puke High School. Ms Waugh admitted to the teacher that she had been up partying and drinking most of the previous night and had not gotten very much sleep. Mr Brickley explained to Ms Waugh that when she had children in her care in a hazardous environment, she must be feeling 100% fit and ready to take on the responsibility.

[10] On another occasion Mr Brickley spoke to Ms Waugh after she had become upset at work. At the time Mr Brickley discussed the incident with Ms Waugh she told him that she had become upset because she had received poor marks in a beauty pagent. The discussion was a general discussion held out of concern that Ms Waugh was upset and was not considered by either Mr Brickley or Ms Waugh to constitute a disciplinary meeting nor were any issues raised about Ms Waugh's performance generally. There was no indication given to Ms Waugh that the incident may give rise to her employment being terminated at the end of the probationary period.

[11] At the investigation meeting Ms Waugh told me that the result at the pagent was only part of the reason she had become upset. She told me that on that day in question, she had been about to take her lunch break and had made her lunch. She was then advised that everyone was going out and she would need to supervise the shop.

[12] Ms Waugh suffers from a mild form of diabetes, which was known to Mr Brickley. If Ms Waugh's sugar levels get too low, she experiences mood swings. During the time she was on her own in the shop, the shop became very busy. This meant she never got time to stop and eat her lunch. This affected her sugar levels which led to her becoming very upset. After lunch Mr Brickley's wife noticed that Ms Waugh was not her usual self, and asked her what was wrong. Ms Waugh became distressed and started crying. Mrs Brickley told Mr Brickley what she had witnessed and Mr Brickley then spoke to Ms Waugh and asked her what had happened. It was common ground at the investigation meeting that this was the first time Mr Brickley had heard that Ms Waugh had become distressed and cried because her sugar levels were low due to not being able to eat her lunch that day.

[13] Other alleged incidents outlined by Mr Brickley, included Ms Waugh providing a customer with a regulator which was not serviceable and was dangerous for the user; a customer alleging that Ms Waugh had filled a dive cylinder which was out of test; and that Ms Waugh had made errors in the stock take. Ms Waugh denies these allegations.

[14] It was common ground that on 3 February 2006 Ms Waugh was called into Mr Brickley's office and advised that she had erroneously given credit to a customer. Mr Brickely was satisfied with Ms Waugh's explanation, however, Ms Waugh was not authorised to give credit to customers and it was Mr Brickley's view that she ought to have checked with a Manager in the first instance.

[15] Ms Waugh was then given two weeks notice of the termination of her employment.

Justification for dismissal

[16] It is necessary to determine on an objective basis whether the company's actions and how the company acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[17] I accept Mr Brickely's evidence that the safety aspects of equipment being provided to customers was an important aspect of Ms Waugh's job. Providing customers with possibly faulty equipment had the potential to cause serious harm to customers.

[18] However, clause 5 of the employment agreement entitles Ms Waugh to receive at least 2 written warnings on her performance before she could be subject to dismissal at the end of the probationary period. Also, as highlighted by the Court of Appeal in *Nelson Air Limited v New Zealand Air Line Pilots Association (Inc)* Ms Waugh was entitled to fair warning before the end of the probationary period, that her employment was coming to an end. It was accepted by Mr Brickley at the investigation meeting that neither of these two requirements were met.

[19] It is not disputed that Mr Brickley discussed some concerns with Ms Waugh on a number of occasions. However, Mr Brickely has not complied with his own employment agreement in that he has failed to provide Ms Waugh with the requisite written warnings before terminating her employment during the probationary period.

[20] Mr Brickley accepted at the investigation meeting that he had not complied with any notion of procedural fairness leading up to the final meeting during which he gave notice of dismissal to Ms Waugh.

[21] Separating out Dive HQ's decision to dismiss against the statutory objective standard of what a fair and reasonable employer would have done in these circumstances, for all the above reasons, **I find that Dive HQ's action in dismissing Ms Waugh was not what a fair and reasonable employer would have done. I find that Ms Waugh has a personal grievance and she is entitled to remedies in settlement of that grievance.**

Remedies

Lost wages

[22] On 3 February 2006, after receiving notice of dismissal, Ms Waugh signed up for a Law Enforcement course. Ms Waugh told me she had wanted to do this for a long time and so took the opportunity that day. Even though she had been provided with two weeks notice Ms Waugh worked one further week at Dive HQ and then left to start her course. She was paid for the second week of her notice in lieu of her working it. Ms Waugh took up part-time work because her studies prevented her from working full-time.

[23] After commencing her studies on or about 13 February 2006 Ms Waugh was no longer available for full-time employment. In those circumstances any lost remuneration is properly attributable to her decision to undertake full-time study rather than the actions of Dive HQ in dismissing her.

Compensation

[24] Ms Waugh seeks compensation for hurt and humiliation caused as a consequence of her dismissal. Ms Waugh gave limited evidence in support of her claim. Ms Waugh told me that she was reduced to tears in the meeting on 3 February 2006 and when she asked if there was anything she could do, was told "no". Ms Waugh told me that when she came across customers of Dive HQ they would ask her why she left and it was stressful having to acknowledge that she had been dismissed.

[25] I find that under section 123(1)(c)(i) of the Act the applicant is entitled to payment of the sum of $2000 as compensation for humiliation, loss of dignity and injury to feelings arising from her dismissal.

Contributory conduct

[26] I am bound by section 124 of the Act to consider the extent to which Ms Waugh's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[27] Ms Waugh was provided with a verbal warning on 9 December 2005. I am satisfied that Ms Waugh understood that on 9 December 2006 her job was now in jeopardy. However, it was common ground at the investigation meeting that following the 9 December 2006 warning, Mr Brickley did not provide any specific training or support to Ms Waugh even though the employment agreement provided for Ms Waugh to receive such training, supervision and support during her probationary period. In answer to questions at the investigation meeting Mr Brickley told me that he assumed Ms Waugh had the necessary knowledge because she had completed Dive HQ's Dive Instructor course.

[28] Real difficulties arise in cases where the process is flawed to the extent that it is not possible for the Authority to ascertain the degree of performance deficiencies because this has been obscured by failures of process (see *Air New Zealand Ltd v Hudson*, unreported, 30 May 2006, AC30/06, Shaw J).

[29] Mr Brickley never carried out any proper investigation into the concerns he outlined to me at the investigation meeting regarding Ms Waugh's performance. Ms Waugh denies the allegations relating to the provision of faulty equipment, errors in the stocktake and filling an out of date dive cylinder. It is not possible to ascertain whether Ms Waugh's alleged errors were sufficiently serious to justify the dismissal or to constitute contributory conduct.

[30] For these reasons, I consider there is no basis for reducing the nature and extent of the remedies to be granted to Ms Waugh.

H.B. Holdings Limited t/a Dive HQ Tauranga is ordered to pay to Ms Waugh the sum of $2,000.00 as compensation pursuant to section 123(1)(c) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

[31] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority