

Relevant terms and conditions of employment

[4] Ms Bennett was subject to a written individual employment agreement. The employment agreement sets out in the first clause the aim of NZML to be the best in the business and seeks an informed and fully motivated team that:

- a) Works in an environment that encourages every member to make a meaningful contribution.
- b) Has a high degree of personal integrity and group honesty.
- c) Recognises personal goals but not hidden agendas.
- d) Continuously monitors and improves its performance.
- e) Is fun to be in.
- f) Exceeds customers' expectations.
- g) Welcomes and encourages innovation.
- h) Ensures security through sustainable business.
- i) Lives a "WE" not "I" philosophy.

[5] The agreement also sets out NZML's company rules and disciplinary procedures. The agreement lists items which constitute misconduct and serious misconduct. Specifically the agreement states:

Sample offences which constitute misconduct and may make you liable to dismissal, but are typically covered by the warning procedure are:

- Inappropriate or disruptive behaviour.
- Failure to observe safety procedures.
- Frequent lateness.
- Unapproved absences.
- Incompetence.
- Attitude.
- Smoking in non-smoking areas.
- Abusive language.
[my emphasis]

[6] The disciplinary procedure provides for summary dismissal for serious misconduct, or dismissal following two previous offences for which warnings have been issued.

[7] NZML also has in place a policy dealing with bullying in the workplace. The salient points of that policy include:

- All employees are to treat all people with respect, as well as developing awareness of the impact of behaviour on other people;
- Bullying is inappropriate and unacceptable behaviour including aggressive or abusive language (including threats or shouting), demeaning remarks, publicly humiliating another employee; and
- Employees who are found to have committed or condoned bullying in the workplace will be subject to disciplinary action, it will be treated as serious misconduct, and may result in dismissal.

April 2006

[8] On 10 April 2006 Ms Bennett received a letter confirming concerns raised in a meeting with her on 4 April which states:

1. On Thursday 30th March you threw a chuck of stalks hitting someone other than the intended person. The throwing of any object is a health and safety issue e.g. if someone were hit in the eye, or were on a ladder. Accordingly this behaviour is not allowed.
2. Childish behaviour and tantrums in the sheds, namely the throwing of gear (which you denied).
3. Generally your inappropriate and disruptive behaviour e.g. making sarcastic and verbal hostile remarks about people within ear-shot which could be deemed bullying.

As discussed with you, we have brought these matters to your attention so that these types of behaviours will cease immediately.

[9] Ms Bennett is then reminded that further breaches of company rules can lead to disciplinary action.

Bullying Training

[10] In May 2006 Ms Bennett underwent training with regard to the recently implemented bullying policy. Participants received training in what was, and was not, appropriate behaviour in the workplace.

[11] It was common ground that at the end of the training session Ms Bennett had attended, she approached Ms Nicola Smith, HR Manager (Group) at Meadows (based in Christchurch), and indicated that she wished to meet with her. Ms Smith had the impression that Ms Bennett wanted to talk more about bullying examples specific to the harvesting shed. As Ms Smith had another group coming in for training she suggested Ms Bennett come back when Ms Smith had finished. Ms Bennett did return, but the training session was still continuing. As Ms Bennett had finished her work for the day she left.

[12] On completion of her training Ms Smith went in search of Ms Bennett but could not find her. The following day Ms Smith was, once again, training. Ms Bennett advised a supervisor, Ms Paula Johnson, the Principal Harvesting Co-ordinator, that she wished to see Ms Smith, however, Ms Smith left Morrinsville without seeing her. Ms Smith made no contact with Ms Bennett after leaving Morrinsville, neither did she pass on to Ms Robyn Quinn, Personnel/Harvesting Manager, information that an employee had approached her wishing to discuss issues relating to the bullying training.

[13] At the investigation meeting no explanation could be given by NZML as to why, after seeking further discussion, Ms Bennett's request was never followed up.

Events leading to dismissal

[14] On 19 September 2006 Ms Bennett overheard a comment made by Ms Debbie Tracy, her supervisor, to one of two Indian sisters (Ms Balvir Singh and Ms Baldish Singh) working in close proximity to Ms Bennett. Ms Bennett says she found the comment offensive. Ms Bennett acknowledges that she discussed the overheard comment that morning at about 9.30am during her morning tea break with either 3 or 4 other workers who were from different sheds.

[15] It was common ground that Ms Bennett also discussed the incident with at least one other staff member that day, however, Ms Bennett says that employee approached her and not the other way around. Ms Tracy says the employee told her that Ms Bennett had told her of the comment made earlier that day. In her incident report completed by her, Ms Tracy acknowledges she was angry with the employee for listening to Ms Bennett and for not stopping the discussion. She also states that she believes Ms Bennett has blown the incident out of proportion.

[16] Unbeknown to Ms Bennett, Ms Tracy had discussed the incident with Ms Singh and had apologised for what she had said, and it was agreed between them that matters would be left there.

[17] Ms Bennett says she went home that night and, in accordance with the instructions given to her at the bullying training, made a note of what she had overheard.

[18] The following morning, Ms Bennett approached Ms Balvir Singh, and advised her that if she was going to make a complaint about what Ms Tracey had said to her the day before, she [Ms Bennett] had a note of the comment made by the supervisor and she was happy to be a witness for her. Ms Bennett was advised that the supervisor had apologised for the comment and that the matter was finished.

[19] That same day, on 20 September 2006, Ms Quinn, received a copy of an incident report completed by Ms Tracy in relation to the incident the previous day. The following day Ms Tracy verbally advised Ms Quinn that she wished to make a formal complaint regarding Ms Bennett's behaviour following the incident on 19 September. Ms Tracy believed Ms Bennett was going around showing her note to

everyone and advised NZML in her incident report that she had had enough and she wanted it sorted out.

[20] On 22 September Ms Bennett was advised by another employee that Ms Johnson had asked her for a copy of the note Ms Bennett had made of the 19 September incident. Ms Bennett immediately approached Ms Johnson, entered into a discussion with her about the incident and gave her a copy of the note.

[21] Ms Johnson provided Ms Quinn with a written account of the conversation she had with Ms Bennett. That account includes advice by Ms Johnson to Ms Bennett that Ms Tracy felt intimidated when she walked in the shed and everyone was watching her. Ms Johnson informed Ms Bennett that it was believed she was encouraging staff to gang up on Ms Tracy and Ms Tracy felt harassed and bullied as a result.

[22] On 2 October 2006 Ms Bennett was invited to attend a meeting. Present at the meeting were Mr Alan Gordon, General Manager, and Ms Quinn. It was common ground that not only did Ms Bennett arrive at the meeting without any knowledge of what was to be discussed, she had not been forewarned that she may be subject to dismissal based on what she contributed to the meeting, nor had she been advised that she was entitled to have a representative with her at the meeting.

[23] Mr Gordon commenced the meeting by asking Ms Bennett if she wanted to have a support person with her. As she didn't know what the issues were to be discussed, nor the serious consequences that might flow from the discussion she told Mr Gordon truthfully, that she didn't know if she needed a support person or not.

[24] Mr Gordon then read from a prepared statement outlining the issues to be discussed including the formal complaint from Ms Tracy, complaints from Ms Tracy and Ms Johnson that Ms Bennett's general behaviour was disharmonious and disruptive to the overall team and that Ms Bennett had shown a letter to other staff in a way which encouraged others to gang up on Ms Tracy.

[25] Mr Gordon also advised Ms Bennett that both Ms Johnson and Ms Tracy had threatened to resign and that it was the view of both supervisors that her attitude was incompatible with a harmonious team environment. Mr Gordon explained that the matters were serious and could jeopardise Ms Bennett's employment.

[26] An exchange then ensued during which no specific questions were asked of Ms Bennett except when Mr Gordon asked Ms Bennett why she went around with a letter, to which Ms Bennett responded that she was told in the bullying training to write everything down when she did because she was offended by Ms Tracy's comment.

[27] The meeting ended with Mr Gordon suggesting Ms Bennett think about things overnight and arrangements were made to meet again at 10.00am the next morning. Ms Bennett was also told that if she wanted a support person that would be fine.

[28] A second meeting took place on 3 October at 10.00am as arranged. Ms Bennett took a fellow employee, Ms Pam Mora, as her support person.

[29] Right from the outset Ms Mora raised issues on behalf of Ms Bennett that she felt there had been bullying by the co-ordinators. The meeting seems to then have concentrated on the potential bullying by the co-ordinators as Ms Quinn sought more details from Ms Mora.

[30] Mr Gordon attempted to bring the meeting back to the issues relating to Ms Bennett and her behaviours and advised her:

Generally your inappropriate and disruptive behaviour eg making sarcastic and verbally hostile remark's about people within earshot which could be deemed bullying. Lots of people can't be wrong if things are observed. It's still about getting involved in things you shouldn't – going round showing the "letter".

[31] Ms Bennett's response was consistent with her response the previous day, that during the bullying training staff were told to write things down as they could use it if they were asked to be a witness. She was adamant that she had made the note just in case a complaint was made about Ms Tracy's comment to Ms Singh.

[32] The meeting adjourned and Ms Quinn followed up the accounts Ms Mora had provided of the dealings she had witnessed between Ms Tracy and other employees. Following her further investigations it was decided to dismiss Ms Bennett without notice as her behaviour had not changed since the informal discussion held in April 2006.

[33] That afternoon, at 2.45pm the final meeting was held. Mr Gordon read from a prepared note and advised Ms Bennett that her constant attitude was incompatible with a harmonious team environment and that her behaviour had

created sustained conflict and disharmony. Ms Tracy's complaint was upheld and was found by Mr Gordon, to constitute incompatibility with the company. Ms Bennett was advised her employment was terminated and would receive one weeks pay in lieu of notice.

[34] Ms Bennett says her dismissal is unjustified and seeks remedies. The key issue for this determination is set out in section 103A of the Employment Relations Act which 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.

[35] I must objectively scrutinise NZML's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

Dismissal

[36] NZML says Ms Bennett was justifiably dismissed because she was disruptive and disharmonious which in turn led to issues relating to incompatibility. Employers may take appropriate action, including dismissal, where there is serious incompatibility in the workplace (*Harris and Skinner v Department of Corrections* [2000] 1 ERNZ 544).

[37] A determination that Ms Bennett's conduct meets the threshold of serious misconduct requires an assessment as to whether the employment relationship had reached a point of incompatibility sufficient to justify a summary dismissal. That requires conduct which deeply impairs or is destructive of the basic confidence or trust that is an essential element of the employment relationship and such cases are rare (see *Buxton v Five Star Beef Limited*, unreported, CEC4/98, 30 January 1998, Palmer J; *Mabry v West Auckland Living Skills Home Trust Board Inc.*, unreported, AC86/01, 19 December 2001, Travis J).

[38] A common thread through in the cases cited by the respondent in its submissions, is that in all the cases where employers were found to have justifiably dismissed as a result of incompatibility, the affected employee had received clear unequivocal warnings that their behaviours were having a

detrimental affect on the workplace and workplace relationships. Further, the conduct of the employees in those cases was strikingly serious, including verbal abuse and threatening or violent behaviour.

[39] Ms Bennett had received clear and unequivocal advice in April 2006 that disruptive and inappropriate behaviours could lead to disciplinary action. The employment agreement between the parties states that disciplinary action for conduct which is disruptive or inappropriate is usually a warning. After two warnings an employee may be dismissed. For the sake of completeness I record here that NZML told me, and I accept, that it did not rely on an expired warning from 2005 which was mistakenly not taken off Ms Bennett's file.

[40] Ms Bennett was dismissed because the complaint by Ms Tracy was found to have substance and NZML concluded that Ms Bennett had shown no improvement in her behaviours since the meeting in April. The types of behaviours, characterised in the April letter included sarcastic and verbally hostile remarks about people within ear shot, which could be deemed to be bullying.

[41] While I am not satisfied Ms Bennett's actions relating to the Ms Singh incident were as innocent as she portrayed them to me at the investigation meeting I also consider the conduct by Ms Bennett was not at the level that the employer could safely conclude it deeply impaired or destroyed the basic confidence or trust essential to the employment relationship.

[42] A fair and reasonable employer in the circumstances of this case would, according to the contractual rules between the parties, have issued a warning as the appropriate penalty as a precursor to stronger action.

[43] With regard to the investigation undertaken by NZML, the first meeting provided the opportunity for NZML to outline the allegations it was investigating and during this meeting the respondent made it clear Ms Bennett's job was in jeopardy and gave her time to think about the allegations and to arrange for support for the second meeting.

[44] All the allegations were put to Ms Bennett for her response at the second meeting. However, during the course of this meeting, Ms Bennett's support person raised, on behalf of Ms Bennett, concerns that Ms Tracy was bullying staff. These allegations were briefly followed up as part of the disciplinary investigation process and dismissed as having no merit.

[45] I am surprised these concerns were not taken more seriously by NZML. They are consistent with statements made by Ms Bennett at the initial meeting that she felt she was being picked on, and are consistent with Ms Smith's evidence that Ms Bennett had wanted to talk to her about bullying examples in the harvesting shed.

[46] I find the conclusion reached by NZML in relation to Ms Bennett's action on 19 and 20 September 2006 was unreasonable. NZML did not act as a fair and reasonable employer and therefore Ms Bennett's dismissal cannot be justified.

Remedies

[47] Under section 124 of the Act remedies may be withheld or reduced where there has been contribution or fault on the part of the employee. The Authority may regard as a matter of contribution any blameworthy conduct of the employee that is causally connected to the situation that gave rise to the personal grievance.

[48] The evidence at the investigation meeting supports a finding that Ms Bennett contributed to the situation that gave rise to the personal grievance. Ms Bennett approached Ms Singh on 20 September 2006, with her note about the incident from the previous day. Ms Singh advised her that the matter had been finished and an apology had been given and accepted. That should have been the end of the matter, but it wasn't. I am satisfied Ms Bennett continued to discuss the incident with other staff members in an attempt to garner support against Ms Tracy. Ms Bennett was aware that disruption and inappropriate behaviour in the workplace would result in disciplinary action.

[49] I have assessed Ms Bennett's contribution as 25%.

Lost wages

[50] Ms Bennett is seeking payment for 17 weeks during which she was unemployed. I am not satisfied Ms Bennett made reasonable attempts to mitigate her lost earnings. Subject to contribution I am satisfied it is just to award three months lost wages of \$3,471.39. This amount takes into account the one weeks wages in lieu of notice paid to Ms Bennett at the end of her employment.

NZ Mushrooms Limited is ordered to pay to Ms Bennett, within 28 days of the date of this determination, the sum of \$2,603.54 gross, pursuant to section 123(1)(b) of the Employment Relations Act.

Compensation

[51] Ms Bennett was dismissed following eight years employment. I readily accept that Ms Bennett found being dismissed humiliating and distressing. Taking all the relevant matters into consideration and subject to contribution I find that pursuant to s.123(1)(c)(i) of the Act an award of \$5,000 is appropriate.

NZ Mushrooms Limited is ordered to pay to Ms Bennett, within 28 days of the date of this determination, the sum of \$3,750.00, pursuant to section 123(1)(b) of the Employment Relations Act.

Costs

[1] 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