

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 138
5367111

BETWEEN CHRISTINE WILDS
 Applicant

AND UGL (NZ) LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Fionnuala Kelly, Counsel for the Applicant
 Martin Reid, Counsel for the Respondent

Investigation Meeting: 21 August 2012 at Wellington

Submissions Received: 21 and 22 August and 14 and 15 September 2012

Determination: 31 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dismissal that relates to serious misconduct involving verbal abuse. UGL NZ Limited (UGL) decided that language used by Ms Wilds during a meeting with her branch manager amounted to insubordination and disrespectful conduct and warranted Ms Wilds' dismissal.

[2] The dismissal arose from a meeting between Ms Wilds and her senior manager Ian Clough on 28 September 2012. It is common ground that Ms Wilds used colourful language in two instances, which Mr Clough says shocked him because it happened once and she left and returned and repeated swearing. He reported the matter to two human resources people who happened to arrive at the branch the next day. As a consequence Mr Clough and Ms Kelly Graham, HR adviser, conducted a disciplinary process that culminated in Ms Wilds' termination of employment.

[3] Ms Wilds has challenged the decision, and is seeking compensation for lost wages, compensation for hurt and humiliation and costs. The respondent denies all Ms Wilds' claims.

The Issues

[4] The primary issue in this matter is whether a fair and reasonable employer could have dismissed Ms Wilds in all the circumstances?

[5] In addition, there are two procedural matters. The first is whether there was any investigation, and if not, would the outcome have been the same given that Ms Wilds admitted to using colourful language during the meeting held on 28 September 2011. Second, Mr Clough was the primary decision maker on Ms Wilds' termination of employment. The central question to this was whether or not his involvement in the process and making the decision was fair.

UGL (NZ) Limited

[6] UGL (NZ) Limited (UGL) is in the business of designing and maintaining critical transport power and water assets. It is wholly owned subsidiary of an Australian listed company UGL Limited. It is also part of the UGL Group. The particular section of the business which employed Ms Wilds operated at the service centre in Upper Hutt for UGL's term maintenance lines overhead contract with Transpower. That contract ended on 30 June 2012, and the branch located at Upper Hutt was closed with effect from 1 July 2012. UGL now operates out of its existing locations at Auckland, Hamilton and Kawarau.

Ms Wilds' employment with UGL

[7] Ms Wilds was employed at the Upper Hutt branch of UGL in the position of a Projects Administrator. She had been employed since 2001. The parties had a signed off employment agreement. Ms Wilds' pay was \$47,000 per annum and she was required to work 40 hours per week. She reported to the Branch Manager, Mr Clough. Mr Clough had been sent to the branch to improve its financial situation and the maintenance of its contract. He acknowledged that this created some tension at least.

Incident on 28 September 2011

[8] During a planning meeting on 27 September 2011 Ms Wilds became upset about changes in her work that she says that she heard for the first time from Mr Clough. These changes occurred because Mr Clough decided that he needed to prioritise her work. On 28 September 2011 he called Ms Wilds into his office to discuss the matters arising out of the prior day's planning meeting. He was concerned at her ability to complete particular tasks in light of her work load. Shortly into the discussion Ms Wilds uncharacteristically proceeded to use colourful language in reacting to the situation she found herself in. The conversation deteriorated and Mr Clough requested her to leave his office. She did so, but returned shortly after to again use colourful language in describing what she thought and her reaction to the situation she was in. Mr Clough left the office to bring a halt to the situation. Mr Jared Fowler another employee in attendance remained sitting there, with his mouth open according to Ms Wilds. She says that she asked Mr Fowler what she should do, and she says he said that she should go home.

[9] Ms Wilds left the office and did not return to work until a disciplinary meeting was held on the morning of Monday 3 October 2011. Ms Wilds had been put on notice of the allegation and I quote verbatim that the allegation read:

The purpose of this meeting is to discuss and give you an opportunity respond to the following allegation of insubordination involving disrespectful conduct and language directed at a senior manager.

On the 29th of September 2011 at approximately 8.30am, Ian Clough asked you if you had five minutes to discuss an outstanding issue in his office.

Ian wanted to clear up a comment made in the previous days planning meeting where you stated that you couldn't complete a task on time because of all the other tasks that Ian had been given you. Ian's response was that he hadn't give you any other tasks and the task in question was to be her sole priority.

At some stage throughout the conversation you stood up from your chair and said "I know you think I'm a f ... king useless bitch, why don't you just tell me to f ... king off, you have been f ... king gunning for me every since you started".

A few more colourful comments were said before you turned and walked out of the room.

Ian asked you to stop swearing as he didn't appreciate being spoken to like that, and you said "I'm f ... king going home this is ..."

Approximately twenty seconds later you re-entered the office with more foul language stating that Ian had been f ... king gunning for her ever since (swear name withheld) had left etc., Ian asked you to please calm down and leave his office, you wouldn't and didn't so Ian removed himself from the office.

At this meeting will be Kelly Graham from Human Resources and myself. It is strongly recommended that you have a support person with you. It would be helpful if you could let me know in advance who you will inviting. You may wish to talk to other employees about our concerns, and all comments by you and others will be taken into consideration before any decision is made. Christine I would also like to remind you of UGL (NZ) Limited Employee Assistance Programme (EAP) that you can use for support during this process. Christine you must appreciate that the Company considers this allegation to be Serious Misconduct, therefore if it is believed to have substance, then an outcome of the meeting could be disciplinary action up to and including a dismissal.

Disciplinary meeting Monday 3 October 2011

[10] Ms Wilds attended the disciplinary meeting with a support person. Mr Clough attended and was the primary decision maker for UGL, but was getting advice from Ms Graham, who was also in attendance to provide appropriate guidance.

[11] During the meeting Ms Wilds apologised for her behaviour and initially offered her resignation before retracting it. At the conclusion of the meeting Mr Clough and Ms Graham advised Ms Wilds and her support person that the outcome of the meeting was that Ms Wilds' employment would be terminated on the grounds of serious misconduct. Ms Wilds was given an opportunity to comment on the penalty. The dismissal decision was finalised, and Ms Wilds was paid a months salary by way of notice (until 31 October 2011).

Determination

[12] First I hold that Ms Wilds' apology was genuine and sincere. I hold this because:

- a) Ms Wilds' demeanour during the Authority's investigation meeting was consistent with being apologetic.
- b) Ms Wilds was consistent about apologising and being ashamed of what she had done.

- c) Ms Wilds accepted what UGL says she said at the time. In this regard she has been truthful and willing to accept that there has been a consequence because of her behaviour.
- d) That there was no evidence challenging that this was an uncharacteristic situation.
- e) That Ms Wilds suggested resigning before retracting it.

[13] Second when Ms Wilds was given an opportunity to comment and provide her input on a penalty she raised matter about her employment that involved Mr Clough that a fair and reasonable employer could be expected to investigate objectively and impartially, hold. The issues she raised were allegations about Mr Clough's conduct in the way he treated her involving making decisions on the work she was required to do. There was no proper investigation conducted in regard to the matter she raised. Moreover Ms Graham accepted that what Mr Clough had to say was the truth of the matter without any other proper enquiry. It was simply concluded that Ms Wilds' conduct was unacceptable, and I hold that Mr Clough and Ms Graham closed their minds to any possible explanation from Ms Wilds in regard to her behaviour. They did not adequately take in to account Ms Wilds' 10 years service, satisfactory performance reviews and no prior warnings. A fair and reasonable employer could not decide to dismiss without taking those into account. In addition UGL did not get someone else to conduct the disciplinary process since Mr Clough was directly involved in allegations that were related to Ms Wilds given that her behaviour was unusual and a one off. UGL had other options to manage the process that could have included other senior managers to investigate, including the Human Resources manager, and even Ms Graham.

[14] Ms Wilds has a personal grievance. Her dismissal was unjustified. Her actions amount to blameworthy conduct that has contributed to the personal grievance. She should have had better control especially since she returned to the meeting and swore again. My assessment is that her remedies are to be reduced by 25%.

[15] Her lost wages amount to three months as claimed. Thirteen weeks lost wages and less 25% is \$8,812.50 based on the salary of \$47,000 per annum. I am satisfied that Ms Wilds' attempted to mitigate her lost wages and obtained work elsewhere.

[16] Ms Wilds has claimed compensation. I award her \$6,000 less 25% for compensation for hurt and humiliation and lost feelings.

[17] Costs are reserved, but as I signalled during the investigation meeting the tariff would ordinarily apply and costs follow the event for the successful party. A contribution to reasonable costs would be \$3,500 plus \$71.56 filing fee.

Orders of the Authority

[18] UGL (NZ) Limited is required to pay Christine Wilds:

[19] \$8,812.50 lost wages.

[20] \$4,500 compensation for hurt humiliation and loss of dignity under s 123 (1) (c) (i) of the Employment Relations Act.

[21] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority