

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 283
5354478

BETWEEN JASMINE BRODIE-FELL
 Applicant

A N D KATIKATI FAMILY DENTAL
 CENTRE LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: G Bennett, Advocate for Applicant
 N Al-shamma, Advocate for Respondent

Investigation meeting: 17 February 2012 at Tauranga

Submissions Received 5 March 2012 for Applicant
 20 March 2012 for Respondent

Date of Determination: 21 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Jasmine Brodie-Fell, claims that she was unjustifiably dismissed, effective from 22 March 2011. Ms Brodie-Fell also claims that she was disadvantaged in her employment by an unjustifiable action by her employer. This claim relates to a warning that she received, dated 17 February 2011.

[2] The respondent denies the claims of Ms Brodie-Fell and says that the dismissal of the applicant was justifiable on the ground of poor performance over a period of time; and she was treated fairly and reasonably at all times.

Background

[3] The Katikati Family Dental Centre (the practice) is owned and operated by Mrs Nuha and Mr Mohamad Al-shamma. Mrs Al-shamma is the sole practice dentist. She is assisted in the management of the business by Mr Al-shamma.

[4] Ms Brodie-Fell commenced her employment as a dental receptionist on 8 September 2010, following an interview with Mr and Mrs Al-shamma. Ms Brodie-Fell was very young, effectively a school leaver, aged 16½ at the time. She was accompanied by her mother at the job interview. The agreed rate of pay was \$13.00 per hour.

[5] The evidence of Mrs Al-shamma is that at the interview, Ms Brodie-Fell was told that the job would give her a good opportunity to engage in a training course organised by the New Zealand Dental Association. Ms Brodie-Fell was also told about a requirement, as a condition of her employment, to undertake a first aid course, including CPR.

[6] Ms Brodie-Fell was given an employment agreement on 11 October 2010. Having sought the advice of her mother, she returned the signed document on 19 October 2010. There is some difference in the evidence of Ms Brodie-Fell and Mrs Al-shamma about the date of the receipt and subsequent return of the employment agreement. Nothing in particular rests on this, but the evidence of Mrs Al-shamma about this matter appears to be more probable.

[7] The job of dental receptionist had three main components: reception, chair-side assistance and cleaning. Ms Brodie-Fell says that as the children of Mr and Mrs Al-shamma were often present after school and during school holidays, she felt, at times, that she was a babysitter for the children (aged 8 and 10). In regard to this, Mrs Al-shamma denies that Ms Brodie-Fell was expected to babysit the children, because Mr Al-shamma was there to supervise them.

Performance issues

[8] The evidence of Mrs Al-shamma is that when Ms Brodie-Fell first started in the job, she seemed keen to learn, but after the signing of the employment agreement, her attitude changed and she was doing things slower than before. However, Mrs Al-

shamma accepted that Ms Brodie-Fell was effectively a new trainee and would need some time to get acquainted with what was required.

[9] Mrs Al-shamma referred to some issues that arose in the employment relationship. For example; mistakes in writing down the details of patients and ensuring patients understood the inconvenience incurred by a cancellation of an appointment, given the small scale of the practice. Mrs Al-shamma also attested to there being a lack of progress by Ms Brodie-Fell in regard to making arrangements to do the first aid/CPR course. It appears that there was some discussion about the requirement for Ms Brodie-Fell to anticipate the needs of the surgery in regard to ordering supplies and ensuring that Mrs Al-shamma had the necessary instruments available in the surgery.

[10] The evidence of Mrs Al-shamma is that early in the employment relationship, she “sat down” with Ms Brodie-Fell, to express her concerns, on more than one occasion. Mrs Al-shamma recalled two specific occasions: 10 November 2010 and 21 December 2010. Mrs Al-shamma says she spoke to Ms Brodie-Fell about the need for clear handwriting for the practice records, not to leave confidential papers in view of the public, and the need to explain to patients there would be a cancellation fee if appointments were cancelled on the day of the appointment. There was some discussion also about time management and the importance of Ms Brodie-Fell being at the front counter when patients were ready to leave and make payment; and not to let them wait. Also discussed was the requirement for Ms Brodie-Fell to assist Mrs Al-shamma in the surgery when not required at the front desk, and making sure sufficient details were obtained when taking patient bookings.

[11] The evidence of Mrs Al-shamma is that when she discussed the various problems with Ms Brodie-Fell on 21 December 2010, she was hopeful that the New Year would bring a new start and that Ms Brodie-Fell would perform better. However, Mrs Al-shamma says this did not happen so she decided that it would make things clearer for Ms Brodie-Fell if she put the concerns in writing; which she did via a letter dated 10 January 2011:

Dear Jasmine,

It has been more than three months since you started working with us. I have noticed that certain points in your performance have been criticised by myself on more than one occasion but unfortunately my instructions have been taken lightly, although I understand that you

were unwell for a period of time and you made an effort to come to work and carry on with your tasks. That is appreciated, but at the same time we have a standard of performance that should be met in order for you to continue working in our practice. I will point out the areas that you need to work on:

- Responsibility, your job comes with a lot of responsibility realising this is crucial, working in a health facility requires attention to details.
- Speed, accuracy and efficiency with your work is required at all times, eg tasks such as finding patient's cards, attending to phone calls and booking patients should be done with concentration and an eye for detail (ensure all details are correct and writing is tidy).
- Time is the pulse of work, it is expected that you keep your mind on-the-job and anticipate what the next step will be and be prepared for it, eg; drawers, consumables and stationery are checked and topped up periodically during the day.
- Being motivated and self driven, understanding and realising your responsibilities without waiting for the next instruction, eg; assisting in the surgery when the workload doesn't require your presence at the front and vice versa.
- Confidentiality and professionalism at all times when handling phone calls and inquiries, if at all you are in doubt of what would be the best course of action, take advice.
- During working hours time should be dedicated to work, any personal issues or mobile calls or texts are to be attended to during break time only.
- Show more interest to learn and improve, as we definitely want to make a good dental assistant out of you.
- Over all cleanliness of the practice should be a prime priority, cleaning tasks should be carried out thoroughly and properly, take your time vacuuming as you can't do a proper job in a haste.

I trust this letter will help you overcome any difficulties you have found in fulfilling your job requirements so you can improve where mentioned above and anticipate seeing this improvement immediately. This will allow us all to have a more pleasant and smooth working atmosphere.

Yours truly,
Nuha Al-shamma
Katikati Family Dental Centre

[12] Mrs Al-shamma says that the intention of this letter was that Ms Brodie-Fell should understand that the matters mentioned should be taken seriously. Ms Brodie-

Fell could discuss the content with her mother, and if there was any disagreement with anything raised in the letter, she could “come back” or Ms Brodie-Fell could seek clarification on any of the content. Mrs Al-shamma attests that she followed up with Ms Brodie-Fell a day or two later and asked her if she understood what was required. Apparently, Ms Brodie-Fell confirmed that she did understand and Mrs Al-shamma indicated that she wanted to make “a good dental assistant” out of Ms Brodie-Fell and there would be the possibility of earning more pay.

The warning letter

[13] Unfortunately, shortly after the receipt of the letter dated 10 January 2011, (possibly 12 January) Ms Brodie-Fell made a mistake in regard to recording a \$2,000 payment from a patient. It was entered as cash when the payment had been made by cheque. The evidence of Mrs Al-shamma is that because of this mistake and the need to revisit a number of other matters with Ms Brodie-Fell, she prepared a warning letter. On 17 January 2011, Mrs Al-shamma had a brief discussion with Ms Brodie-Fell; indicating that there were some things she was not happy about. Mrs Al-shamma gave Ms Brodie-Fell a letter dated 17 January 2011:

RE: Repeated failure to follow instructions

Dear Jasmine,

Further to my letter to you dated 10 January 2011, regarding your performance at work. There are still points that have not been taken seriously enough and instructions are not being strictly followed which led to the problem of

- Giving a client a receipt with the wrong method of payment written on it.
- Also cleaning the surgery floors was not done according to instructions (all floors cleaned on a daily basis).
- When booking patients ensure all details are taken correctly.
- All relevant information regarding calls and inquiries is in (sic) noted in the communication book.

I consider this as a warning to you that similar mistakes will not be acceptable.

Kind regards,
Nuha Al-shamma
Katikati Family Dental Centre

[14] The evidence of Mrs Al-shamma is that she only had a short time available to give the letter to Ms Brodie-Fell as she had to get back to treating a patient. Mrs Al-shamma says that she followed up again with Ms Brodie-Fell and indicated that she would like to get a response to the letter from her, but Ms Brodie-Fell informed that she did not know what she should say. Mrs Al-shamma suggested that Ms Brodie-Fell should obtain some assistance from her mother.

[15] Ms Brodie-Fell did respond to the warning letter via a comprehensive letter dated 10 February 2011. Given the length of the letter, it is not practicable to reproduce it here but it is appropriate to record the following relevant points:

- (a) Ms Brodie-Fell informed that she wanted to continue to work for Mrs Al-shamma as she was enjoying the job.
- (b) The reason for writing her letter was that she had become nervous about making errors and it had become stressful having received the warning letters which she felt were “quite harsh”.
- (c) Ms Brodie-Fell found it hard to concentrate on her duties when the children were there. She informed of various incidents involving the son of Mr and Mrs Al-shamma and the difficulties relating to his behaviour.
- (d) Ms Brodie-Fell referred to an incident where a patient was “accidentally” overcharged as a result of her being unaware that the patient had previously, part paid their account and the response of Mrs Al-shamma being that if Ms Brodie-Fell had listened to the conversation between Mrs Al-shamma and the patient, she would have realised that part of the account had been paid. Ms Brodie-Fell records that:

I had no idea that I would need to listen to conversations such as this. I will do my best to do that in the future, sometimes I ask you a question and you say yes without looking or listening. You have apologised to me for this once in the past but I would like you to take the time to listen to what I am saying if I ask questions as I am double checking that I have understood to avoid making any errors.

- (e) Ms Brodie-Fell referred to the criticism she had received about her writing and asked that in future she be shown as soon as possible rather than Mr or Mr Al-shamma writing over her mistakes before she gets to see them.
- (f) There was a response to the criticism of her cleaning. Ms Brodie-Fell explained that her job description states that the floors were to be mopped three times each week whereas the warning letter requires them to be mopped daily.

[16] In conclusion Ms Brodie-Fell conveyed that:

I will try to do more with my time but I can assure you that I feel that I do my best under sometimes difficult circumstances as detailed above. I would like to improve our working relationship with your support as my employer and not feel as though I am being micro managed. I truly want your business to succeed and will do my best by you as my employer. I feel that the way things have been lately I am quite nervous trying to do everything perfectly and stress about things I have done hoping they are up to yours and Mohamed's expectations. I do not want to make any mistakes as I understand the importance and responsibility my job has. I hope we can move forward in a more positive environment. I would like to work at the Dental Centre for years to come and hope that you understand my reasons for writing this letter.

[17] Finally, Ms Brodie-Fell commented on the requirement for her to complete a first aid course. As the business was not going to pay for the course (\$250) and the fact that she would have to take two days off work (unpaid), this required financial assistance from WINZ. Ms Brodie-Fell reminded Mrs Al-shamma that she had (last week) requested a letter for WINZ stating that the first aid course is a requirement of her employment and she "would appreciate it" if she could have this letter as soon as possible.

[18] Via a comprehensive letter dated 14 February 2011, Mrs Al-shamma responded to the letter of 10 February 2011 from Ms Brodie-Fell. Mrs Al-shamma complimented Ms Brodie-Fell on the effort she put in her letter but then went on to state:

I have to say if you had shown a similar effort carrying out any of your tasks, we wouldn't have the problem today.

[19] Mrs Al-shamma did not accept Ms Brodie-Fell's explanations in regard to the previous criticism of her performance. For example, Mrs Al-shamma stated:

I appreciate your intentions about improving the working relationship and want you to understand that this working relationship will not improve unless a sound standard of performance, hygiene, and integrity is met.

[20] In regard to the first aid course, Mrs Al-shamma was largely unsympathetic:

The FIRST AID course that is part of your work requirement and that was explained to you before you started your job, it is the minimum and simplest requirement, usually people only need to do a refresher course which is not (sic) expensive nor lengthy one, you have not completed this course before and thus it was a problem for you at the end of the day. It is a basic course that gives you skills that will come in handy in your everyday life and in several fields of work or training in the future. You are struggling to come to terms with the cost of this course and although you say you intend to work in the practice for years to come you have not shown any interest in enrolling for a dental assisting course that is likely to boost up your knowledge and experience in the dental field. This is a much more expensive course and it seems you are unlikely to do it.

[21] The letter then concludes that:

I am sorry to hear you have been stressed and nervous lately trying your best to meet up with the standard and our expectations and although we do not enjoy finding new employees and spending the time and effort in training them, but if you feel you are constantly uncomfortable and nervous we advise you to find another line of employment that would better suit your capability, you are still in the beginning of your carier (sic) life and there is (sic) more opportunities and wider fields for you to explore.

[22] The evidence of Mrs Al-shamma is that on several occasions after giving the above letter to Ms Brodie-Fell, she asked her for a response.

[23] On or about 2 March 2011, issues arose regarding a patient (Mr M¹) and his appointment, along with a debt that apparently was owed by him to the practice. The evidence about this matter is somewhat uncertain, but it is apparent that some conflict arose and as a result, Ms Brodie-Fell wrote to Mrs Al-Shamma on 3 March 2011. The substance of Ms Brodie-Fell's letter is about the issues pertaining to Mr M. Referring to a request to have her mother meet with Mrs Al-shamma, Ms Brodie-Fell writes:

¹ For privacy reasons the name of this person is protected.

You have told me when I have asked that we can't sit down to discuss any issues in a meeting with my Mum. However, I feel strongly that this would be beneficial to all concerned so that we may move forward.

[24] Ms Brodie-Fell writes further:

I would like to approach the Labour Department so that we may sit down and have a meeting where I can have proper support and representation in a controlled and fair environment, this I will arrange tomorrow.

Termination of the employment of Ms Brodie-Fell

[25] The evidence of Mrs Al-shamma is that another incident arose on 7 March 2011, relating to what appears to have been a wrong perception on the part of Ms Brodie-Fell about Mrs Al-shamma's earlier instructions pertaining to answering phone calls; in particular, from people that called the Katikati Family Dental Centre by mistake. Mrs Al-shamma says that Ms Brodie-Fell denied that previous instructions had been given to her about this. Mrs Al-shamma considered that Ms Brodie-Fell was accusing her of lying, but this seems to be an over-reaction on the part of Mrs Al-shamma. Nonetheless, this incident appears to have been the breaking point for Mrs Al-shamma and she wrote to Ms Brodie-Fell on 8 March 2011:

Dear Jasmine,

During your employment with us I have noticed several negative points in your performance especially being inconsistent with your work, a lack of interest in this field, and in learning and pursuing dental assisting as a career.

Further to my previous letters and in light of the last incidents that have occurred at work that clearly show how my instructions have either been deliberately ignored or received with lack of concentration from your side and thus totally misinterpreted, verbal and written instructions are being taken without genuine concern and where facts are being twisted.

We are a small workforce and I am committed to providing the high quality professional care that my patients deserve and expect, thus a smooth and comfortable environment is essential.

So I will take all the necessary steps to ensure that happens in a fair and reasonable manner.

Unfortunately this does not seem to be the right line of employment for you, however you have most definitely experienced a steep learning curve and trust this will assist you in pursuing your future career. It is with regret that I hereby give you two weeks notice of

termination of your employment. Your last working day being Tuesday the 22nd of March 2011. I wish you all the best for the future.

Nuha Al-shamma

Was the dismissal unjustifiable?

[26] The question of whether a dismissal is justifiable must be determined by the Authority on an objective basis. The test is whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances.²

[27] It is clear from any interpretation of the overall evidence, that Ms Brodie-Fell had some serious difficulties in coming to grips with the requirements of being a competent dental assistant. Indeed one gets the clear impression that she should never have been appointed to the role. I note that the "*Ideal person specification*" attached to the job description for the position, envisages that the ideal person would have:

Experience as a dental chair side assistant and that a dental assistant certificate (NZDA) or similar would be an advantage.

[28] It also appears to be important that the ideal person for the job would have: "people skills that show a good working relationship in a multi disciplinary team".

[29] Ms Brodie-Fell was in reality, what is commonly called "a school leaver". She had no experience in regard to the requirements of the position. Nonetheless, it was the evidence of Mrs Al-shamma that the person that was employed as a dental assistant before Ms Brodie-Fell was also young and inexperienced but went on to fulfil the role competently, in addition to obtaining a dental assistant's certificate.

[30] It seems that Mrs Al-shamma thought that Ms Brodie-Fell should be given the opportunity to follow in the footsteps of her predecessor and that for the first three months of Ms Brodie-Fell's employment; Mrs Al-shamma was prepared to accommodate the inexperience of Ms Brodie-Fell, at least to some extent. Then via the letter dated 10 January 2011, Mrs Al-shamma set out the areas that Ms Brodie-Fell needed to "work on". This was an entirely fair and reasonable approach on the part of Mrs Al-shamma.

² Section 103A of the Employment Relations Act 2000 as it was then

[31] Regrettably, Ms Brodie-Fell did not respond in the manner that was reasonably anticipated. Hence a warning was issued via the letter dated 17 January 2011.

[32] It was at this point that the employer started to depart from a number of requirements pertaining to imposing disciplinary sanctions. First, the employment agreement at clause 21.1, provides that:

If the employer decides to issue a warning, this will be formally and clearly issued and confirmed in writing. The employee will be advised of any corrective action that is required and the consequence of further instances of misconduct or substandard job performance.

[33] The warning letter, while referring to what Ms Brodie-Fell had done wrong, failed to advise of the “corrective action that is required” and “the consequence” of any further instances of misconduct.

[34] Apart from the requirements of the employment agreement, the Employment Court has, on a number of occasions, set out the basic legal requirements pertaining to the actions of an employer when undertaking the performance management of an employee. A leading case in regard to the Court, or the Authority, determining whether dismissal for unsatisfactory work performance is fair, is *Trotter v. Telecom Corporation of New Zealand Ltd*³. The Court stated that the assessment of whether a dismissal on the grounds of unsatisfactory work performance is justifiable, requires reaching a view on a number of questions:

- (1) Did the employer in fact become dissatisfied with the performance of his or her duties?
- (2) If so did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?
- (3) Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of standards requiring to be met?
- (4) Was a reasonable time allowed for the attainment of those standards?
- (5) Following the expiry of such a reasonable time and following reasonable information of what was required of the employee,

³ [1993] 2 ERNZ 659

did the employer turn its mind fairly to the question of whether the employee had achieved or substantially achieved what was expected including:

- (a) using an objective assessment of measurable targets;
- (b) fairly placing the tentative conclusions before the employee with an opportunity to explain or refute those conclusions;
- (c) listening to the employee's explanation with an open mind;
- (d) considering the employee's explanation and more favourable aspects of the employee's service record and the employer's responsibility for the situation that had developed (for example, by not detecting weaknesses sooner or by promoting the employee beyond the level of his or her competence); and
- (e) exhausting all possible remedial steps including training, counselling, and the exploration of redeployment?

[35] The above cannot be seen to be a "one size fits all" criteria as the nature and resources of respective businesses must also be factors. Nonetheless, if the criteria are applied in a common sense manner to the circumstances pertaining to Ms Brodie-Fell, the questions can be answered accordingly. First, Mrs Al-shamma did, in fact, become dissatisfied with Ms Brodie-Fell's performance of her duties, and secondly, Mrs Al-shamma did inform Ms Brodie-Fell of her dissatisfaction and required her to achieve a higher standard of performance.

[36] But on the third question, while Mrs Al-shamma initially provided an objective criticism of Ms Brodie-Fell's work and set out the standards required to be met, as evidenced by the letter dated 10 January 2011, the fairness of the process fell away from there. In particular, the letter of 17 January 2011 is deficient. This was a warning letter and effectively the first step in the disciplinary process associated with the management of the work performance of Ms Brodie-Fell. While it set out four specific areas where Ms Brodie-Fell had failed to meet the requirements of the business, it was not a readily comprehensive or objective statement of the standards that Mrs Al-shamma required from Ms Brodie-Fell, or how long she had in which to meet them; or the consequences of not doing so.

[37] Perhaps, given the circumstances of a busy sole dental practice and the associated commitments of Mrs Al-shamma, the lack of meaningful content in the

warning letter may have been excused if she had firstly spent some time with Ms Brodie-Fell, as being so young, she should have had someone to support her, i.e. her mother. Indeed there is evidence that Ms Brodie-Fell attempted to have her mother involved, but nothing came of this; the reasons as to why are inconclusive.

[38] Mrs Al-shamma did persist in requiring a response from Ms Brodie-Fell in regard to the warning letter, but this was after the fact of receiving it. Before issuing the warning letter, Mrs Al-shamma was required to inform Ms Brodie-Fell of the impending disciplinary action, give her a written summary of the matters she wished to discuss, and then arrange a meeting with Ms Brodie-Fell and her mother (or another support person), whereby there could have been a full and frank discussion about what was expected of Ms Brodie-Fell and by when; and the consequences of failing to meet the performance standards required.

[39] Nonetheless, the letter from Ms Brodie-Fell, dated 10 February 2011, shows that she understood at least some of the concerns of her employer and those concerns were enlarged upon in the response of Mrs Al-shamma via her letter dated 14 February 2011.

[40] But the problem with Mrs Al-shamma's response is that while acknowledging Ms Brodie-Fell's view of matters, she simply advised her to "find another line of employment" rather than making any attempt to take remedial steps as envisaged by *Trotter*, i.e. further training.

[41] A critical flaw in regard to the treatment of Ms Brodie-Fell is evidenced by the response of Mrs Al-shamma to the proposal contained in Ms Brodie-Fell's letter of 3 March 2011, where she suggested involving the Department of Labour (presumably via its mediation service) in a meeting to discuss the problems that had arisen. Rather than respond in a constructive manner, Mrs Al-shamma terminated the employment of Ms Brodie-Fell a few days later, without any discussion or an opportunity to be heard prior to the decision being made.

Conclusions

[42] The question of whether a dismissal is justifiable must be determined by the Authority on an objective basis. The test is whether the employer's actions and how

the employer acted were what a fair and reasonable employer would have done in all the circumstances.⁴

[43] I conclude that the manner in which the dismissal of Ms Brodie-Fell was implemented was not what a fair and reasonable employer would have done in all the circumstances.

[44] Given the general failure of Ms Brodie-Fell, after some six months of employment, to consistently meet the basic requirements of the dental practice, her dismissal could, arguably, be substantively justifiable. However, the dismissal failed to meet the basic principles of procedural fairness. In *New Zealand (with exceptions) Food Processing IUOW v. Unilever New Zealand*⁵ the Chief Judge of the Labour Court held that the minimum requirements in relation to procedural fairness can be said to be:

- (1) Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;
- (2) An opportunity which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain it or to mitigate his or her conduct; and
- (3) An unbiased consideration of the worker's explanation in the sense that that consideration must be free from predetermination and uninfluenced by irrelevant considerations.

Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion of the gravity, viewed in real terms of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair minded but not over indulgent person.

[45] In addition to the common law procedural (or natural justice) requirements as referred to above, there is a statutory duty to act in good faith under the Employment Relations Act 2000; in particular, (pertaining to the circumstances here) as set out at s.4 (1A)(c); the duty of good faith:

⁴ Section 103A Employment Relations Act 2000, as it was then

⁵ [1990] 1 NZILR 35.

without limiting paragraph (b) requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees effected-

- (i) access to information, relevant to the continuation of the employee's employment, about the decision; and
- (ii) an opportunity to comment on the information to their employer before the decision is made.
[Underlining added]

[46] Unfortunately, the decision to dismiss Ms Brodie-Fell, or in the words of the Act (above), not to sustain *the continuation of employment*, was made without allowing her any access to the essential information (that is, why her dismissal was pending) and without an opportunity to comment on that information to her employer before the final decision was made to terminate the employment. It goes without saying that the failure by the employer to comply with the above duty of good faith, in itself,⁶ makes the dismissal of Ms Brodie-Fell unjustifiable.

[47] I record at this point that in relation to the claim of unjustifiable disadvantage, in the absence of any tangible evidence from Ms Brodie-Fell about the affect of the written warning, I have regarded the warning as part of the matrix leading up to the unjustifiable dismissal.

Remedies

[48] Having found that the dismissal of Ms Brodie-Fell was unjustifiable and hence she has a personal grievance; pursuant to s.123(1) of the Employment Relations Act 2000 (the Act):

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for one or more of the following remedies ...

[49] Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings. Then, at s.128(2) of the Act, if the Authority determines that a employee has a personal grievance and there has been lost remuneration because of the grievance, the Authority:

⁶ But in addition to the other factors.

... must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months ordinary time remuneration.

(a) *Reimbursement of lost wages.*

[50] Ms Brodie-Fell obtained new employment, commencing 17 May 2011. While there is some inconclusive evidence relating to when Ms Brodie-Fell was available to work during the notice period, for all intents and purposes, her last day of employment was 22 March 2011. Therefore, her loss of wages was for a period of eight weeks. The base hours of work for Ms Brodie-Fell (according to the employment agreement) were 30 hours per week at \$13 per hour. Therefore, the loss of wages is calculated to be \$3,120 (gross).

[51] Subject to a consideration of any reduction pursuant to s.124 of the Act, Ms Brodie-Fell is entitled to this sum.

(b) *Compensation*

[52] Section 123(1)(c)(i) of the Act provides for the payment to the employee of compensation by the employer, including compensation for humiliation, loss of dignity and injury to the feelings of the employee.

[53] In her statement of problem, Ms Brodie-Fell claims compensation of the sum of \$10,000. But there is little in her witness statement about why such a sum is warranted. Nor did Ms Brodie-Fell give any evidence at the investigation meeting about the affect of the dismissal, albeit she became tearful when recalling some matters. But given the lack of overall evidence to support her claim for compensation, any award made to her must be minimal. I deem the sum of \$2,000 to be appropriate in all the circumstances.

(c) *Contribution*

[54] Pursuant to s.124 of the Act, when considering the nature and extent of the remedies to be provided in respect of a personal grievance, the Authority is required to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those facts so require it, reduce the remedies that would otherwise be awarded accordingly.

[55] The submissions for Ms Brodie-Fell acknowledge that she contributed to the circumstances that gave rise to the personal grievance. It is submitted that had Ms Brodie-Fell been a mature adult, the contribution should be considered to warrant a 40% reduction in the remedies awarded. But, it is submitted, because of the young age of Ms Brodie-Fell, and her lack of work experience, the reduction should be only 15% to 20%.

[56] The evidence shows that while Ms Brodie-Fell was certainly lacking in work experience, given that she was really a school leaver, this was taken into account for about three months by Mrs Al-shamma. However, the weight of the evidence shows that Ms Brodie-Fell was simply the wrong person for the job. Indeed, having observed Ms Brodie-Fell at the investigation meeting and even taking into account her relative youth and some possible nervousness at appearing before the Authority, I gained the distinct impression that, even given more time and training, she would always have had some difficulty in coping with a busy dental practice, where using one's initiative was an essential requirement.

[57] Nonetheless, when it comes to the assessment of contribution, I have also observed the nature of the approach that Mrs Al-shamma adopted when communicating with Ms Brodie-Fell. While I have some understanding of, and empathy for, the frustrations that Mrs Al-shamma must have had experienced in the circumstances - being a busy sole practice dentist - it is clear that the appointment of Ms Brodie-Fell in such circumstances, was a fundamental mistake, which soon became obvious. But having employed her, there was an obligation to ensure that Ms Brodie-Fell received appropriate training and supervision. I conclude that both of these factors appear to have been inadequate, notwithstanding my earlier comment about the unsuitability of Ms Brodie-Fell for the role.

[58] Taking into account the rather minimal remedies that are available in any event, I conclude that it is appropriate that they should be reduced by 40%.

Determination

[59] For the reasons set out above, I find that the dismissal of Ms Brodie-Fell was unjustifiable. She has a personal grievance.

[60] Katikati Family Dental Centre Limited is order to pay to Ms Brodie-Fell the following sums:

- (a) Pursuant to s.123(1)(b) and s.128(2) of the Act, reimbursement of lost wages in the gross sum of \$3,120; less 40%: **\$1,872.00.**
- (b) Pursuant to s.123(1)(c)(i) of the Act, compensation in the sum of \$2,000; less 40%: **\$1,200.00.**

Costs

[61] Costs are reserved. The parties are invited to resolve that matter if they can, taking into account the outcome and the usual daily approach adopted by the Authority. In the event a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority