

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 39/10
5155981

BETWEEN

KATHERINE AUSTIN
Applicant

AND

THE MULCHER LIMITED
Respondent

Member of Authority: Dzintra King

Representatives: Stan Austin, Advocate for Applicant
Tony Katavich, Advocate for Respondent

Submissions Received 24 November and 5 December 2009 from Applicant
26 November 2009 from Respondent

Determination: 29 January 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Katherine Austin, says she has been unjustifiably dismissed by the respondent, The Mulcher Ltd.

[2] The respondent says the dismissal was for redundancy and that it was effected because of the behaviour of Ms Austin's representative.

Background

[3] Ms Austin was employed by the company as a sales/customer support representative in September 2008 and dismissed on 27 January 2009.

[4] On 16 January 2009 Mr Tony Katavich, the director of the company, asked that Ms Austin attend a disciplinary meeting. This had to do with a door not being secured.

[5] On 20 January Ms Austin, her father, Mr Katavich and Ms Heather Crowe, attended the first disciplinary meeting. Mr Austin asked for additional information including servicing records and the operation log for the alarm. Mr Austin said Ms Crowe was not introduced to him and he asked who she was.

[6] On 22 January Mr Katavich received an email from Mr Austin which he described as being “blunt” and “partially illiterate” and said the tone was overwhelmingly hostile. The email to which Mr Katavich took exception reads:

I refer to your letter dated 20 January 2008.

I am not available to meet on 26 January 2008. I can be available, subject to confirmation today, at 3.30pm on Thursday 22 or Friday 23 January. Please contact me to confirm suitability or make other arrangements as agreed Tuesday.

I did not request that a written submission be made as you state but did make clear some steps that would need to be taken to ensure that important principles of natural justice were observed.

The process that you propose in your letter would certainly breach those principles of natural justice. Any action you take on the basis of such a breach would be unjustifiable. We can discuss this when we meet.

Finally I do have to say that I am staggered at the length of time you propose to take before further progressing this simple matter. I consider this to be unfair.

[7] On 23 January a second meeting was held. The alarm operating log Mr Austin had requested was provided after the meeting. Mr Katavich advised he would be issuing a warning.

[8] On 24 January Mr Katavich advised that he had changed his mind and would not issue a warning.

[9] Mr Katavich had formed an unfavourable view of Mr Austin. Unfortunately this was to play a significant part in future events. Mr Katavich said Mr Austin was hostile and “loudly and rudely challenged [him] on every point.” He said Mr Austin threatened him, the threat being that Mr Katavich should drop the matter or face the consequences, those being a personal grievance being taken by Ms Austin.

[10] Mr Katavich said that Mr Austin described him as “lacking social skills” and that Mr Austin had put his hand beside Mr Katavich's head and said Mr Katavich's ears were painted

on. The reference to a lack of social skills was to Mr Katavich's failure to introduce Ms Crowe and the remark regarding the ears was a question put to Mr Katavich after Mr Austin became frustrated with Mr Katavich's responses. Mr Austin said he had repeatedly asked Mr Katavich to stop talking and start listening.

[11] Mr Katavich referred to "offensive" statements made by Mr Austin, which were that the process was flawed, that the matter had been predetermined, that the decision was not reasonable and that proceeding would cost a huge amount of time and expense.

[12] It is clear that both Mr Katavich and Mr Austin were finding the meetings difficult.

Restructuring

[13] Mr Katavich said he and Ms Crowe, his partner, had discussed the likelihood that a restructuring would be necessary at the end of December 2008 in light of the upcoming implementation of a new database system. They decided that the likely candidates for redundancy would be Ms Austin and Mr Vincent Warner, both being in sales.

[14] On 26 January Mr Katavich gave notice that he intended to review staff numbers and the following day Mr Katavich, Ms Austin, Mr Austin and Mr Warner met at 10.30am. Mr Warner and Ms Austin were provided with a six page report on the restructuring. Mr Austin told Mr Katavich that he would let him know by 29 January what additional information he required. He also queried the length of the consultation period. Mr Katavich said two days was adequate.

[15] Later on 27 January at 12.24pm Mr Katavich advised that he would extend the consultation period from two to three days.

[16] Mr Katavich and Ms Crowe discussed the potential redundancy situation. Mr Katavich said given Mr Austin's abuse and intimidation, his attempts to frustrate any process they had attempted to run, that he had set out to destroy the employment relationship, plus a consideration of the selection criteria for the position, they determined that Ms Austin's employment should be terminated forthwith.

[17] At 2.15 pm on 27 January Mr Katavich dismissed Ms Austin despite the fact that 30 January was the date scheduled for the final consultation meeting. He gave her no notice of

why he wished to speak to her, she had no opportunity for any input and was given no reason for the termination. She was told to collect her belongings and leave the office immediately.

Reasons for the dismissal

[18] On 28 January Mr Austin asked for a written statement of the reasons for dismissal. On 2 February Mr Katavich responded as follows:

Katherine was dismissed because her position was made redundant. You were aware that we were considering redundancy because of the issues outlined in our letter to Katherine. We were attempting to consult with Katherine however you were intent on frustrating the restructuring process, in the same manner in which you attempted to frustrate the earlier disciplinary proceedings.

The reasons behind the redundancy are genuine and we had hoped to work through these in more detail had the process not become frustrated.

Your ongoing threatening behaviour including advising us on no less than four occasions that Katherine would consider or take personal grievance against the company. These ongoing comments, and indeed the bullying and intimidation you routinely doled out during the meetings made it abundantly clear that a personal grievance would be taken no matter what. This effectively destroyed the employment relationship and any chance of a positive relationship going forward even if the position had not been redundant.

[19] Although Mr Katavich maintained that the dismissal was on the grounds of redundancy it is abundantly clear, from his own evidence and closing submissions, that factors totally unrelated to the restructuring proposal played an important part in the decision to dismiss Ms Austin. These factors were Mr Katavich's dislike of Mr Austin and his behaviour; and allegations regarding Ms Austin's personal habits which were never put to her by Mr Katavich. The sending of a general email to all staff does not qualify as raising an issue with a particular person.

[20] When I asked Mr Katavich whether his reasons for dismissal related to the purported behaviour of Mr Austin he said they did and that Ms Austin had "*wilfully set a crazed man onto us. That effectively brought things to a head.*"

[21] Mr Katavich referred to the breakdown in the employment relationship being orchestrated by Mr Austin aided by his daughter. He referred to Mr Austin's "*threatening, bullying and intimidating conduct*" and that Mr Austin and Ms Austin had frustrated all the

processes the company was entitled to run. In his closing submissions Mr Katavich said *“the representative’s conduct is a major determining factor for Katherine needing to be made redundant when she was.”*

[22] An employer is entitled to conduct disciplinary meetings and to restructure its business. A representative is entitled to ask for additional time to consider a potential redundancy and to ask for relevant information. Doing so does not constitute frustrating the consultation process.

[23] From the correspondence prior to the hearing, the evidence at the hearing and the closing written submissions I have formed the view that Mr Katavich took exception to Mr Austin’s attempts to represent his daughter. When I asked Mr Katavich and Ms Crowe to give me examples of Mr Austin’s allegedly abusive and threatening behaviour not much was forthcoming. Mr Katavich was offended that Mr Austin made reference to a personal grievance at the disciplinary meeting and that he had asked Ms Crowe who she was when she was taking notes during the first restructuring notes. It was perfectly reasonable for Mr Austin to ask that Ms Crowe be identified and there was nothing untoward in Mr Austin referring to personal grievance proceedings.

[24] I have made reference to some of the allegations Mr Katavich has made about Mr Austin. However, I do not intend to go into the allegations made by Mr Katavich in any further detail because they are ultimately irrelevant to the decision I have to make. Mr Katavich could not terminate Ms Austin’s employment because of her choice of an advocate nor because of the behaviour of that advocate.

[25] What s 103A requires me to do is to consider, on an objective basis, whether the actions of the employer in all the circumstances of the case at the time of the dismissal were what a fair and reasonable employer would have done in all the circumstances.

[26] The tenor of much of the material I have been privy to is of an unfortunately intemperate and ad hominem nature, making irrelevant, offensive and derogatory remarks about Mr Austin and also negative and irrelevant references to Ms Austin’s physical stature.

[27] Mr Katavich had a restructuring proposal. After a proper consultation had taken place Mr Katavich may have been entitled to terminate Ms Austin’s employment subject to undertaking a fair selection process. There was not proper consultation. The time period

proposed was too short and any opportunity for appropriate input by Ms Austin was frustrated not by Mr Austin but by Mr Katavich's decision to cut short the consultation time period and process. The fact that he found Mr Austin difficult to deal with does not and could not justify this pre-empting of Ms Austin's right to consultation.

[28] Given that Mr Katavich failed to consult and to carry out a proper selection process (Ms Austin had no notice or knowledge of the criteria let alone an opportunity to comment on them) it cannot be said that the redundancy was justifiable either substantively or procedurally.

[29] There were improper motives in terminating the employment, ostensibly for redundancy. These had to do with her choice of representative and personal habits.

[30] The dismissal was unjustified.

Remedies

[31] Ms Austin was upset and humiliated by the dismissal. Aggravating factors include the failure to tell her why she was dismissed, the cutting short of the consultation process and the later raising of personal matters, which had not been put to her for her comment, in what was clearly an attempt to humiliate and embarrass her; and Mr Katavich's requirement that she leave the premises immediately. Ms Austin was required to collect her belongings and leave the office immediately. She was subsequently paid four weeks in lieu of notice.

[32] The respondent is to pay the applicant the sum of \$10,000 pursuant s 123 (1) (c) (i).

[33] Ms Austin is entitled to reimbursement of lost wages. Ms Austin said she had applied for any job that was available, including jobs outside the area. She had looked at websites and sent out copies of her CV. WINZ had been helping her in her search for employment.

[34] I would normally ask the parties to try and resolve the amount of lost wages to be paid to the applicant. I have, however, no doubt that this approach would not in this case be viable. I therefore require the respondent to provide me with time and wages records for Ms Austin for the last year of employment; and the applicant to provide records of her earnings for the three months after dismissal. I will calculate the amount to be paid.

[35] I have considered whether there was contributory conduct by Ms Austin and have determined that she did not contribute to the circumstances giving rise to the personal grievance. There is to be no reduction of remedies.

Costs

[36] The applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum

Dzintra King
Member of the Employment Relations Authority