

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 153
5379147

BETWEEN SANDRA WILSON
 Applicant

A N D PET STAY LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Jenny Murphy, Advocate for Applicant
 G J O'Sullivan, Counsel for Respondent

Investigation Meeting: 11 October 2012 at Palmerston North

Submissions and further
information Received: 8 and 19 October 2012

Date of Determination: 3 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem has to do with Ms Wilson's willingness to attend a disciplinary meeting, so long as her employer (i) provided her with more details in regard to a number of allegations about her behaviour at work, (ii) agreed to attend mediation, and (iii) provided Ms Wilson with more time to consult her representative.

[2] Ms Wilson claims that she has been unjustifiably disadvantaged and unjustifiably dismissed. She claims lost wages compensation for hurt and humiliation and costs.

[3] Pet Stay Limited (Pet Stay) says:

- That Ms Wilson was provided with sufficient and reasonable information in regard to the request for her to attend a disciplinary meeting;
- That it was entitled to conduct a separate disciplinary process instead of attending mediation;
- That Ms Wilson had time to consult and get advice from a representative;
- That Ms Wilson did not attend a disciplinary meeting.

[4] Pet Stay denies Ms Wilson's claims. Both parties are asking for costs.

The issues

[5] The issues for the Authority to determine are:

- i. Was the employer's request for Ms Wilson to attend a disciplinary meeting reasonable and a fair request;
- ii. Could a fair and reasonable employer dismiss Ms Wilson in regard to the reasons relied upon when Ms Wilson failed to turn up to a disciplinary meeting;
- iii. Could the employer justify its actions, and would the outcome have been any different if the employer proceeded differently;
- iv. What is Ms Wilson relying on to resolve her employment relationship problem?

The facts

[6] Pet Stay Limited is a privately owned boarding kennel for cats and dogs located at Feilding. The sole director of Pet Stay is Susan Flavin.

[7] Ms Wilson and Ms Flavin signed an individual employment agreement (September 2010), and Ms Wilson started work on 1 October 2010 as a kennel worker. The individual employment agreement provided a minimum of 32 hours per fortnight (four days), but by agreement, the hours were increased to 64 hours per

fortnight and Ms Wilson's rate of pay was increased to \$16 per hour. Ms Wilson accepted the new rate and her hours of work to accommodate her needs. Ms Wilson worked at the Feilding sale yards on Fridays and continues to do so. On 16 November 2011, Ms Wilson was also paid a bonus, which she accepted.

[8] On 31 December 2011, Ms Wilson received a letter (31 December 2011) requesting her to meet with Ms Flavin and talk about some issues in the employment. No meeting occurred, and Ms Wilson responded to Ms Flavin in the New Year.

[9] Ms Flavin says that she and Ms Wilson agreed in January 2012 that they needed to communicate better and needed to make an effort (in regard to their relationship). She could not tell me when the agreement occurred. However she confirmed in her letter dated 26 March 2012 the exchange of correspondence and "*...agreed that we both probably needed to communicate better and needed to make an effort*".

[10] On 21 January 2012, Ms Wilson wrote a letter to Ms Flavin in regard to two incidents that she says occurred on 21 and 28 December 2011 and other issues she had about her employment, and her relationship with Ms Flavin. This means that there still were outstanding issues. Ms Wilson suggested that they sit down and discuss her issues.

[11] In February and March 2012, Ms Wilson asked not to be rostered to work every Saturday. The arrangements in regard to Ms Wilson's hours of work became a hot issue between them. On 20 March 2012, Ms Wilson became involved in a radio interview in which she made comments about how unhappy she was in her job and about the management of the business that she was working in. She did not actually mention any names and where she worked. Also there are claims that there was an incident on 22 March about Ms Wilson yelling and threatening to go to the SPCA and Department of Labour.

[12] Ms Flavin heard about the radio interview from at least one acquaintance and Ms Flavin requested a transcript of the conversation from the radio station. A transcript was provided and this was subsequently passed on to Ms Wilson.

[13] Ms Wilson was requested to attend a disciplinary meeting by Ms Flavin in regard to her behaviour and relationship with Ms Flavin at work. In a letter dated 26 March (document 8) Ms Flavin referred to a number of matters concerning her. These

included matters in regard to information from the Department of Labour and ACC, Ms Wilson criticising the business, a concern about cages that were filthy and had urine in them, and that Ms Wilson shouted at Ms Flavin and they could not conduct a conversation because Ms Wilson was walking away and at which point Ms Wilson raised an issue about a dentist's bill, time off, the non-payment of overtime and Ms Wilson's request to attend mediation.

[14] On 28 March, Ms Flavin asked Ms Wilson to attend a disciplinary meeting. Both parties then engaged representatives. Ms Wilson's representative, Jenny Murphy, asked Ms Flavin for more details on the allegations, and to produce documents. Ms Murphy suggested at that point that the parties should attend mediation and requested Ms Flavin to attend mediation.

[15] The disciplinary meeting time became an issue in regard to Ms Wilson's representative's availability and her request for more details in regard to the allegations. No mediation took place, and the parties did not meet. Indeed, Ms Wilson says that she was willing to attend a disciplinary meeting, but put conditions on meeting. Her attendance at a meeting was conditional on more details being provided and having a representative present. Ms Flavin says that she could not offer any more information because any further information was "in her mind" and needed to be covered at the disciplinary meeting. The applicant and her representative lost an opportunity when they decided not to go to the disciplinary meeting and try and get any further information then.

[16] Also, Ms Flavin advised Ms Wilson that she had been advised that Ms Wilson had been heard on the radio about how much she hated her work and that Ms Flavin regarded her behaviour, if it was true, as being disloyal and a breach of her employment agreement. Ms Flavin suggested they meet on 29 March. In the communications book/diary, Ms Wilson wrote:

Sue I will respond with your letter with a letter, and then I'm happy for me and you to have a meeting with the Labour Department. We can ring and make a time. The number is ... I would like a copy of my signed contract ...

[17] The letter from Ms Flavin dated 28 March 2012 reads:

Proposed disciplinary meeting

I am most unhappy with your response to my letter of 26 March 2012.

You now leave me with no option but to set a date and accordingly I require you to meet with me this Thursday to discuss the issues outlined in my letter of 26 March 2012.

As you are aware, I have serious concerns and should I reach an adverse finding then your continued employment with the Company is in jeopardy. If you refuse to meet, then I will make a decision regarding the future of your employment with the Company on the information I currently hold, which includes a transcript from your radio interview. I await your urgent response.

[18] Ms Wilson's representative (Jenny Murphy) then responded that she was representing Ms Wilson concerning the employment issues with Pet Stay. She requested the disclosure of the complete employment file including, but not limited to, all notes and internal memoranda and a copy of the signed individual employment agreement, a summary of the time and wage records and all evidence in relation to the allegations to which Ms Wilson was expected to respond.

[19] By this time, Ms Flavin had also engaged her representative and the communications on any arrangements for meetings and information took place between both parties' representatives. This included a reply from Ms Flavin's representative (Geoff O'Sullivan) on 2 April. It was agreed that it would be reasonable to delay the meeting until such time as Ms Wilson had the opportunity to meet with her representative. In the meantime, a copy of the radio transcript was provided too.

[20] In reply Jenny Murphy outlined the information that she had in regard to the matters between both parties (2 April 2012 document D SIR). This letter included the following comment:

We would be willing to attend any proposed meeting, after the allegations are made clear, the documents that were requested are supplied and I have a reasonable opportunity to meet with Sandra to discuss the supplied material ... As an alternative to any disciplinary meeting and the possibility of a personal grievance being raised, it is requested that your client agree to attend mediation with Mediation Services to resolve the relationship issues and to ensure that the situation does not escalate unnecessarily.

[21] Ms Flavin's representative replied as follows:

We attach a copy of our client's file as it relates to Ms Wilson. Ms Wilson's behaviour is well documented as you will see. However, our client's view is that Ms Wilson's continued inability to modify her

behaviour has resulted in the last altercation which my client is not prepared to allow to continue unabated.

You will be well aware that mediation is not an alternative to a disciplinary process.

We have re-read our client's letter which, with all due respect, is clear enough to enable Ms Wilson to respond to. If, at the meeting, she did require further information, then she could specifically ask for clarification.

As we have now provided all the documentation held by our client in respect of Ms Wilson's employment we need you to urgently confirm the meeting will now occur. Again, we must respectfully point out that if your client is unable or unwilling to attend the meeting without reasonable cause, then the meeting will be held without her and a decision made based on the information the employer currently holds. That decision may of course range up to and include dismissal.

[22] On 3 and 6 April 2012, Ms Wilson was instructed by her employer to attend a disciplinary meeting and on a date and time to be arranged.

[23] In a further reply, Ms Murphy indicated that the only date the meeting could be held was on Tuesday, 10 April 2012, preferably in the afternoon. However, she also stated that any agreement to attend any meeting at that time was "*conditional upon the allegations being provided in writing ...*".

[24] Mr O'Sullivan's reply was that "*I confirm I am available to meet with you on Tuesday 10 April 2012 at 2pm at Pet Stay Feilding*". This was confirmed by Ms Murphy provided "*of course that the allegations are formally advised in writing along with copies of any evidence that will be relied upon*".

[25] Ms Murphy was advised by Mr O'Sullivan that, having checked the file, he was satisfied that the allegations had been formally advised and pointed out that his client required Ms Wilson to attend the meeting and that if she did not attend the meeting then Ms Wilson would be refusing a direct instruction from her employer, and that in such circumstances Pet Stay would make a decision on the evidence that it had in front of it.

[26] Ms Murphy advised Mr O'Sullivan that she would not be in a position to attend a proposed meeting on Tuesday, 10 April 2012 (document I SIR) because the precondition for meeting had not been settled. She asked for the meeting to be re-scheduled, but this was declined.

[27] Ms Wilson attended work on 10 April 2012, but no meeting took place at the scheduled time. Indeed it became clear to Ms Flavin beforehand that Ms Wilson and her representative would not attend the disciplinary meeting. Therefore Ms Flavin and Mr O'Sullivan decided that he would not need to attend because they understood that Ms Wilson and Ms Murphy would not attend. Instead, after 2.00pm on 10 April, Ms Flavin contacted Mr O'Sullivan in regard to what she should do, and then she decided to dismiss Ms Wilson. She was relying on Ms Wilson being advised of the requirement for her to attend the meeting and that if she did not attend the meeting, then the employer would make a decision based on the information available to it. Ms Flavin then considered the information available and what Ms Wilson had been given an opportunity to comment on before she made her decision on 10 April 2012 and confirmed it.

[28] Reasons for the dismissal were requested, and the reasons were subsequently provided in writing.

[29] A personal grievance was raised on 19 April 2012. The applicant tried to make arrangements for mediation first. There was no mediation until the Employment Relations Authority directed the parties to attend mediation before an investigation meeting. It now falls on the Authority to make a determination on the matters that remain unresolved between both parties.

Determination

[30] The applicant's non attendance at a required meeting was fatal. This is because she was put on notice that a decision would be made based on the information available to the employer if she did not attend. Her failure to attend resulted in her employer making a decision. The employer made an entirely justifiable decision and to proceed and to dismiss Ms Wilson. This is because:

- a) There were alleged matters about Ms Wilson's behaviour that Ms Flavin took issue with. These grounds were about alleged yelling, shouting, arguing and threats in the workplace. Also, there was the matter of the radio conversation and the transcript.
- b) Ms Wilson was told that the radio transcript gave rise to the possibility of a finding of disloyalty.

- c) Ms Wilson did not respond to the other allegations, but instead focussed on the respondent's process, and her issues were irrelevant to the disciplinary matters raised by the respondent.
- d) There are letters that set out Ms Flavin's concerns. Historical matters were included to support Ms Flavin's claims of a pattern of behaviour that underpinned any lack of specifics being provided. In addition the issues and allegations were solely between Ms Flavin and Ms Wilson that occurred at the time. They were the only two people directly involved. Even if Ms Wilson held a different opinion at the very least Ms Wilson understood what Ms Flavin was raising, I hold.
- e) Ms Murphy was informed that that if Ms Wilson did not attend the meeting, then the employer would make a decision based on the information available to it.
- f) The letter outlined that Ms Flavin had three issues about Ms Wilson that occurred on 20 and 21 March.
- g) The letter also set out that the behaviour if proved was abusive and could amount to serious misconduct.
- h) Ms Wilson was informed that she had an opportunity to provide an explanation in regard to the matters. At the very least it was open to her to deny them or say what she believed happened on the two days when she had contact with Ms Flavin, and to put in to context the radio talk back show comments. She did not do so to her peril, I hold
- i) Ms Wilson was advised of the employer's time for the disciplinary meeting, and that she was allowed a representative. She was informed of what the outcome could be and her need to respond.
- j) Documents were provided to Ms Wilson.
- k) Ms Wilson had been informed that if she required further information then she could specifically ask for it at the meeting.
- l) Ms Murphy was informed by Mr O'Sullivan that that if Ms Wilson did not attend the meeting then Ms Wilson would be refusing a direct instruction from

her employer and in such circumstances Pet Stay would make a decision on the evidence that it had in front of it.

[31] It was unreasonable for Ms Wilson to put preconditions on the meeting taking place because the employer had provided her with sufficient information to respond to, and her right remained protected for any further response, and she could have requested a delay to reply later if it was needed. A fair and reasonable employer could be expected to allow that to occur. Ms Wilson's decision and action ruled that possibility out. Ms Wilson was requested to attend a disciplinary meeting four times. The time and date on 10 April seemed to be mutually acceptable at first. The time was set and confirmed. The applicant must have known that if she failed to attend the respondent had put her on notice of what the outcomes could likely be, including dismissal.

[32] There was no reason provided as to why Ms Wilson did not attend the meeting. While she was at work Ms Flavin could rightly assume that she had to deal with Ms Wilson's representative. Ms Flavin had a reasonable expectation that the meeting had been agreed even though Ms Wilson and Ms Murphy had difficulties about Ms Murphy's availability on 9 April because of a holiday weekend.

[33] Ms Wilson says that she was trying to avoid any extra costs meeting with Ms Murphy when the respondent did not provide the further information that had been requested by Ms Murphy. I hold that Ms Wilson's action was unreasonable given the expectation that the meeting would take place on 10 April. Indeed her reasoning for the meeting not to happen was unreasonable and not justified, I hold. As Ms Wilson says she always was intending to attend the meeting, and she should have done so, I hold. Her representative was available as was Mr O'Sullivan for 10 April.

[34] When the deadline from Ms Murphy for Ms Flavin to provide further information had passed, Ms Wilson says that she would have been available any time the following week, and Ms Murphy suggested a suspension as possible action. First those were not actions that could be expected of a fair and reasonable employer. It is not up to an applicant's representative to demand deadlines for information other than to expect information to be provided in a reasonable time. This was a demand without any qualification. Second, everyone was available for 10 April and given Ms Flavin's inability to provide anything more it is probable nothing would have changed. Third, it is strange for a representative to suggest her own client be

suspended from work. The fact that Ms Wilson was not suspended with allegations of serious misconduct was a powerful position for Ms Wilson to exploit, but since she did not attend the meeting and did not provide a response it was lost sight of. Fourth if Ms Murphy and Ms Wilson cancelled the 10 April meeting they were not entitled to do that, I hold. It was a lawful instruction from the employer to have the meeting. Further, an employer is not obliged to attend mediation in place of a disciplinary meeting when it wants to undertake a disciplinary process. The employer had issues that Ms Flavin wanted to discuss and Ms Wilson was obliged to be communicative and responsive. Her response was unreasonable.

[35] Ms Wilson had plenty of time to get and arrange a representative, and indeed her representative was responding to the employer on her behalf. In such circumstances there was no reason for Ms Wilson to refuse to attend the meeting requested as she had a representative, they could all attend on 10 April and the only thing preventing it was Ms Murphy's demand for Pet Stay to attend mediation and provide more information.

[36] I therefore hold that Pet Stay's decision was a decision a fair and reasonable employer could make having regard to the employer's position on the matter. It tried to conduct an investigation when Ms Wilson was asked to attend a meeting. The employer's concerns were put to Ms Wilson and she had an opportunity to comment and provide her input. This is a small employer with few employees and the matter was between the owner and Ms Wilson.

[37] I am not satisfied that the procedure followed by the employer was defective.

[38] Furthermore I am satisfied that the employer came to a decision that a fair and reasonable employer could have made in all the circumstances given the size of the employer, that there were two people directly involved in the allegations and that Ms Flavin never received Ms Wilson's response to her allegations. This involves:

- a) Ms Flavin reaching her own conclusion on what she says happened.
- b) The radio talkback transcript in which Ms Wilson was critical of the workplace and that an acquaintance of Ms Flavin's was able to identify that it was Ms Flavin's business being talked about by Ms Wilson.
- c) Ms Wilson cancelling the meeting scheduled for 10 April, and not attending.

- d) Ms Wilson repeatedly seeking to find fault with Ms Flavin and her running of the business.
- e) Ms Wilson failing to be communicative and responsive after 4 attempts from Ms Flavin and her representative.

[39] Ms Wilson's claims are dismissed.

Costs

[40] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority