

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 228
5450861

BETWEEN

AROHA CLARK
Applicant

A N D

GOODMAN FIELDER NEW
ZEALAND LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: W Reid, Advocate for Applicant
S Maxfield, Counsel for Respondent

Date of Meeting: 30-31 July 2015 at Tauranga

Date of Oral
Determination: 31 July 2015

Date of Written
Determination: 4 August 2015

ORAL DETERMINATION OF THE AUTHORITY

- A. Aroha Clark was unjustifiably dismissed by Goodman Fielder New Zealand Limited.**
- B. Goodman Fielder New Zealand Limited is to pay lost remuneration of two months' ordinary time remuneration less PAYE and a further reduction to be made of 50% for Ms Clark's contributory behaviour pursuant to ss.123(b), 124 and 128 of the Employment Relations Act 2000.**
- C. Goodman Fielder New Zealand Limited is to pay compensation of \$2,500 including a reduction of 50% for Ms Clark's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**

D. Costs are reserved. If either party seeks an order for costs, a memorandum will be filed and served 14 days from the date of this determination. The other party will have 14 days to file and serve a reply.

Employment relationship problem

[1] This is an application by Aroha Clark alleging an unjustified dismissal due to timesheet discrepancies. She says this was unfair and there were unreasonable actions by Goodman Fielder New Zealand Limited leading to her dismissal.

Facts leading to dismissal

[2] The facts are largely undisputed. Ms Clark started employment as a merchandiser with the respondent's predecessor on 24 October 2009. At the time she worked in Rotorua, moving to Tauranga in 2010. Her job was to refill supermarket shelves and refrigerators with the respondent's products. When visiting stores, she was required to sign in and out on a sheet. The sign on/sign out sheets were for the purposes of health and safety. At the end of each week, she was also required to fill in a timesheet. The timesheet had columns for her daily start and finish time, the total amount of hours worked per day and at the bottom of the timesheet a place for totalling the number of hours she worked per week.

[3] On 20 August 2012 Ms Clark signed a new employment agreement with the respondent following a restructuring and merger.

[4] In November 2012 Ms Clark was the subject of a disciplinary procedure regarding discrepancies between her timesheets and the store sign-in/sign out sheets, her lack of adherence to her call cycle for her merchandising and signing into stores which were not on that call cycle. The call cycle was a run sheet setting out the store names, dates and times for attending supermarkets for merchandising. She received a final written warning.

[5] On 2 May 2013 a letter was sent out to all merchandisers regarding their adherence to call cycles and signing in and out of stores. The letter emphasised that if call cycles were not being followed, this must be reflected in the merchandiser's timesheets. Ms Clark received and signed a copy of that letter.

[6] In September 2013 Ms Clark was subjected to another disciplinary procedure for verbal harassment of another employee. She received a written warning.

[7] On 9 October 2013 Ms Clark signed a schedule of hours. This document set out her hours of work namely 8 hours per day over 4 days with a start time of 4.45am and a total of 32 hours per week.

[8] On 10 November 2013 Ms Clark was seen by Greg Blackbourn, Regional Field Sales Manager, merchandising in a store which was not part of her call cycle. He made a complaint to Ms Clark's supervisor, Angela Hays-Johnson. From her investigations Ms Hays-Johnson detected problems between Ms Clark's timesheets and call cycle.

[9] This resulted in an invitation to a disciplinary meeting by letter dated 19 November 2013. The allegations were similar to those in the final written warning she received in November 2012 namely discrepancies between timesheets and the store sign-in/sign-out sheets, non-adherence to the merchandiser's call cycle and not signing into stores where she was seen merchandising.

[10] A disciplinary meeting was held on 28 November 2013. The respondent's decision-maker was Michelle Thompson, HR adviser. Ms Clark attended with a support person. At the end of the meeting she was summarily dismissed. A letter confirming the dismissal for serious misconduct was sent out on 29 November 2013.

[11] On 23 February 2014, Ms Clark raised a personal grievance through her then advocate.

[12] On 22 September 2014, a statement of problem was filed in the Authority. The matter was unable to be resolved at mediation and it is now before me for determination.

Issues

[13] The issues are as set out in my Minute dated 12 June 2015 namely:

- (a) Was Ms Clark's conduct what a fair and reasonable employer could have dismissed her for?

- (b) Were the respondent's actions leading to the dismissal what a fair and reasonable employer could have done in all the circumstances?

Parties Positions

[14] The parties' positions are understandably polarised. Ms Clark asserts that the respondent did not sufficiently investigate the allegations against her before dismissing her. She says it had sufficient resources available to do so but did not. She further alleges the employer did not give her a reasonable opportunity to respond to the concerns prior to dismissal. She refers to a "*reconstructed*" schedule Ms Thompson and Ms Hays-Johnson put together during the disciplinary meeting. She submits the employer did not give genuine consideration to her explanation before dismissing her because genuine consideration would have required a reasonable time, not the 25 minutes taken, and further inquiry should have been made about her workload.

[15] Ms Clark makes specific criticisms of the disciplinary meeting process. She asserts from the oral evidence it was clear that the decision-maker, Ms Thompson, had no knowledge of the merchandisers' practices she was investigating and she was reliant upon Ms Hays-Johnson for advice. She also refers to Ms Hays-Johnson oral evidence that this was "*all brand spanking new and terrifying*" to explain why she could not recall the basis upon which she had made the calculations in the reconstructed schedule Ms Thompson relied upon to make her decision. Ms Clark submits it was a case of "*the blind leading the blind*".

[16] Ms Clark also submits Ms Thompson adopted a reverse standard of proof. Ms Thompson's oral evidence gave her some 'credit' for the time spent working in the stores when there were no sign-in or sign-out records but inexplicably shaved off time based on what she asserts were admissions of time spent on various shifts. Where Ms Clark could not prove that she was working, Ms Thompson made the false assumption that she was not.

[17] Ms Clark also asserts that the reconstruction of Ms Clark's hours by Ms Thompson and Ms Hays-Johnson during the disciplinary meeting was entirely speculative. That process lacked fairness because the "*reconstructed*" schedule was not put to Ms Clark for comment prior to the decision to dismiss. She also raised considerable doubt about the time allowed as paid and unpaid breaks and travel time

for an additional trip to Tauranga at the end of the day. It was also unreasonable for the respondent employer to expect Ms Clark to have perfect recall of how her time was spent given this had taken place almost one month prior to the disciplinary meeting.

[18] The respondent submits that the dismissal was both substantively and procedurally justified. It acknowledges that the time totals on the initial spreadsheet analysis prepared by Ms Hays-Johnson prior to the disciplinary meeting were not precise. However, Ms Thompson's conclusion that there were discrepancies, was substantiated based upon a (later) comparison between the sign-in and sign-out sheets and the applicant's timesheets. She also took into account the applicant's statements made during the disciplinary meeting.

[19] The respondent provided a summary of the hours that have been calculated since dismissal based upon that information. Those hours were as follows:

- 4 November 2013 – 6 hours 35 minutes of actual work;
- 6 November 2013 – 6 hours 20 minutes of actual work;
- 10 November 2014 – 6 hours of actual work; and
- 11 November 2013 – 7 hours and 45 minutes of actual work.

[20] The respondent also points to the applicant's awareness of her sign-in and sign-out times having to be accurate and reliable. These were spelled out in the code of conduct, the letter of expectation dated 2 May 2013, the final written warning and Mr Blackbourn's evidence of an instruction that Ms Clark must sign-in and sign-out of every store on every occasion and her own oral evidence that "*everyone had to sign in*".

[21] The respondent points to the fact that timesheet fraud is serious misconduct. In particular, it submits there are no hard and fast rules in relation to the fairness and reasonableness of an inquiry into alleged misconduct and the process which brings about a decision to dismiss referring to *Air New Zealand v. Sutherland*¹. Further it

¹ [1993] 2 ERNZ 10 at [14]

states that an employer's investigation should not be subject to minute or pedantic scrutiny referring to *King v. PPCS Richmond*².

[22] It submits it complied with the requirements set out in s.103A(3) of the Employment Relations Act 2000 (the Act) and carried out a thorough investigation. Mr Blackbourn met with Ms Hayes-Johnson on 11 November 2013 where he advised he had seen Ms Clark merchandising in a store that was not within her call cycle. Ms Hayes-Johnson then became concerned that the applicant was not working to her call cycle and may not have been completing her timesheets correctly. Ms Hayes-Johnson requested a written statement from Mr Blackburn and obtained copies of the sign-in and sign-out books for the affected stores within Ms Clark's call cycle.

[23] The respondent further submits that Ms Clark should have been fully aware of the serious misconduct allegations of timesheet fraud and merchandising in a store outside her call cycle. She had been informed by letter dated 18 November 2013. She was aware of the seriousness and she had been given copies of the relevant documents, including the schedule completed by Ms Hayes-Johnson and the sign-in/sign-out sheets. Ms Clark was given a full, fair and repeated opportunity to respond to the allegations and the material gathered during the investigation. It submits it genuinely considered her comments before reaching a view that the allegations were substantiated and amounted to serious misconduct. Ms Thompson adjourned the disciplinary meeting after hearing Ms Clark's response to the allegations and during that adjournment considered the statements and submissions made by Ms Clark during the meeting but still decided that the allegations were substantiated nonetheless.

[24] If there are any defects in this process, the respondent submits that those are minor and did not result in unfairness to the applicant. In particular it points to its zero tolerance approach to timesheet fraud and that any discrepancy no matter how small is taken seriously. It makes the point that it is not the amount of time discrepancy that affected the proposed disciplinary outcome. Any time discrepancy would have resulted in dismissal no matter what.

² AC 61/05, 19 October 2005 per Colgan J

[25] Finally, it is submitted that even if I was minded to find that the respondent's process was flawed in some way, the probabilities were that this applicant would have been dismissed for serious misconduct anyway.

Law

[26] The applicable law is that set out in s.103A of the Employment Relations Act 2000. The fact Ms Clark's employment was terminated is accepted. Therefore the onus falls upon the respondent employer to justify whether its actions "*were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*"³.

[27] In applying this test, I must consider the matters set out in s.103A(3) of the Act. In summary these matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[28] I must not determine a dismissal is unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly⁴. A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified⁵.

Determination

[29] My findings on these issues are as follows. The serious misconduct leading to dismissal was timesheet fraud only. It was alleged Ms Clark was also dismissed for the serious misconduct of merchandising in a store outside of her call cycle. Based upon the evidence I heard from the decision-maker, Ms Thompson, and the final letter setting out the grounds for dismissal, I have reached the conclusion that it was timesheet fraud alone that Ms Clark was dismissed for.

[30] I also conclude that there has been insufficient investigation of the concerns, and the respondent's concerns were not properly raised to allow this applicant a reasonable opportunity to respond. The reason I have come to that conclusion is because the information before the applicant and decision-maker at the time was erroneous and inadequate.

³ Section 103A(2) of the Act

⁴ Section 103A(5) of the Act

⁵ *Angus v. Ports of Auckland Ltd* [2011] NZEmpC 160 at [26]

[31] The alleged dates when timesheet fraud occurred were 4,6,10 and 11 November 2013. Ms Thompson gave evidence that she had three sources of information before her prior to making that decision. These were the schedule prepared by Ms Hayes-Johnson before the meeting; the sign-in and sign-out sheets for 4-11 November 2013 from the two affected stores; and her impression of Ms Clark's testimony she had heard minutes prior to making the decision. The meeting was being recorded but there was no transcript. Notes were being taken by another employee but were not before Ms Thompson at the time of her decision.

[32] Firstly Ms Thompson made an erroneous assumption Ms Clark had accepted she had not worked eight hours. When the notes and transcript were put to Ms Thompson in cross-examination she could not show where Ms Clark had made the alleged concession.

[33] From the transcript and notes, it also appears that Ms Thompson made the erroneous assumption Ms Clark's breaks were all to be unpaid. It was accepted at hearing Ms Clark was entitled to have two ten minute paid breaks by law within the eight hour work period. Ms Thompson's later calculations did not appear to give any credit for the paid 10 minute breaks. These misapprehensions led to the hours being underestimated and unfairness to Ms Clark in the resulting decision to dismiss.

[34] I have also had considered the schedule prepared by Ms Hayes-Johnson. If there had been small differences which did not underestimate the hours worked, those mistakes may have been safely seen as minor defects which did not result in unfairness. An example is where the schedule incorrectly calculates from the call cycle run schedule the amount of total minutes to be spent in Tauranga as 181 minutes when it was supposed to be 195 minutes. This favours Ms Clark.

[35] Unfortunately from my review of the schedule, the mistakes went further. The schedule omits 20 minutes time spent at the Countdown Tauranga shown in the sign-in sheets on 11 November 2013. These extra minutes would have taken Ms Clark up to 8 hours worked for that day. The schedule arguably omits 50 minutes time shown in the sign in/sign out sheets for 4 November which also takes her up to 8 hours worked for the day. The hours in the schedule worked on 4 and 11 November 2013 in Bethlehem are also incorrect. The impression I had from the schedule was that it underestimated Ms Clark's hours worked by a significant amount.

[36] There were also handwritten remarks on the schedule. When questioned about these, Ms Hayes-Johnson was unable to give any explanation. When Ms Thompson was questioned about the handwritten remarks, she stated they were Ms Hayes-Johnson's and not hers. She too had no explanation for what they may or may not have meant at the time to her. Some appeared to coincide with Ms Clark's remarks at the meeting others did not. Some appeared to be based upon a reconstruction of time by Ms Thompson and/or Ms Hays-Johnson where there were gaps in the sign-in and out sheets. None of these "*reconstructed*" figures were put to Ms Clark prior to the decision being made. This was unfair.

[37] There were also issues with the sign-in/sign out sheets. Ms Clark had raised concerns in the disciplinary meeting about the accuracy and integrity of these sheets, including they may have been falsified with respect to dates etc. The purpose of the sign-in and sign-out sheets was to record who was present on the store premises for health and safety concerns. The purpose was not for time record keeping. The sign-in sheets were not the respondent's documents. It could not attest to their accuracy and integrity. Mr Blackbourn gave evidence these sign-in/sign-out sheets were publicly available. I can only infer there is potential for them to be changed as suggested by the applicant either deliberately or recklessly by others.

[38] The respondent submitted that that does not matter because the decision-maker accepted Ms Clark's view of any variances in any event. I cannot accept that submission given the decision-maker's evidence she believed the sign-in and sign-out sheets were reliable at the time. I can only infer that she preferred the sign-in and out sheets over Ms Clark's allegations about their accuracy and integrity and any variances that may therefore arise. This is confirmed by her lack of further investigation of these concerns.

[39] More puzzling is decision-maker's failure to undertake an accurate re-calculation of the hours worked until after she had made the decision to terminate. She relied upon the erroneous schedule prepared by others to come to her conclusion that there was conduct of timesheet fraud. She had no final schedule of the hours. It appeared her decision was made on the basis of an impression of fraudulent behaviour without any clear factual basis. This was unreasonable.

[40] In my view, all of these defects were not minor and did cause unfairness to the applicant. Aroha Clark was unjustifiably dismissed by Goodman Fielder New Zealand Limited.

Remedies

[41] Having found there is a personal grievance, the applicant is entitled to seek lost remuneration and compensation for hurt and humiliation pursuant to s.123 of the Employment Relations Act 2000.

Lost Remuneration

[42] Ms Clark seeks lost wages of three months' ordinary time. Her evidence was that she did not find employment until April 2014. She gave oral evidence of seeking jobs. She attested to searching daily for work given her dire finances, searching Trademe, asking friends and family and putting her name down for minimum wage jobs picking fruit, undertaking horticultural work and working in a retail shop. She signed up for WINZ in February 2014 due to the stand down period.

[43] The respondent rightly referred to a decision of Chief Judge Colgan in *Allen v. Transpacific Industries Group Ltd t/a Media Smart Ltd*⁶ where Judge Colgan stated:

Dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require in practice a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.

[44] The above evidence more easily accommodates professional employees. From my own experience, Ms Clark's work does not necessarily require any formal application or written correspondence. Fruit picking and casual horticultural work generally involves calling the orchard owner and putting your name on a list, then waiting to be called back for work as and when needed. There would be no paper trail. While she could have signed up for a WINZ benefit earlier, it is speculative what benefit work wise she would have received.

[45] I am satisfied from Ms Clark's oral evidence she mitigated her lost remuneration and there is no basis for me to reduce her remuneration accordingly.

⁶ (2009) 6 NZELR 530

[46] The respondent also submitted that I should take a counter-factual analysis of the amount of remuneration to be awarded. It submits that at best the investigation of the applicant's concerns would have taken two weeks. Thereafter she would most likely have been summarily dismissed having regard to the hours it subsequently calculated she worked. She may have worked 8 hours on 4 and 11 November 2013 but it was clear on 6 and 10 November 2013 she did not. No amount of investigation would have produced the extra hours required for her to show 8 hours that she was paid for.

[47] The Court of Appeal has held there is no automatic entitlement to full compensation and moderation is required in setting awards for lost remuneration and any award of compensation must have regard to the individual circumstances of the particular case. It is also necessary to have regard to the counter-factual analysis and make allowance for all contingencies that might, but for the unjustified dismissal, have resulted in the termination of the applicant's employment⁷. The Court has recently applied "*counter-factual analysis*" in setting the amount of lost remuneration⁸.

[48] I accept that there would have been possibly two weeks required for the respondent to complete any further investigation. I also take into account that Ms Clark would have been given at least two weeks to consider the information before the disciplinary meeting would take place. From the evidence before me, I accept there was little to show on 6 and 10 November 2013, Ms Clark worked the full 8 hours claimed. Taking a counter-factual analysis, it is probable she would have been dismissed 1 to 2 months after the disciplinary meeting. I reduce the award of lost remuneration to two months subject to contributory behaviour.

Compensation

[49] Ms Clark gave evidence of hurt and humiliation resulting from the dismissal. I accept her evidence that she required medical intervention in the form of anti-depressants and counselling. She had worked for this employer for some years. I accept there were ongoing physical consequences of the dismissal. I do not require more corroborative evidence as suggested by the respondent.

⁷ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [36] and [37].

⁸ *Hall v Dionex Pty Ltd* [2015] NZEmpC 29.

[50] In my view, an appropriate amount of compensation would be \$5,000 subject to any reduction for contributory behaviour.

Contributory conduct

[51] The respondent submits that there was contributory conduct requiring a reduction of 100%. It submits that Ms Clark's conduct had bearing on the situation to a very significant degree. The applicant was warned and reminded multiple times, both formally and informally, about recording the time actually worked on her timesheets and not merchandising stores that were not on her call cycle. She was offered assistance and training but chose to decline those offers. In its view, the applicant was the author of her own misfortune.

[52] An employee's conduct may be relevant to remedies. Section 124 of the Act requires me to "*consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance*" in deciding the nature and extent of remedies to be provided in respect of a personal grievance.

[53] In order for contributory behaviour to be taken into account in the reduction of remedies, the actions of the employee must be both causative of the outcome and blameworthy⁹.

[54] In my view, having regard to the disciplinary history between these parties, there was behaviour which was both causative and blameworthy. This requires a reduction in remedies in my view of 50%.

Orders

[55] Accordingly, the following orders are now made:

- (a) Aroha Clark was unjustifiably dismissed by Goodman Fielder New Zealand Limited.
- (b) Goodman Fielder New Zealand Limited is to pay lost remuneration of two months' ordinary time remuneration less PAYE and a further reduction to be made of 50% for Ms Clark's contributory behaviour pursuant to ss.123(b), 124 and 128 of the Employment Relations Act 2000.

⁹ *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at [49]

- (c) Goodman Fielder New Zealand Limited is to pay compensation of \$2,500 including a reduction of 50% for Ms Clark's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.
- (d) Costs are reserved. If either party seeks an order for costs, a memorandum will be filed and served 14 days from the date of this determination. The other party will have 14 days to file and serve a reply.

[56] Counsel and advocates are reminded if they wish to seek costs they are to file copies of their invoices and/or time records. Failure to do so may result in a costs application being declined.

T G Tetitaha
Member of the Employment Relations Authority