

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 435
5439961

BETWEEN ANGELA BENNETT
 Applicant

A N D REAL ESTATE OUT WEST
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Keshila Fayen, Advocate for the Applicant
 David Sharma, Advocate for the Respondent

Investigation Meeting: 26 September 2014 at Auckland

Submissions Received: 26 September 2014 from the Applicant and from the
 Respondent

Date of Determination: 23 October 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Angela Bennett, claims that she was unjustifiably dismissed by the Respondent, Real Estate Out West Limited (REOW) on 20 June 2013.

[2] REOW denies that Ms Bennett was unjustifiably dismissed and claims that she voluntarily resigned her employment.

Issues

[3] The issues before the Authority for determination are whether or not Ms Bennett was:

- unjustifiably dismissed from her employment with REOW or whether she voluntarily resigned.
- Sexually harassed by Mr Sharma



Background facts

[4] Prior to the commencement of her employment with REOW, Ms Bennett said that she had known Mr David Sharma, the sole director and shareholder of REOW, socially for several years. Ms Bennett said she had a background in real estate.

[5] Mr Sharma said he met Ms Bennett in late April 2013 for a lunch appointment; she had recently changed jobs, and during their conversation she had indicated that she was looking for alternative employment which would assist her in entering into the area of property management.

[6] Mr Sharma said he had told Ms Bennett that he was looking for a personal assistant (PA), and had subsequently made her an offer of employment for that position which she accepted.

[7] Ms Bennett commenced employment with REOW on 8 May 2013 and was issued with an individual employment agreement (the Employment Agreement) which she and Mr Sharma signed on 7 May 2013. In accordance with the Employment Agreement, Ms Bennett's employment commenced on 8 May 2013 and she received a salary of \$60,000.00 per annum to be paid weekly. Her hours of work were specified in clause 7.1 as being normally 40 per week: "However *in order to perform the requirements of the position effectively, the Employee agrees to work those additional hours reasonably necessary to perform the role effectively*". .

[8] The Employment Agreement contained the following clauses:

8.0 *Probationary Period*

8.1 *The employee's employment is subject to a probationary period of up to 90 days commencing on the date specified in clause 2.1 above. During the continuance of the probationary period the employee's performance and conduct will be appraised and monitored as the employer deems appropriate, with the object of enabling the employer to assess whether the employee is likely to be a satisfactory appointment to the permanent staff.*

8.2 *During the probationary period the employment may be terminated by either party on giving two weeks' written notice but only by the employer after the employee has been formally warned of specific shortcomings in their performance.*

8.3 *If the Employer dismisses the Employee during the probationary period the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*

16.0 Termination

16.1 *Either party may terminate this agreement by giving one months notice in writing to the other party. The Employer reserves the right to pay the Employee in lieu of notice for all or part of the notice period. ...*

16.2 *Nothing in the above clause prevents the employee's dismissal without notice in the case of serious misconduct or other cause justifying summary dismissal.*

20.0 Workplace Practices

20.3 *Deliberate or unreasonable waste of time will not be tolerated; as well as personal phone calls, emails and or visits to unauthorised websites such as Facebook.*

[9] Mr Sharma said that a few days after Ms Bennett commenced employment he had a meeting with her together with his sales manager and office manager and outlined some of the responsibilities that were required both from her and the administration staff.

[10] Mr Sharma said that he was satisfied with Ms Bennett's performance initially but after a few weeks he started to notice that she was taking private telephone calls and that she was on the Facebook website using the company mobile telephone. He also said that she was being constantly loud in the office and was very aggressive to the other salespeople. As a result, he had an informal discussion with her.

Informal Meeting 28 May 2013

[11] On 27 May 2013, Mr Sharma wrote to Ms Bennett advising her that he needed to talk to her about employment matters. In the letter Mr Sharma outlined the concerns he had about her work performance which were:

1. *Continued use of personal phone for calls, texts and Facebook during business hours.*
2. *Errors occurring with checking of listings entered, incomplete information or inaccurate information.*
3. *Follow through on tasks, for example reporting back to myself on the progress for allowing marking to be completed.*
4. *Other people's business (gossip) will not be tolerated especially when repeated to outside parties.*
5. *Business vehicle to be garaged.*
6. *Diplomacy and tact required when personally addressing a salesperson's attire.*

[12] Mr Sharma outlined in the letter that she was entitled to have a support person or representative present at the meeting. The letter also stated: “*I must advise you that if an allegation of misconduct is established disciplinary action may be taken and your employment will be in jeopardy*”.

[13] The meeting took place on 28 May 2013. In attendance with Mr Sharma were the Sales and Office Managers. Ms Bennett confirmed that she had attended the meeting without a support person, and that it had been made quite clear to her that she was not to access the Facebook website during working hours.

[14] Ms Bennett had visited a REOW tenanted property on 13 June 2013. Her view had been that the property was in an unacceptable state and she had indicated as such to the tenants, stating that she felt \$435 per week was an excessive rent given the standard of the property.

[15] Mr Sharma said that shortly after Ms Bennett had left the property he had received a telephone call from the tenants residing there who informed him of the comments made by Ms Bennett. Not only did he find this highly inappropriate behaviour from her as a representative of REOW but in addition he had received a telephone call from the aggrieved landlord of the property to tell him that the tenants of the property had also called her (the landlord) and reported the conversation.

[16] Mr Sharma said he had reprimanded Ms Bennett in respect of her conduct, but had taken no formal action.

Events on 14 June 2013

[17] Ms Bennett said that on 14 June 2014 the day after Mr Sharma had been made aware of her comments to the property tenants on the previous day his reaction had been to tell her in the open area part of the office in the presence of the other employees to: “*shut your f***** mouth!*”. Ms Bennett said she was shocked at Mr Sharma’s unprofessional language.

[18] Other than the comment made to Ms Bennett, there is no evidence that Mr Sharma took any steps in respect of a disciplinary process in relation to this matter. Moreover Ms Bennett was employed subject to a probationary period during which an employer is expected to raise performance issues with an employee with a view to assisting the employee to improve his or her performance. ,

[19] Later that day, Ms Bennett said that Mr Sharma, who appeared to her to be under the influence of alcohol, directed the comment: "*show me your nipples*" at her. Mr Sharma said he did not recall making such a comment to Ms Bennett, however, he said that the comment may have related to a standing joke between them which related to an incident a few years earlier at a company dinner where Ms Bennett had squeezed his nipples in front of his wife and staff.

[20] Ms Bennett said that she agreed that comments of that nature had been made to each other in the past; however, she was disturbed at Mr Sharma making this comment in the context of the workplace.

[21] Mr Sharma explained that it was quite usual for REOW employees to work late on Friday evenings especially if there was an open home or auction over the weekend. During this time it was usual for alcoholic drinks to be made available to the employees.

[22] Mr Ian Warner, a former employee of REOW, said he had regularly returned to the REOW's office on Friday afternoons after he had ceased employment to assist the staff with any queries about REOW properties, and he had been present at the REOW office on 14 June 2013, arriving at approximately 5.30-6pm.

[23] He helped the employees with any property queries and then had a beer which had been offered to him by Mr Sharma, sitting down with him and another employee for a chat. He said that Mr Sharma was already noticeably intoxicated at that time and becoming increasingly agitated about his PA, Ms Bennett.

[24] Mr Warner said that Mr Sharma stated several times that he was going to dismiss her and when he had asked him why, he had replied that he could not trust her.

[25] Mr Sharma said he did not recall making the comment that he intended to dismiss Ms Bennett, but confirmed that he had reached the stage, following the comments she had made to the REOW tenants the previous day, that he had lost trust in her.

[26] During the time Mr Warner had been having a drink with Mr Sharma, he said Ms Bennett was still in her office preparing documents for the weekend's open homes and auctions.

[27] He said that Mr Sharma continued to drink more wine, becoming more intoxicated and more agitated about Ms Bennett. At approximately 8pm, Mr Sharma had risen and gone into Ms Bennett's office.

[28] Mr Sharma recalled going into Ms Bennett's office and said the reason for doing so was to send her home as the work had been completed. Whilst there he had found Ms Bennett accessing the Facebook website on the REOW computer, a website he had repeatedly asked her not to visit and he had once again reprimanded her for doing so.

[29] Ms Bennett explained that at approximately 8.15pm that evening while she was waiting for a print run to complete, she had accessed the Facebook website. She had considered she was justified in so doing on the basis that she was required to work regular overtime and she felt it was acceptable to spend a moment on a personal task as it was after 8pm and other staff were drinking and relaxing in the office.

[30] She said that when Mr Sharma found her looking at the website he became uncontrollably abusive telling her to "*get the f*** out*" of his office and "*never come back*".

[31] Mr Warner said that after Mr Sharma had gone into her office to see Ms Bennett he had heard raised voices and swearing. Mr Sharma had returned and told him and another employee that he had discovered Ms Bennett on the Facebook site and had told her to: *F*** off*".

[32] As Ms Bennett walked past them and left the office, leaving the keys to the REOW offices on her desk, Mr Sharma had told her to: "*F... off and don't come back*".

[33] Ms Bennett said that as instructed by Mr Sharma, she had left the premises without taking her assigned company car. Later that evening, Mr Sharma had left her a voicemail message in what she described as a: "*sing song voice*" in which he insisted that she return to the office to deliver the company mobile phone immediately, however, she decided not to do so at that time of night.

[34] Mr Sharma said that on the evening of 14 June 2013 after Ms Bennett had walked out, she had texted his son, Rhyas Sharma, at 8.20pm saying "*I've just walked myself, keys on my desk I'll clear this phone and drop it down to you later, f*** this I'm worth more x*".

Events following 14 June 2013

[35] Mr Sharma said that because Ms Bennett had a company telephone and a number of REOW customers had her contact details, she would often receive telephone calls on his behalf. As a result, he decided to divert the number she was using to his mobile telephone in order to protect his business.

[36] Ms Bennett said that the following morning, 15 June 2013, she discovered that the mobile telephone supplied to her by REOW had been disconnected and she had arranged for a staff member to collect the telephone from her home to be returned to Mr Sharma.

[37] Mr Sharma emailed Ms Bennett on 18 June 2013 asking her what her intentions were as he had not heard from her.

[38] Ms Bennett responded by email dated 18 June 2013 stating:

Hi David,

*My intentions are clear and run with the voice message you left on the business phone Friday evening, or perhaps you don't recall your continual outburst from Friday, let me assist in jogging your memory, firstly that afternoon, you told me to shut my f***ing mouth, regardless of saying something incorrect on my part, there are professional ways of dealing with such incidents and abusing your staff is most certainly not one of them.*

That being said you can only imagine the disgust I felt, when at 8.15 that Friday evening, while still working diligently to ensure all is ready for the weekend ... I took time for myself to message Morgan {Bernadette's sister} regarding Fleetwood Mac tickets this forthcoming December, you saw this on my computer screen and I received further abuse and disdain from you. ... Therefore I decided to leave the premises before control was lost and things were said that couldn't be unsaid.

On the basis of your message left on my phone on Friday evening and the fact that you cut the business mobile phone off the following morning clearly displayed to me, my employee (sic) with you was terminated, that being said, I will require a termination letter dated 14 June 2013.

I have no intention of taking this matter further. I wish you all the success in your business ventures and look forward to seeing the next office opening for you. This and any other business will remain confidentially kept by me. ... I wish you every success this forthcoming weekend at the auctions and those thereafter.

Thank you for the experience, I appreciated the opportunity but considering the clear personality differences between you and I this professional relationship is, at your hand, is now over.

[39] Mr Sharma responded to Ms Bennett's email by letter dated 20 June 2013 stating in the letter:

Thank you for your email dated 18 June 2013 outlining your reasons for not returning to [REOW] and for confirming your last working day as 14 June 2013.

Please take this letter as formal written notice in accordance with clause 8.0 – referring to the probationary period in your individual

employment agreement; as after reflecting on previous discussions regarding the shortcomings in your performance and conduct, this clearly has led to a breakdown of confidence and trust in the employment relationship.

Referring to clause 8.2, your final payment in lieu of notice shall be two weeks' pay from 17 June until 8 July 2013 plus any holiday pay you may have accumulated. There will be a deduction for damages to the Holden Cruze as agreed by you and also deduction for the cost of the Real Estate Agents Authority Salesperson relicensing in accordance with clause 9.0(a) at full cost. The remaining balance shall be paid by direct credit to your nominated bank account on 21 June 2013.

Determination

Was Ms Bennett unjustifiably dismissed from her employment with REOW, or did she resign?

[40] On 14 June 2013 Mr Sharma had sworn at Ms Bennett and had told her to: “*F... off and don't come back*”. I find that these words constitute a sending away on the part of the employer. Ms Bennett had interpreted it as a dismissal, leaving behind on departure from the REOW offices her set of REOW office keys and the company car allocated to her for her work use.

[41] I observe that all the evidence, including that of Mr Sharma himself, establishes that he had imbibed a sufficient amount of alcohol at the time of his interactions with Ms Bennett on 14 June 2013 for him not to be able to recall all the details of what had taken place between them at that time.

[42] Later that same evening Mr Sharma left a message on Ms Bennett's telephone, requesting that she return the company mobile telephone. At that time, Ms Sharma's action may have been attributable to the amount of alcohol he had consumed, and it is possible that the employment relationship between him and Ms Bennett, with whom he had formerly been on close terms, may have been capable of being restored at that point.

[43] However by the following morning when he would have had an opportunity to recover from the alcoholic influence, Mr Sharma had organised the disconnection of the mobile telephone assigned to Ms Bennett for her business usage. At this point I consider that Ms Bennett rightly concluded that Mr Sharma had terminated her employment with REOW.

[44] Having considered all the evidence as presented, I find that Ms Bennett did not resign from her employment with REOW, but that she had been dismissed by Mr Sharma.

[45] Ms Bennett was employed subject to a probationary period contained in clause 8.0 of the Employment Agreement. Such a clause relating to probationary periods must be in accordance with the provisions of s.67 of the Employment Relations Act 2000 (the Act) which states:

S 67 Probationary arrangements

(1) Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation after the commencement of employment –

- a) The fact of the probation period must be specified in writing in the employment agreement;*
- b) Neither the fact that the probation period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation period.*

[46] Accordingly, despite the statement in cl 8.3 of the Employment Agreement that an employee dismissed during the probationary period is not entitled to bring a personal grievance, I find this not to be in accord with the provisions of s 67 of the Act which makes it clear that failure to continue an employee's employment must still be justifiable.

[47] The Test of Justification in s103A of the Act states:

S103A Test of Justification

- i. 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 applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[48] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. REOW must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[49] The Employment Agreement states at clause 16.2 that an employee may be dismissed without notice in the case of serious misconduct. Clause 20.0 of the Employment Agreement entitled: "*Workplace Practices*" states at clause 20.3 that: "*Deliberate or*

unreasonable waste of time will not be tolerated; as well as personal phone calls, emails and or visits to unauthorised websites such as Facebook.”. Clause 22.0 of the Employment Agreement entitled: “*Email, Intranet and Internet Policy*”, states at clause 22.6 that: “*Unauthorised and/or inappropriate email, intranet, and/or internet use is prohibited*” and at clause 22.10 that: “*Failure to comply with the provisions of this clause may be treated as serious misconduct*”.

[50] The use of the word “*may*” is a permissive wording rather than mandatory wording. As such I consider it relevant that while the meeting with Ms Bennett held on 28 May 2013 made it clear to her that she was not to access the Facebook website during working hours, there was no formal letter of warning following that meeting.

[51] Nor was she advised that the outcome of the meeting was that: “*an allegation of misconduct had been established*” in relation to her accessing of the Facebook website during working hours such that she could reasonably assume that any further accessing of that internet site would be considered to be serious misconduct and would put her continued employment with REOW in jeopardy.

[52] It is also clear that during the evening of 14 June 2013 Mr Sharma had been considering dismissing Ms Bennett for what he regarded as a breach of the trust and confidence he could have in her as an employee following the incident with the REOW tenants on 13 June 2013.

[53] There is no reference in the Employment Agreement to the effect such a communication to tenants might have on continued employment and whilst there is evidence that Mr Sharma appeared to have addressed the issue somewhat informally on 14 June 2013 by instructing Ms Bennett to: “*shut your f***** mouth!*”, there is no evidence that it was intended by REOW to constitute a formal indication that her actions were to be the subject of disciplinary investigation.

[54] Even had REOW considered Ms Bennett’s unauthorised accessing of the Facebook website to have been serious misconduct, a dismissal must also be procedurally fair.

[55] As regards procedural justification, in accordance with s 103A (3) of the Act the Authority must also consider whether:

- (a) *Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee ...*

(b) ... *the employer raised the concerns that the employer had with the employee ...*

(c) ...*the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...*

(d) ... *the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...*

[56] Whilst I accept that REOW was a small employer and as such lacked the resources normally available to a larger employer when dealing with disciplinary matters, I consider that there were major rather than minor flaws in the procedure adopted by REOW in terminating Ms Bennett's employment which cannot be explained merely by the fact that REOW was a smaller employer. In this case:

- There is no evidence that REOW took any steps to investigate its concerns about Ms Bennett's conduct;
- Ms Bennett was provided with no opportunity to provide an explanation;
- Ms Bennett had not been advised of her right to have a support person present during the interchanges with Mr Sharma on 14 June 2013; and
- There is no evidence that Mr Sharma genuinely considered any explanation that she may have provided had she been given an opportunity to do so.

[57] I accept that this is a situation in which a social relationship, an employment relationship and alcohol were closely combined; however there remains the onus on REOW to behave as a fair and reasonable employer towards Ms Bennett as its employee, and this it failed to do.

[58] I determine that Ms Bennett was unjustifiably dismissed by REOW.

Was Ms Bennett sexually harassed by Mr Sharma?

[59] Ms Bennett claims that Mr Sharma directed the comment: "*show me your nipples*" at her on 14 June 2013. Mr Sharma, who was under the influence of alcohol at the time the comment was made, did not recall having made such a comment, however stated that if he had done so, it was part of a background of shared humour and previous events arising within the context of their social relationship.

[60] It is clear that the comment made at that time was unwelcome to Ms Bennett; who confirmed in her evidence: "... I agree that we have made comments of this nature to each other in the past.", however I do not find that it formed part of repeated behaviour within the context of the workplace, or that her refusing to comply had any effect on the continuity of her employment.

[61] I determine that Ms Bennett was not sexually harassed by Mr Sharma.

Remedies

[62] Ms Bennett has been unjustifiably dismissed and she is entitled to remedies.

Lost wages

[63] I am satisfied that Ms Bennett had taken steps to mitigate her loss however she was not able to obtain alternative employment until 14 July 2014.

[64] I order that REOW pay Ms Bennett the sum of \$5,107.50 gross in respect of lost wages (calculated as 13 weeks at salary payment of \$60,000.00 per annum less two weeks' notice payment and the amount of \$7,584.30 received during this period from WINZ) pursuant to s 128 (2) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i) of the Act.

[65] Ms Bennett was dismissed following the interchanges between herself and Mr Sharma on 14 June 2013 which were witnessed by Mr Warner and other employees present at the time.

[66] I accept that in this situation Ms Bennett experienced hurt and humiliation.

[67] I order REOW to pay Ms Bennett the sum of \$5,000.00, pursuant to s 123(1)(c)(i) of the Act.

Contribution

[68] I have considered the matter of contribution as I am required to do under s124 of the Act. I accept that there is evidence that Ms Bennett exercised poor judgement in respect of her comments to the REOW tenants on 13 June 2013 which had undermined Mr Sharma's trust in her, and in addition, she accessed the unauthorised Facebook website on 14 June 2013 despite having been instructed not to do so and in breach of the REOW Company Practices as set out in the Employment Agreement.

[69] I find the actions of Ms Bennett to have been contributory to the events which lead to the termination of her employment by REOW and reduce the remedies awarded by 10%.

Costs

[70] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.



Eleanor Robinson
Member of the Employment Relations Authority

