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Candyland Limited v Jarvis [2013] NZEmpC 206 (19 November 2013)

Last Updated: 30 November 2013

IN THE EMPLOYMENT COURT AUCKLAND

[\[2013\] NZEmpC 206](#)

ARC 46/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN CANDYLAND LIMITED Plaintiff

AND JO-ANNE JARVIS Defendant

Hearing: 29-31 October 2013

Appearances: Michele Coker, representative for the plaintiff

Mark Nutsford, advocate for the defendant

Judgment: 19 November 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Candyland Limited (Candyland) is a tourist attraction that operates candy making shows and tours, a shop and a cafe. Mrs Coker, the sole director and shareholder, purchased the business from her father in early 2011. Mrs Jarvis, the defendant, commenced work at Candyland in March 2011.

[2] Mrs Coker describes Candyland as a happy place, geared towards children. Staff are expected to “theme up” by wearing appropriate clothing. Mrs Jarvis said that she enjoyed wearing fairy outfits, combining them with wings, brightly coloured tights, glitter shoes and costume jewellery. Mrs Coker said that she had occasion to speak to Mrs Jarvis about her propensity for wearing black clothing, her attitude to customers and staff, and her work ethic. There was a stark contrast in the evidence relating to the validity of these concerns and the extent to which they were raised

with Mrs Jarvis during the course of her employment. I return to these issues later.

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[3] The one issue that the parties were agreed on was the fact that a deep unhappiness descended on Candyland on 24 July 2011, sometime before a third candy making show was to take place. The candy maker, Mr Chen, for reasons which remained somewhat obscure, threw off his themed wig and overalls and announced in no uncertain terms that he was leaving. Mrs Coker believed that Mrs Jarvis had followed suit, abandoning her employment after an explosive outburst. Mrs Coker met with Mrs Jarvis on 27 July 2011. Towards the end of the meeting she told Mrs Jarvis that she was dismissed. Mrs Jarvis has a different perspective of events.

[4] Mrs Jarvis pursued a personal grievance against Candyland. The Employment Relations Authority (the Authority) found

that she had been unjustifiably dismissed and awarded her lost remuneration and compensation, although the latter was reduced by way of contributory conduct.¹ Candyland challenged the Authority's determination on a de novo basis.

The facts

[5] Mrs Jarvis was expected to carry out a range of tasks, including hosting candy making shows, taking and preparing orders in the cafe and performing retail, cleaning and stocktaking duties in the shop. She worked rostered hours, which she was advised of in advance. On occasion she was called in to cover for other staff. On average Mrs Jarvis worked 25 to 30 hours a week although this increased to more than 35 hours during the busier school holiday periods. She was paid \$15 an hour.

[6] Mrs Jarvis was not given a written employment agreement. Mrs Coker said that Mrs Jarvis, who had background experience in the hospitality industry, told her that it was common practice not to have a written agreement. Mrs Jarvis accepted that she told Mrs Coker that she was not troubled by the fact that she did not initially have a written agreement but denied advising Mrs Coker that she did not require one.

[7] Mrs Jarvis was not initially rostered on to work on 24 July. She was called in because another staff member (Ms Betts, who had only recently been appointed) was

¹ [2012] NZERA Auckland 218.

unwell. It is apparent that a number of staff members were in various stages of illness around this time. Mrs Jarvis said that she had been sick for a few weeks and that she did not feel well that day, although she came in to work. She was rostered to work from 9.00 am to 5.00 pm. I pause to note that Mrs Coker disputed that Mrs Jarvis was feeling ill. She put it to Mrs Jarvis that if she was as ill as she said, she was in breach of her duties to her employer by placing it at risk of violating its health and safety obligations. One particular concern was that Mrs Jarvis might have vomited into the melted chocolate during the candy making show. Mrs Jarvis denied that this was so, and said that she was past the stage of being contagious.

[8] As it happened 24 July was around the middle of the busy school holiday period. Mrs Coker told Mrs Jarvis to have a break for lunch at around 1.00 pm. Mrs Jarvis says that she went for her lunch break at around 1.30 pm, but that it did not eventuate as one of the other staff members (Ms Lang) asked for her assistance with the show and that she went to help. Mrs Coker did not immediately know that Mrs Jarvis had been asked to help out with the show and assumed that Mrs Jarvis was having her break. Mrs Coker believed that Mrs Jarvis had taken too long for lunch when she did not return to the cafe until around 2.00 pm. This irritated her because she had been busy in the intervening period. When Mrs Jarvis did appear Mrs Coker says she made a joking comment about long lunches and the pressure she had been under. Mrs Jarvis says that she told Mrs Coker that she had been helping Ms Lang at the show.

[9] Up to three shows are conducted at Candyland a day, depending on demand. Mrs Coker decided that a third show would take place that afternoon. There was some confusion in Mrs Jarvis' mind about whether it would be her or Ms Lang doing the show. Ultimately Ms Lang was tasked with hosting responsibilities. Mrs Jarvis says that at this point she decided to go and get changed out of her fairy outfit and have a belated lunch break. Mrs Coker believes that Mrs Jarvis was indignant that she was not doing the show, although this was denied by Mrs Jarvis.

[10] Mrs Jarvis' husband also worked at Candyland, on a casual basis. Mrs Coker's ex-partner, Mr Gillard, worked there too. Mr Jarvis and Mr Gillard were together in the candy room when word came through that a third show would be

taking place. It seems that the candy maker, Mr Chen, was given no forewarning about this. It may be that it was for this reason that he became upset and announced that he was leaving. Whatever the catalyst was, he marched to the carpark and started packing up his belongings, returned inside, handed over his key to Candyland to Mr Jarvis, and left.

[11] Mrs Jarvis says that she heard the commotion while she was getting changed out of her fairy outfit, became concerned, and decided to find out what was going on. She followed Mr Chen to the carpark to try to persuade him to return to the show. She says that she spoke to Mr Chen for around 10 to 15 minutes, without success. Mrs Jarvis says that by this stage she was upset about what had happened, was tired, had still not had a break, and was feeling unwell. She returned inside and asked her husband to take her home. He said that he could not leave because he would be preparing for the candy show with Mr Gillard in Mr Chen's absence.

[12] Mr Gillard's evidence was that Mrs Jarvis was present at the time Mr Chen announced his departure and that she had thrown a "tantrum" herself, saying that she would be leaving too. Mrs Coker's evidence was to similar effect, although she was not in the room at the time. Both Mr and Mrs Jarvis hotly disputed that she had acted in this way or said that she was leaving.

[13] It is, however, common ground that Mrs Jarvis watched part of the third show, announced after it that it had not been very good and made derogatory remarks about Ms Betts because she had not turned up for work that day. Mr Gillard said that these comments were made in front of customers. Mrs Jarvis was adamant that they had not been. Mr Jarvis thought that they may have been made as the last customers were leaving the room and they would not have heard.

[14] In the intervening period Mrs Coker was busy working in the cafe, trying to keep up a cheerful front for the sake of her customers. She was becoming increasingly disgruntled about what Mrs Jarvis was doing, or failing to do. She says that she had taken particular note of Mrs Jarvis leaving at 2.00 pm and that she believed Mrs Jarvis had gone for good. She said that she was “relieved” by this turn of events. Her evidence was that Mrs Jarvis later returned, much to her

disappointment, and that she disappeared into the kitchen, doing little for the rest of the day. Mrs Jarvis says that she was busily occupied, including clearing dishes in the cafe.

[15] At some stage during the afternoon Mrs Coker says she saw Mr Murphy, who undertook cleaning duties at Candyland, visibly upset and that she overheard him tell Mr Gillard that he was leaving too because Mrs Jarvis had accused him of being hired to spy on the staff. Mrs Jarvis denied telling Mr Murphy any such thing. Mrs Jarvis approached Mr Jarvis again shortly before 4.00 pm and reiterated her earlier request to be taken home. Mr Jarvis told Mr Gillard that he was intending to take his wife home and Mr Gillard concurred, expressing the view that it was a “good idea”. Mr and Mrs Jarvis then left. Mrs Coker was not advised that Mrs Jarvis was going home. Mrs Coker formed the view that Mrs Jarvis had abandoned her employment as her shift did not finish until 5.00 pm and she had done nothing productive since

2.00 pm.

[16] Mrs Jarvis had not been rostered on for 25 July. She spent the day in bed feeling unwell. She texted Mrs Coker at 3.02 pm to advise that she would be in at work the following day and asked whether she was needed for a 9.00 am or 10.00 am start. Mrs Coker did not immediately reply. Mrs Jarvis resent the text message at 7.17 pm and received a response at 10.01 pm saying:

Didn't expect you back. Rostered Amber and Janine working this week instead. [Mr Jarvis] can come in for bagging if he wants

[17] Mrs Jarvis says she was astounded to receive this message and sent a reply advising that she would not leave work without giving proper notice, and that she had never indicated nor said that she was leaving. Further text messages failed to illicit a response from Mrs Coker. Mrs and Mr Jarvis decided that it would be a good idea to go and talk to her to smooth out any issues. They went to Candyland on

27 July. Mrs Jarvis said that she believed that she was still employed at this stage. Mrs Coker was not immediately available but Mr Gillard was. He indicated that he was not prepared to talk to them and that they needed to speak to Mrs Coker, as their employer. Mrs Coker came out into the car park area at around 10.00 am. She had a show to do at 10.30 am, so was pressed for time.

[18] It is apparent that in the intervening period Mrs Coker had spoken to other staff members about what had occurred on 24 July and more generally. She said that she spoke to Mr Gillard, Ms Betts, Ms Lang, her friend Ms Rowe (who had arrived to stay on 24 July and had pitched in to help), and Mr Murphy. Written statements from each of these people were before the Court, each containing stinging criticisms of Mrs Jarvis' conduct on 24 July in addition to a plethora of more generalised concerns.

[19] While Mr and Mrs Jarvis believed that they would be discussing the events of

24 July in an effort to clear the air, Mrs Coker took the opportunity to convert the discussion into a disciplinary meeting. She says that she went through each of the concerns that had been identified in relation to Mrs Jarvis' conduct both relating to, and preceding, the events of 24 July, including that Mrs Jarvis had called Mr Murphy names; that she had used profane language on numerous occasions with staff and members of the public; that she had abandoned her employment on 24 July as well as on an earlier occasion; that she had disobeyed the directions of her employer; that she refused to wear any colour other than black; and that she refused to undertake stock takes.

[20] Unsurprisingly, Mrs Jarvis was caught off guard with this litany of complaints, none of which (as Mrs Coker accepted) had been formally raised with her previously. I pause to note that while Mrs Coker's evidence was that the feedback from other staff comprised a significant part of the list of concerns raised by her on 27 July, Ms Rowe's statement is dated 30 July 2011 and Mr Murphy's evidence was that he did not provide his statement to Mrs Coker until some six weeks after the events of 24 July, and well after Mrs Jarvis had departed from Candyland.

[21] Mr Gillard was becoming increasingly concerned about the 10.30 am show, which Mrs Coker had to get ready for. He came out twice to hurry her along, interrupting the meeting when he did so.

[22] Mrs Coker says that she clearly and distinctly told Mrs Jarvis that she considered that her conduct amounted to serious misconduct and that she was to be

summarily dismissed. Effectively, Mrs Coker saw no point in prolonging the situation as Mrs Jarvis had simply denied everything. Mrs Jarvis says that she did not understand Mrs Coker to be summarily dismissing her, although she accepted that Mrs Coker had said words to this effect. Mrs Jarvis says that she left the meeting thinking she was still employed because

Mrs Coker told her that there would be a further meeting the following week with staff, including Mr Chen, to talk about what had occurred. Mr Jarvis came away with a similar view. They believed that the staff meeting would resolve matters.

[23] Mrs Coker accepted that she had indicated that there would be a meeting but said that she made it clear to Mrs Jarvis that letters of apology would need to be tendered to all staff, including herself. If Mrs Jarvis took this step Mrs Coker would reconsider her employment status. Mrs Jarvis remained unclear as to what the requested apologies might be for and, in the event, none were provided. Mrs Coker says that the failure to provide any letters of apology confirmed in her mind that Mrs Jarvis would not be returning.

[24] No meeting took place, despite Mrs Jarvis sending follow-up correspondence to Mrs Coker, including asking about her rostered shifts. The correspondence went unanswered, as did a request for a mediated meeting. Mrs Coker says that she was too busy to write letters and that she did not see the purpose in doing so as Mrs Jarvis had abandoned her employment and had then been summarily dismissed.

[25] Mrs Jarvis started looking for alternative work in the first week of August. She was offered, and accepted, a role that commenced on 21 September 2011. She sent a text to Mrs Coker on 2 September saying:

... if I give my notice to finish my tenure with you will you deposit my holiday pay as well as [Mr Jarvis'] the same pay week within receiving it let me know ASAP

[26] Mrs Coker said that she was surprised that Mrs Jarvis was resigning after having been dismissed and having earlier abandoned her employment. She surmised that Mrs Jarvis had been "schooled" by the Department of Labour to try to re-characterise what had occurred, although there was nothing to support this interpretation of events. I am satisfied that Mrs Jarvis sent the text message in the

terms she did to ensure that she would get paid her outstanding wages, which had not otherwise been forthcoming. By this time Mrs Jarvis had reluctantly accepted that she would not be going back to Candyland and believed that she had been dismissed. Mrs Coker responded to the text message in the following terms: "Can do". Mrs Jarvis' letter of resignation cited removal from rostered duties as the reason for her resignation.

Analysis

[27] Section 103A of the Act provides that the question of whether a dismissal was justifiable must be determined, on an objective basis, having regard to whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred.

[28] I have no difficulty concluding that Mrs Jarvis was unjustifiably dismissed by Mrs Coker on 27 July 2011. Her dismissal was procedurally and substantively flawed. Dismissal was not what a fair and reasonable employer could have done in all of the circumstances and the process followed fell well short of what is required,

even having regard to the size of the business and the resources available to it.²

[29] The concerns raised on 27 July included that Mrs Jarvis had left work early on 24 July, thereby abandoning her employment. Two timeframes were referred to. First, it was suggested that Mrs Jarvis abandoned her employment at 2.00 pm, when she allegedly stopped work for the day. In evidence Mrs Jarvis denied this, saying that she had spent time clearing up around the cafe, getting changed out of her fairy outfit and trying to persuade Mr Chen to return to do the final show. Mrs Coker put it to her that the last two activities were personal, not work related. I do not consider that anything can be made of this point. As Mrs Jarvis said, she was upset about Mr Chen's outburst and wanted to try to persuade him to return, given he was the only experienced candy maker on site. She believed that she was acting as a team player

in doing so. And while I accept that Mrs Jarvis was not as productive as she might

² Section 103A(3)(a).

otherwise have been, given the surrounding circumstances, she did do some work between 2.00 pm and 4.00 pm.

[30] Second, it was suggested that Mrs Jarvis had abandoned her employment at

4.00 pm when she left, despite the fact that she had been rostered on until 5.00 pm. Again, Mrs Jarvis denied that this was so. She said that she was feeling unwell and was upset over what had occurred that afternoon. She ought to have made sure that Mrs Coker was aware of her movements and her proposal to go home early. However, Mr Gillard (who both Mr and Mrs Jarvis believed had some supervisory status at Candyland) was told that Mr Jarvis was intending to take Mrs Jarvis home at 4.00 pm and Mr Gillard responded by saying that it was a "good idea". Mrs Coker's evidence was that Mr Gillard had advised her of the position at around this time and that he told her that Mrs Jarvis was upset. In the circumstances it is evident that Mrs Jarvis did not abandon her employment on 24 July and Mrs Coker could not reasonably have believed that she had done so.

[31] It is clear that nerves were stretched, no doubt exacerbated by the illness that staff generally appear to have been labouring under around this time, the pressures of the school holidays and the business demands that this placed on everyone, including the key protagonists in events that occurred that day. Even if Mrs Coker genuinely believed that Mrs Jarvis had left and did not intend to return, Mrs Jarvis' text messages the next day (asking whether she should arrive at work at 9.00 am or 10.00 am on 26 July) would have corrected any misapprehension.

[32] Mrs Coker raised a plethora of issues with Mrs Jarvis on 27 July. There were a number of difficulties with her approach, including her reliance on repeat misconduct. In this regard Mrs Coker told Mrs Jarvis that she had abandoned her employment on 24 July and that this was not the first occasion on which she had done so. Mrs Jarvis asked her what she was referring to. Mrs Coker confirmed that it related to events on 24 May 2011 when Mrs Jarvis had left work early. Her mother-in-law had died unexpectedly and she had been asked to purchase some items for the funeral the next day. Mrs Jarvis said that it had been quiet at Candyland, that Mrs Coker was not there, and that Mr Jarvis (who was working at the time) had said that he would cover for her while she went to the shops. Mrs

Coker says that she passed Mrs Jarvis in the driveway and asked where she was going, but that Mrs Jarvis ignored her. In any event, it was common ground that Mrs Coker did not raise any concerns about this matter with Mrs Jarvis at the relevant time. Mrs Coker gave evidence that she had "reluctantly excused her rude behaviour due to her mother in law's death". The first suggestion that Mrs Jarvis had earlier abandoned her employment was made at the meeting on 27 July, well after the day in question.

[33] The Court has previously held that conduct that is condoned cannot be relied on to found subsequent disciplinary action. In *Ashton v Shoreline Hotel* Chief Judge Goddard held that:³

It is well established that an employer who discovers misconduct committed by its employee, yet overlooks that conduct and continues the employee's employment, must be taken to have affirmed the employment and cannot subsequently dismiss the employee in reliance on that conduct.

[34] The extent to which this approach can be definitively stated must now be open to question, including having regard to the relatively recent amendment to s

103A.4 However, in the circumstances of this case the seriousness of Mrs Jarvis'

early departure from work on 24 July could not reasonably have been inflated by way of reference to the earlier incident. Even if Mrs Coker was genuinely concerned about it, it was too late on 27 July to raise it as an example of repeat misconduct, even putting to one side other difficulties associated with the way in which it was raised.

[35] At the 27 July meeting Mrs Coker also raised concerns about Mrs Jarvis' alleged abuse of other staff members. Her comments were based on her own observations of Mrs Jarvis, supplemented by staff feedback. Mrs Coker also made it plain that she considered Mrs Jarvis to be inflexible and unwilling to take on a range of tasks expected of her, including stocktakes. Mr Gillard gave evidence that Mrs Jarvis would have a tantrum every time she was asked to make a cup of coffee and that she had a fondness for telling lurid jokes.

³ [1994] 1 ERNZ 421 at 429.

⁴ Discussed in *B v Virgin Australia (NZ) Employment and Crewing Ltd* [2013] NZEmpC 40 at [139] –

[151].

[36] Mrs Jarvis said that the meeting was conducted in quick-fire fashion, with Mrs Coker disgorging a stream of criticisms which she had little opportunity to respond to. She said that she generally denied the concerns that were raised, but that she was not afforded the chance to substantively respond to the allegations. I accept that that was so. It is plain that Mrs Coker covered an extensive range, and number, of complaints about Mrs Jarvis' conduct dating back to the commencement of her employment at Candyland, in addition to the events of 24 July. The meeting only took 20-25 minutes, and was interrupted twice by Mr Gillard. Eventually he pulled Mrs Coker inside to do the show. Mr Jarvis' evidence, which I accept, was that Mrs Coker did most of the talking at the meeting and was clearly in an agitated state, with her arms folded and talking very fast.

[37] The allegations relating to professionalism and work ethic were strongly denied by Mrs Jarvis, and supported by the evidence of her husband. But even if these concerns were well founded, they were not raised formally with Mrs Jarvis during the course of her employment and no measures were put in place to address them. They could not have supported the decision to dismiss against this backdrop. I accept that Mrs Coker was busy with the business and was having difficulty with a range of issues, including in relation to other staff members. She said that she preferred to deal with staff issues on an informal basis rather than escalating them and that she did not issue formal warnings as it created belligerence in staff, no matter how carefully formulated the warning was. I took it from Mrs Coker's evidence that her preference was to seek to deal with things informally until breaking point was reached. That is not the sort of approach required under the Act.

[38] It is well established that employers are required to identify performance issues with an employee, advise them of the need for improvement and then provide a sufficient period of time to address the issues that have been brought to their attention.⁵ Mrs Coker had not formally raised any performance issues with Mrs Jarvis previously. Mrs Jarvis was not aware that they were issues of concern and nor had she been given the opportunity to address the serious issues that Mrs Coker says

she had.

5 Trotter v Telecom Corporation New Zealand Ltd [1993] NZEmpC 152; [1993] 2 ERNZ 659 at 679.

[39] Mrs Coker raised a number of other concerns at the meeting, including Mrs Jarvis' alleged failure to follow instructions, refusing to take a lunch break as directed, and assisting with the afternoon show when she had been told not to do so and to work in the cafe. Mrs Jarvis did not have the opportunity to provide a substantive response to any of the concerns raised. At the hearing, Mrs Jarvis accepted that Mrs Coker had told her to have her lunch break but that she got diverted by Ms Lang asking for assistance with her show. Rather than immediately taking a break, she assisted Ms Lang and then had a brief break later, as time permitted. It is evident that staff members pitched in to help others as required, consistently with the varied nature of the tasks they were employed to do and the ebb and flow of customer demands throughout the day. Mrs Jarvis said that it was not uncommon for her to work through lunch, and said that if Mrs Coker had made it clear to her that she wanted her to help in the cafe all she had to do was ask. It is apparent that there was a break-down of communication and that, by this time, Mrs Coker was feeling under pressure, was not aware of what Mrs Jarvis was doing, and felt as though she was being left to manage a busy cafe on her own. However, it is also evident that by this stage she was not communicating with Mrs Jarvis and she believed that Mrs Jarvis was upset that she had been told off for taking too long a break at lunch.

[40] Mrs Coker also raised concerns with Mrs Jarvis about customer feedback, including that she had closed the cafe on two previous occasions. These concerns were denied by Mrs Jarvis and were not raised at the time. At the hearing two online reviews were referred to, setting out customer complaints relating to a show some months previously. This feedback was not made available to Mrs Jarvis at the time and it was not sufficiently established that the feedback related to her in any event.

[41] In addition, Mrs Coker alluded to a concern that Mr Murphy had been abused by Mrs Jarvis. Particular reference was made to Mrs Jarvis calling him "spud". Mrs Jarvis said that Mr Murphy had never raised concerns about this with her, and he accepted in evidence that it was a common nickname for him (although he did not

like it). As I have already observed, Mr Murphy's statement relating to events on 24

July appears to have been prepared some six weeks later.⁶

[42] I am satisfied that Mrs Jarvis was taken by surprise at the meeting on 27 July. She was confronted with a litany of complaints, criticisms and concerns. She could not reasonably have been expected to respond them during the course of the meeting, which was impromptu, with no advance warning, no time for preparation, no opportunity for representation, no adequate previous articulation of the concerns and

no warning of the possible consequences for her.⁷ While the meeting had been

initiated at the request of Mr and Mrs Jarvis, it quickly morphed into a disciplinary meeting, conducted in a rapid fire manner, with little scope for considered response. Mrs Jarvis was effectively caught off guard, bombarded with issues and concerns, and was given no realistic opportunity to reply. The meeting culminated in Mrs Coker advising Mrs Jarvis that she had been dismissed.

[43] Mrs Coker said that she formed a clear view that Mrs Jarvis had committed serious misconduct and that she ought to be summarily dismissed. She said that she came to this conclusion after having regard to Mrs Jarvis' denials and carefully considering her explanations. However I do not accept that Mrs Jarvis was given an adequate opportunity to offer an explanation and nor do I accept that Mrs Coker genuinely considered the limited explanations that Mrs Jarvis was able to give.⁸ Mrs Coker went into the meeting with a predetermined view that Mrs Jarvis had committed serious misconduct and that she should not be permitted to return to

work. This is consistent with Mrs Jarvis' removal from the roster and the failure to proactively engage with her following her text messages of 25 July. Mrs Coker gave evidence that cell phone coverage was limited and presented difficulties for communication, but that does not explain why she was able to respond to some messages but not others. In cross examination Mrs Coker agreed that Mrs Jarvis was

'for the high jump' if she returned to work after 24 July. She described her 'delight'

⁶ The statement included reference to other alleged activities on 24 July, which do not appear to have been put to Mrs Jarvis, including the allegation that she had tried to grapple a writhing high pressure hose off him.

⁷ Section 103A(3)(b) and (c).

8 Section 103A(3)(d).

when Mrs Jarvis left on 24 July and how ‘horrified’ she was to see Mrs Jarvis return three days later.

[44] Mrs Jarvis spoke rudely about Ms Betts, and to Mr Jarvis and Mr Gillard following their show. She said that her comments about Ms Betts were borne of frustration but accepted that she should not have spoken as she did. Both she and Mr Jarvis were adamant that customers were departing from the building and would not have overheard the comments. I accept their evidence in this regard. While these comments may have given rise to justifiable disciplinary action against Mrs Jarvis, they would not have otherwise have justified summary dismissal.

[45] I am satisfied that many of the concerns raised about Mrs Jarvis’ conduct and performance, both at the meeting of 27 July and during the course of the hearing, were exaggerated. I agree with Mr Jarvis’ summation that the events of 24 July appear to have represented something of a storm in a tea cup.

[46] Mrs Coker contended that Mrs Jarvis had breached her obligations of good faith in failing to advise her that she was obliged to provide a written agreement and that Candyland would be liable to a fine if no such agreement was provided. I do not consider that Candyland can absolve itself of its own responsibilities by sheeting the blame on to one of its employees. The Act clearly places the responsibility on employers, not employees, and employers are obliged to understand and comply with the law.

[47] Mrs Jarvis was feeling under the weather on 24 July but agreed to come into work to assist Mrs Coker, who was otherwise short staffed. The fact that she worked in these circumstances does not support the decision to dismiss.

[48] The defects in process were significant and resulted in Mrs Jarvis being treated unfairly. The decision to dismiss was unjustified in any event, having regard to the surrounding circumstances.

Remedies

[49] The Authority awarded Mrs Jarvis \$5,000 compensation by way of hurt and humiliation.⁹ I am satisfied that that is an appropriate figure having regard to the circumstances and the impact of the unjustified dismissal on Mrs Jarvis. I am also satisfied that a figure of \$3,748.28 by way of lost remuneration is appropriate, having regard to what Mrs Jarvis would likely have earned in the three month period following 27 July minus the amount she was able to earn in that period (a figure of \$556.72).

[50] Mrs Jarvis took adequate steps to mitigate her losses, seeking and later finding alternative employment.

[51] Mr Nutsford volunteered a concession that Mrs Jarvis had contributed to the situation that led to her dismissal, and submitted that a 10 percent deduction in remedies would be appropriate. I accept that is so having regard to the evidence before the Court, and Mrs Jarvis’ inflammatory conduct on 24 July.

[52] The defendant is entitled to costs in relation to the Authority’s investigation, which were assessed at \$5,250, plus disbursements of \$71.56. I did not take the plaintiff to be disputing that assessment if costs were otherwise appropriate.

Conclusion

[53] The plaintiff must pay the defendant the following sums:

- \$3,748.28 by way of lost remuneration
- \$4,500 compensation under s 123(1)(c)(i) of the Act (being \$5,000 less

10 percent to reflect contribution)

- \$5,250, plus \$71.56 by way of contribution to costs in the Authority

9 Minus 25 per cent for contributory conduct.

[54] The defendant is entitled to costs on the challenge in this Court. If they cannot otherwise be agreed between the parties they may be the subject of an exchange of memoranda with the defendant filing and serving any memoranda and supporting documentation within 30 days of the date of this judgment and the plaintiff filing and serving a reply within a further 20 days.

Judgment signed at 2.30 pm on Tuesday 19 November 2013

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