

Employment Relations Authority

Te Ratonga Ahumana Taimahi



ERRATUM

Issued 5 January 2017

DETERMINATION NUMBER: [2016] NZERA Wellington 148

ERA File: 5608911 | Woodcock AND Agrissentials

Please find attached a corrected version of the above determination; correcting various errors contained in the previously issued copy. Please replace the determination you have with the one attached. The following changes have been made;

- The date of the Investigation Meeting AND Oral Determination date which should read ***28 November 2016*** not 21 November 2016.
- Page 2 [para D.] and Page 7 [para [31] (a) which should read ***\$5,625*** not \$5,000.

Our apologies for any inconvenience this error has caused.

Regards

A handwritten signature in blue ink, appearing to read 'Natasha Minnoch'.

Natasha Minnoch

AUTHORITY OFFICER | Wellington

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 148
5608911

BETWEEN LYNN WOODCOCK
Applicant
AND AGRISSENTIALS NEW
ZEALAND LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: R Ward, Advocate for the Applicant
R Nabney, Counsel for the Respondent
Date of Investigation meeting: 28 November 2016 at Palmerston North
Submissions received: 21 November 2016 from Applicant
21 November 2016 from Respondent
Date of Oral Determination: 28 November 2016
Date of Written Determination: 5 December 2016

**ORAL DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Lynn Woodcock was unjustifiably dismissed by Agrissentials Limited.**
- B. The applications for penalty are dismissed.**
- C. There is an order that Agrissentials Limited pay Lynn Woodcock lost remuneration of three months ordinary remuneration less PAYE to be reduced by 25% for contributory behaviour pursuant to ss.123(b), 128 and 124 of the Act.**



D. There is an order that Agrissentials Limited pay Lynn Woodcock compensation of \$5,625 that is inclusive of a reduction of 25% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Act.

E. Costs are reserved.

Employment Relationship Problem

[1] Lynn Woodcock alleges she was unjustifiably dismissed and that there were breaches of good faith by her employer on or about 17 December 2015.

[2] Agrissentials New Zealand Limited (Agrissentials) sells organic fertiliser products.

[3] Ms Woodcock was employed as a Sales Consultant on 6 August 2013. She was paid a \$40,000 annual salary plus bonuses and was provided with a mobile phone and work vehicle. Her job was to sell Agrissentials products to farmers within the Wairarapa/Manawatu area where she lived.

[4] On 7 December 2015 Agrissentials CEO, John Morris sent an email to Ms Woodcock regarding the parking of her motor vehicle at unusual addresses for lengthy periods of time between 10 November and 2 December 2015. He sought an explanation. Ms Woodcock replied in detail denying the numbers of hours alleged to have been spent at the addresses and suggested he check the GPS in her car and her timesheets.

[5] On 10 December 2015 Ms Woodcock received a letter from Mr Morris alleging she had committed serious misconduct by

- (a) Having 48.85 hours of unaccounted for time in the past month shown by GPS records from her motor vehicle;
- (b) Repeatedly refusing to follow reasonable instructions to do face-to-face visits with clients;
- (c) Discrediting the product "Oceans 100" by telling colleagues, clients and management it did not work; and
- (d) Misuse of email by making derogatory comments about the company and staff members.

[6] On 12 December 2015 Ms Woodcock, through her lawyer, emailed Agrissentials denying all of the allegations except for (d) above. She admitted calling an employee, GL “the antichrist” in an email. GL was the Office Manager and life partner of Mr Morris.

[7] On 14 December 2015 GL sent Ms Woodcock further GPS information by email.

[8] On 15 December 2015 an investigation meeting was held by teleconference. Ms Woodcock attended with her lawyer. Mr Morris attended with GL and an HR employee, A.

[9] Following that meeting A undertook further investigations. She contacted Lindsey Kerrigan, the manufacturer of the GPS system installed in Ms Woodcock’s car. Mr Kerrigan was instructed to investigate the movement of the GPS system known as ROK3 on 11 November 2015 only. This involved reviewing the raw data against the website for 11 November 2015. He was given no other information.

[10] On 17 December 2015 the parties met again. At the end of that meeting Ms Woodcock was advised she was summarily dismissed. A letter confirming her dismissal was sent within one to two days thereafter.

Was Ms Woodcock unjustifiably dismissed?

[11] The fact Ms Woodcock’s employment was terminated is accepted. The onus falls upon Agrissentials to justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.¹

[12] To determine whether Agrissentials actions leading to dismissal were justified, I must consider the matters set out in s.103A(3) of the Employment Relations Act 2000 (the Act). Those matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations against the employee, raised its concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely consider the employee’s explanation prior to dismissal. A

¹ Section 103A(2) Employment Relations Act 2000.

failure to meet any of the s.103A(3) tests is likely to result in a dismissal/disadvantage being found to be unjustified.²

[13] A dismissal is not unjustifiable if the procedural defects were minor and did not result in the employee being treated unfairly.³

[14] Mr Morris was the decision maker. In his evidence to me today he admitted the real reason for the dismissal was Ms Woodcock's inadequate sales performance.

[15] If the real reason for dismissal was Ms Woodcock's sales performance, the dismissal was defective. That concern was not raised with her in the letter of 10 December 2015. It may have been implied as the reason for why they were considering the other concerns, but it certainly was not raised with her as the concern for investigation or for her to respond to during the disciplinary process.

[16] There is no evidence that concern was investigated prior to dismissal. Because of these defects there has been no opportunity for Ms Woodcock to respond to the concern before dismissal and there cannot have been any genuine consideration of her explanation as a result.

[17] Those defects are not minor and would have resulted in Ms Woodcock being treated unfairly. Lynn Woodcock was unjustifiably dismissed by Agrissentials New Zealand Limited.

Penalty?

[18] Ms Woodcock seeks penalties. She alleges Agrissentials failure to raise concerns about a "90 day sale" prior to the disciplinary meeting on 15 December 2015 and failure to provide an opportunity to comment on GPS data gathered by Lindsey Kerrigan breached its statutory duty of good faith.

[19] In her evidence, Ms Woodcock admitted that she in fact raised the "90 day sale" issue not Agrissentials. This was confirmed in Agrissentials letter of 17 December 2015 which also answered her concerns about this. There cannot have been any breach of good faith by any employer action if it did not raise this concern in the first place.

² *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26].

³ Section 103A(5) Employment Relations Act 2000.

[20] It was accepted by Mr Morris Agrissential's report showing how the 48.85 hours of unaccounted time arose and the additional GPS information received from Lindsey Kerrigan on 15 December 2015 were not given to Ms Woodcock before the dismissal occurred. Given Mr Morris allegedly relied upon this information prior to making the decision, it was a breach of s.4(1A)(c) of the Act. Where an employer proposes to make a decision adverse to the continuation of an employee's employment the section requires they provide them with all relevant information to that decision. Both the report and the GPS information were relevant to an adverse decision about Ms Woodcock's continued employment. She should have been provided with this information.

[21] However I do not accept that there is sufficient evidence to merit the award of a penalty. Mr Morris gave evidence that he thought those documents had been given to Ms Woodcock and her lawyer. He accepted today they may not have, but he was relying upon A and GL to do so. In my view that does not evidence deliberate action by the respondent. It appears to be one of oversight; it also appears to be one-off. In my view these actions in failing to provide that information were neither deliberate nor sustained.

[22] I accept such an oversight would be serious, but it is not egregious enough to warrant a penalty. The application for penalty is dismissed.

Remedies

[23] Where an employee has a personal grievance and has lost remuneration as a result of that grievance, I must order the employer pay the employee the lesser of a sum equal to that lost remuneration or to three months ordinary time remuneration.⁴

[24] An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.⁵ In practice, this requires evidence of a detailed account of efforts

⁴ Section 128 of the Act.

⁵ *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

made to obtain employment including dates, places, names, copies of correspondence and the like⁶.

[25] Ms Woodcock seeks 20 weeks and continuing lost wages. There is little evidence of mitigation to warrant an award in excess of the statutory three months and that would be subject to any reduction for contributing behaviour.

[26] Ms Woodcock also seeks an award of \$15,000 hurt and humiliation compensation.

[27] In considering an award under s.123(1)(c)(i) of the Act, evidence of hurt and humiliation is required, otherwise I am not required by law to award compensation. An employee who seeks relief must lay an evidential foundation for an award in their favour. Simply establishing a basis for a personal grievance does not suffice.

[28] There is no medical evidence. The primary allegation here is one of reputational damage. Ms Woodcock's evidence was that she was hurt because her honesty was put at issue. There is little evidence these allegations have affected her health or reputation within her community, many of whom gave supportive evidence today. However there was evidence of Ms Woodcock's personal distress at her honesty being questioned in this manner. This would, in my view, justify an award starting at \$7,500.

Contributory conduct

[29] An employee's conduct may be relevant to remedies. Section 124 of the Act requires me to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and the facts in deciding the nature and extent of the remedies to be provided. In order for contributing behaviour to be taken into account it must be both causative and blameworthy.

[30] There is contributing behaviour here. Ms Woodcock admitted sending an email calling a fellow employee the *anti-Christ*. This is both causative of the disciplinary procedure and it is blameworthy. It would warrant, in my view, a 25% reduction in remedies to be awarded.

[31] Therefore, the following orders are now made:

⁶ *Allen v Transpacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]

