

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 214
5590209

BETWEEN KERI CLIFTON
Applicant

A N D ROB KORACH
Respondent

Member of Authority: Peter van Keulen

Representatives: Robert Thompson, Advocate for Applicant
Anthony Marsh, Advocate for Respondent

Investigation Meeting: 6 September 2016 at Christchurch

Submissions Received: 6 September 2016, from the Applicant
9 September 2016, from the Respondent

Date of Determination: 7 December 2016

DETERMINATION OF THE AUTHORITY

- A. Mr Korach unjustifiably dismissed Ms Clifton.**
- B. In settlement of Ms Clifton’s personal grievance for unjustified dismissal Mr Korach must pay her the following sums to which a 10% reduction has been applied for contributing behaviour:**
- (a) \$1,024.55 (gross) as reimbursement for lost wages; and**
- (b) \$9,000.00 (without deduction) as compensation for humiliation, loss of dignity and injury to feelings.**
- C. Mr Korach must pay a penalty totalling \$1,500.00 to the Christchurch office of the Employment Relations Authority. The**

Employment Relations Authority will transfer \$750.00 of this penalty to Ms Clifton and \$750.00 to a Crown bank account.

D. Costs are reserved.

Employment relationship problem

[1] The applicant, Keri Clifton, claims the respondent, Rob Korach, unjustifiably dismissed her from her employment. She says this occurred when she asked for a copy of an individual employment agreement and Mr Korach's response was to say to her (by way of text message) "that won't be necessary. You are no longer working for me".

[2] Ms Clifton seeks reimbursement of wages lost and compensation arising out of her personal grievance for unjustified dismissal. Ms Clifton also seeks a penalty against Mr Korach for failing to provide her with an individual employment agreement.

[3] Mr Korach denies that he unjustifiably dismissed Ms Clifton. He says Ms Clifton resigned prior to the text message that he sent and the text message simply records that fact.

Facts

[4] Ms Clifton and Mr Korach live in the same street. In late July or early August Ms Clifton met Mr Korach whilst out walking her dog. They discussed possible employment opportunities in Mr Korach's cleaning business.

[5] Later, on 4 August 2015, Mr Korach left a business card in Ms Clifton's letterbox asking if she was interested in cleaning work.

[6] On 5 August 2015, Ms Clifton approach Mr Korach and asked about starting work in Mr Korach's business.

[7] Ms Clifton and Mr Korach discussed possible employment and agreed the following terms:

- a. Ms Clifton would be paid \$17.00 per hour;
- b. Ms Clifton would work five hours per week minimum;

- c. There would be transport available for Ms Clifton from Mr Korach's home to sites where cleaning work was undertaken, if required.

Commencement of employment

[8] Ms Clifton commenced employment with Mr Korach on 6 August 2015. Ms Clifton was taken through an induction and was shown the requirements of the job. She undertook some light duties on that day. Ms Clifton was not provided with an employment agreement prior to commencing work or during her employment.

[9] On the following day, 7 August 2015, Mr Korach paid Ms Clifton \$80.00 cash for the first day's work. This included a contribution to travel costs as Ms Clifton had driven her own car to the work site.

[10] Ms Clifton next worked on 11 August 2015. She worked at a retirement village with Teneka Spooner, the second in charge in Mr Korach's business. Mr Korach was very positive about Ms Clifton's work. Mr Korach provided personal protective equipment including a high visibility jacket, boots and socks to Ms Clifton on 11 August 2015.

Mr Korach's concerns

[11] Mr Korach says that during the first few days of Ms Clifton's employment, he observed Ms Clifton's behaviour of swearing and making rude and offensive comments. He says she swore when talking about her other employer, he also says she made inappropriate remarks when trying on her hi-vis jacket. Mr Korach then received a complaint from another employee, Norman Lawrence, about inappropriate comments that Ms Clifton made about a gardener.

[12] Further, on 18 August 2015 when Ms Clifton was cleaning she made another inappropriate comment to a builder working on site, Jason Thwaites.

Ms Clifton's concerns

[13] Ms Clifton describes her work after 11 August 2015, when she worked with Ms Spooner as being like walking on eggshells. She says it was if she always clashed with Ms Spooner who was really stressed out and snapped at her a lot. She complained that if she did anything wrong Ms Spooner would tell Mr Korach rather than work through any issues with her. Ms Clifton says Mr Korach also became

difficult to work with as he would be moody if jobs were not done properly, telling her off and being rude and offensive. Mr Korach would swear at her telling her she was “fucken useless” and saying things like “you girls never fucken listen”.

Work issues

[14] On 16 September 2015 Ms Spooner reported to Mr Korach that Ms Clifton had not carried out instructions that she had been given for a job and when she was asked a second time to do the job, complying with those instructions, she refused. When Mr Korach went to speak to Ms Clifton about this, he observed her wiping electrical switches with a wet microfiber cloth, which he says is a breach of the health and safety requirements. Mr Korach says he then issued Ms Clifton with a verbal warning “on the spot”.

[15] Ms Clifton denies receiving a verbal warning. She does accept that she wiped electrical switches with a damp microfiber cloth, but says this was the standard practice that she was shown in the induction and during the first period of employment. Ms Clifton says Mr Korach did not reprimand her for doing this.

[16] The next day, on 17 September, Mr Korach says he found Ms Clifton wiping electrical switches with a wet microfiber cloth again. He says he reiterated to her that this was a breach of health and safety and raised serious concerns and issues for him. He says he issued another verbal warning to Ms Clifton in response to her actions.

[17] Again, Ms Clifton denies that this occurred and that she was reprimanded at all for using a wet microfiber cloth to wipe an electrical switch.

[18] On 22 September 2015, Ms Clifton was working on a site in Northwood. There was an incident that day where she had a run-in with Ms Spooner over cleaning walls with spray and wipe and then had some difficulty in removing marks off rails. Ms Clifton says that Mr Korach swore at her on this day.

[19] On 23 September 2015 Mr Korach says he met with Ms Spooner and she told him that Ms Clifton had been using a cloth and spray and wipe to clean electrical switches. He also says that Ms Spooner advised him that she had told Ms Clifton to stop but she had refused to do that, so she then took Ms Clifton off that particular job.

[20] In contrast, Ms Spooner's evidence was that she did not complain to Mr Korach that Ms Clifton was using a wet cloth to clean electrical switches rather, she told Mr Korach that she had seen Ms Clifton using spray and wipe and a cloth to clean walls.

[21] On the afternoon of 23 September 2015, Mr Korach called Ms Clifton. He told her he had had a further report of her breaching health and safety requirements for which he had already warned her twice. He told her he wanted to meet with her the next day and that he wanted her to attend health and safety workshops.

[22] Mr Korach says that Ms Clifton then yelled at him, saying "you're just fucking picking on me", "I'm not doing any of your fucking workshops", "you can get stuffed", and "you can stick your job". Mr Korach took this as a resignation.

[23] Ms Clifton says that Mr Korach called her and she was in her car that was parked at the time having just collected her children. She says that Mr Korach said to her that he cannot trust her, she does not listen, and she doesn't do her job properly. He further said she had not cleaned walls properly and had not finished the rails. Ms Clifton says Mr Korach was yelling at her and she was upset and angry. She accepts that she may have said to Mr Korach "you can get stuffed" but she denies swearing at him and denies telling him that he can "stick his job".

[24] Ms Clifton says that Mr Korach was the one who flew off the handle. She also says that he did not mention health and safety workshops as he had alleged, but rather he had said there would be no further work for her until he was back on site.

[25] The next morning Ms Clifton said she saw Mr Korach and Ms Spooner at his place preparing to go to work. They both ignored her, so she went home and called the Department of Labour and then Citizens Advice to get some information. She was concerned because she had been ignored and because Mr Korach was back working but had not contacted her about working that day. Because of the telephone calls that she made, Ms Clifton was told that she needed to obtain a copy of her employment agreement so that she could get advice on Mr Korach's actions.

[26] Therefore, on 24 September 2015 at 2.40pm Ms Clifton sent a text message to Mr Korach requesting that she be given a written employment agreement. In response to that text, Mr Korach sent a text message back that said "well that won't be necessary you are no longer working for me".

[27] Then on 29 September 2015, Ms Clifton sent a text to Mr Korach stating “Rob, since you have fired me I need you to pay my holiday pay ASAP” and then further she stated “... and I will return the company property”.

[28] At 2.45pm that afternoon Mr Korach sent a text back to Ms Clifton stating “thank you. Return the gear in a clean state and I’ll do that ASAP”.

Issues

[29] The first issue to be resolved is, was there a dismissal. In this case that is an assessment of an evidential conflict:

- a. It is clear that Ms Clifton says that Mr Korach dismissed her by way of text message on 24 September 2015.
- b. In contrast, Mr Korach says Ms Clifton resigned in the telephone conversation on the afternoon of 23 September 2015.

[30] If I conclude there was a dismissal, then the next issue to be decided is whether that dismissal was justified. That requires an assessment of the process and the substantive justification for the dismissal.

[31] If I am satisfied that any dismissal was unjustified, then I must turn to consider remedies, in this case reimbursement and compensation, and I must also consider whether there is any contribution which would justify a reduction in any amount awarded.

[32] Finally, I must consider whether a penalty should be imposed for the failure to have an employment agreement.

Was there a dismissal?

[33] I prefer the evidence of Ms Clifton. I found her evidence overall to be more reliable and more likely in terms of the facts that she says occurred. I also found Ms Clifton to be a more credible witness in terms of the consistency of her evidence and her willingness to make appropriate concessions throughout the questions that I asked.

[34] In contrast, Mr Korach’s evidence was discredited by a major inconsistency he was unable to appropriately explain to me. That inconsistency is, his immediate

response to Ms Clifton's allegation of dismissal was to accept that he had dismissed her and then subsequently he justified her dismissal based on her behaviour. So, for example:

- (a) Mr Korach's response to Ms Clifton's text message where she says, "since you have fired me" is for him to say, thank you please return the gear and I will pay you as soon as possible. It is not, as would be expected if he thought she had resigned, for him to say, "I have not fired you, you resigned".
- (b) In a letter dated 18 October 2015, sent in response to a letter of 5 October 2015 from Ms Clifton's advocate, which raised her personal grievance, Mr Korach did not deny dismissal but rather he confirmed that he had dismissed her, saying things such as:
- the text I sent clearly made it known that your client was no longer required, your client's dismissal ...
 - dismissal via text served the purpose in a formal worded way to avoid any personal allegations of any impropriety in relation to being dismissed ...
 - it is my belief that my decisions to dismissed (sic) your client ...
 - I activated the dismissal ...
 - my decision to activate dismissal ...
 - if I had not actioned my decision to release your client from my employ
- (c) In response to the statement of problem based on an unjustified dismissal, Mr Korach states quite simply "dismissal was justified". The statement in reply then sets out grounds that Mr Korach seeks to rely on to justify the dismissal.

[35] In contrast, it is some 10 months later that Mr Korach first raises the suggestion that Ms Clifton resigned, in his brief of evidence dated 4 August 2016.

[36] When I questioned Mr Korach about this inconsistency in his evidence with his pleaded case, the written response to the grievance and his initial response to the allegation by Ms Clifton that he had dismissed her, Mr Korach said he relied on his then adviser who told him that was the best way to present the case.

[37] The problem that I have with this explanation is Mr Korach's very first response to an allegation that he had dismissed Ms Clifton was in the text message. This was unlikely to have been sent based on advice, so the first reaction from Mr Korach directly to Ms Clifton when she said "you have dismissed me" is for him to accept that.

[38] However, if I accept that Mr Korach was relying on advice to present his case in the best possible way, then it appears that he was prepared to manufacture or create a response that he thinks is appropriate rather than simply saying the truth. He was prepared to say "I dismissed Ms Clifton and it was justifiable for various reasons" rather than tell the truth. The appropriate response in the circumstances, if he is to be believed now, would have been to simply say, "she resigned".

[39] The alternative position is that Mr Korach has now created this evidence in order to support his position, as he believes the dismissal is no longer sustainable.

[40] Either way, one of his stated positions is incorrect and Mr Korach has knowingly put it forward because he believes it would be the best response in the circumstances. I believe Mr Korach is prepared to say whatever he believes is necessary to extricate him from this situation.

[41] On this basis, I simply cannot rely on Mr Korach's evidence and prefer the contemporaneous response, including the written responses to the personal grievance letter and the statement of problem.

[42] As I have said, I also prefer the evidence of Ms Clifton in any event as I found her to be a more reliable witness in terms of consistency, concessions and the contemporaneous documents.

[43] On the basis of this assessment of credibility, I find the relevant facts in relation to the question of dismissal to be:

- a. Ms Clifton was a competent worker who carried out her duties as she had been instructed. She was, however, a person who was prepared to make jokes and comments (some of which may have been inappropriate) whilst working. I do not believe she swore regularly; her comments and behaviour were nothing other than what might normally occur in a work environment. Mr Korach may have had some concerns about her conduct or behaviour, but it was exaggerated to try to justify his own actions.
- b. Ms Clifton did use a damp cloth on occasion to wipe electrical switches, but this had never been pointed out to her as a health and safety concern and she was merely undertaking cleaning as she had been shown.
- c. Mr Korach did not reprimand Ms Clifton for the health and safety concerns as he alleged. I believe that in order to support and justify termination, when responding to the personal grievance and the statement of problem, Mr Korach fabricated the health and safety concerns. He then subsequently used these concerns to justify his position that Ms Clifton resigned.
- d. There was a telephone conversation on 23 September 2015. This occurred because Ms Spooner told Mr Korach that Ms Clifton had been using spray and wipe and a cloth to wipe walls. It was this, coupled with other concerns that Mr Korach appeared to have about Ms Clifton's behaviour, which caused him to call her on 23 September.
- e. In the call on 23 September 2015, Mr Korach was angry and raised his voice at Ms Clifton. He told her that there would be no further work until he was on site. I believe that Mr Korach did swear at Ms Clifton, but I am satisfied that Ms Clifton did not swear in response, particularly, as she said, her children were within earshot and she does not swear in front of them. (I find this to be a quite credible explanation.)
- f. Ms Clifton was upset and angry at the telephone call and may well have lashed out by saying to Mr Korach that he can get stuffed, but I

am satisfied that she did not resign in any way in that telephone call. Her actions after the telephone call are simply inconsistent with a resignation taking place at that time.

[44] Based on this, I am satisfied that Mr Korach's text message on 24 September 2015 amounts to a dismissal.

Was the dismissal justified?

[45] The test for justification is set out in s 103A of the Employment Relations Act 2000 (the Act). This is also informed by the duty of good faith particularly as described in s 4A of the Act. The simple point in relation to justification is that an employer must follow a fair process in taking steps against an employee in respect of conduct or capability. And any action taken by way of sanction must be justified based on a finding of what occurred and the severity of the employee's failing (if any).

[46] In terms of process, the law is very clear in setting out the steps required:

- a. the employer must make a satisfactory investigation into the concerns that it has;
- b. the employee must be made aware of those concerns and be provided with the relevant information;
- c. the employee must have a reasonable opportunity to consider the concerns and the information and respond; and
- d. the employer must consider that response before it makes a decision about what has occurred and whether any sanction is appropriate.

[47] It is abundantly clear that Mr Korach failed to take any of the steps required in respect of the concerns he may have had about Ms Clifton's behaviour or work performance as reported to him by Ms Spooner. I am not satisfied that he:

- a. adequately investigated any concerns he had;
- b. presented those concerns appropriately to Ms Clifton for her to consider;

- c. gave Ms Clifton an adequate opportunity to respond to those concerns;
- d. considered any response before he made a decision as to what steps to take.

[48] There was, in my view, a complete failure to follow any process in respect of some concern that Mr Korach may have had about Ms Clifton's work.

[49] It follows that because the process is flawed any decision to terminate Ms Clifton's employment cannot be justified. Notwithstanding this, if Mr Korach believed that Ms Clifton's work was substandard because of the use of spray and wipe and a cloth, this would not have justified termination of her employment. Ms Spooner gave evidence that said she believed Ms Clifton was a capable worker (not as good as her though) and someone who was certainly capable of reaching higher standards, perhaps with a little bit of assistance in some areas. If there were any concerns about Ms Clifton's performance in her role then that should have been addressed through some training rather than dismissal.

[50] In all the circumstances, I am satisfied that the dismissal was not justified.

Remedies

[51] Ms Clifton gave evidence that her actual loss resulting from the dismissal was \$1,138.38. I am satisfied it is appropriate to award this amount to Ms Clifton pursuant to ss 123(1)(b) and 128 of the Act.

[52] Ms Clifton is also entitled to compensation for humiliation, loss of dignity and injury to feelings.

[53] The evidence from Ms Clifton and Mr Clifton includes that the dismissal caused Ms Clifton to be stressed and depressed. There is a doctor's certificate to support this, but it is of limited probative value, as it is based on self-reporting by Ms Clifton. However, it does show that she reported that she felt stress, anxiety and depression manifesting in panic attacks.

[54] There is also evidence that Ms Clifton would not leave the house unless she had to. She became withdrawn and took alternative medication to help her sleep.

[55] Further evidence from Ms Clifton's husband described her as being really depressed, stressed and crying over the smallest things. He said she was irritable and "grumpy". He told of Ms Clifton suffering from anxiety, which he believed led to panic attacks and depression. He also confirmed that she did not want to go out and became withdrawn.

[56] Based on this evidence, I am satisfied that the consequences of dismissal on Ms Clifton were in the middle range of responses to an unjustified dismissal. I put it at the middle of that spectrum because of the lack of clinical diagnosis or medical evidence to support a higher award.

[57] On this basis, I award \$10,000 under s 123(1)(c)(i) of the Act.

[58] I must now consider contribution under s 124 of the Act.

[59] I am not satisfied that Ms Clifton's behaviour at work is in any way blameworthy or culpable in such a way that it contributed to her grievance. I do, however, accept that her response to Mr Korach in the call on 23 September 2015, is culpable and blameworthy and did contribute to her grievance.

[60] I assess contribution at 10% and therefore reduce the remedies I award appropriately.

Penalty

[61] As the claim for a penalty to be imposed for the failure to have an employment agreement is a breach of a minimum code standard, I am required to consider the judicial guidance set out in *Borsboom v. Preet PVT Ltd and Warrington Discount Tobacco Ltd*¹.

[62] This decision sets out a four step analysis for penalties and I will consider each step.

Step 1: identification of nature and number of breaches

[63] Section 63A of the Act requires an employer to provide an employee with a written employment agreement. An employee who fails to do so is liable to a penalty imposed by the Authority.

¹ [2016] NZEmpC 143

[64] The requirement under s 63A of the Act is a fundamental and basic requirement and cannot be excused. The purpose of having an employment agreement so that an employee can be properly informed of his or her rights and obligations.

[65] There is no dispute in the evidence that Mr Korach failed to provide Ms Clifton with an employment agreement. In fact, he did not have employment agreements for any of his employees, but subsequently remedied that situation.

[66] I am therefore satisfied that I should impose a penalty for breach of s 63A of the Act. While I am aware that there were other employees in Mr Korach's employ who did not have employment agreements, this matter concerns only one breach of s 63A. The maximum penalty I can award is \$10,000 and this is the starting point for my consideration of the penalty to be imposed.

Step 2 : assessment of the severity of the breach – aggravating and mitigating factors

[67] I am not aware of any aggravating factors in respect of this claim other than perhaps the fact that other employees do not have an employment agreement.

[68] I am satisfied there was not an ulterior motive in not having employment agreements, i.e. Mr Korach was not keeping information from employees or trying to avoid his obligations in respect of employees. It was clear that the terms of employment had been agreed with Ms Clifton; the terms simply had not been recorded in an appropriate agreement and signed.

[69] I do not believe Ms Clifton suffered any direct loss because of not having a written employment agreement, but she may have had some more clarity about her rights at the time of the telephone conversation on 23 September 2015. However, I am not satisfied that having a written employment agreement would have changed the outcome or given her more status in respect of protecting her position or avoiding any dismissal.

[70] Reflecting on the aggravating and mitigating factors, I am satisfied that the failure to provide a written employment agreement in this instance is not a serious breach, but it is a breach of a fundamental requirement.

[71] Weighing up all of the factors, I consider the penalty should provisionally set at \$2,000.

Step 3: consider the defendant's financial circumstances

[72] I have no evidence of Mr Korach's financial circumstances and therefore cannot consider any reduction in the amount of the penalty to be awarded on that basis.

Step 4: proportionality of outcome

[73] Stepping back I must consider the provisional level of the penalty against all of the circumstances to consider whether it is proportionate to the seriousness of the breach and any harm occasioned by the breach. I must keep in mind the need to have a deterrent effect and that a penalty is a punishment but must weigh against that the need to ensure that penalties are not unrealistically high.

[74] In this case, I am satisfied that a small reduction is appropriate when considering the proportionality of the outcome. I reduce the penalty from \$2,000.00 to \$1,500.00.

Should the penalty be paid to Ms Clifton?

[75] Section 136(1) of the Act states that every penalty recovered should be paid into the Authority and must be paid by the Authority to a Crown bank account. Under s 136(2) I can order that any penalty, or part of a penalty, be paid to a person.

[76] In this case I am satisfied that Ms Clifton did suffer some detriment by not having a written employment agreement because she was unable to take advice immediately about her position and had no clarity around her rights in respect of what Mr Korach had said to her at the time. Whilst she has received some compensation with respect to this to the extent that it is based on her unjustified dismissal claim, I am satisfied that part of the penalty should be paid to her to reflect this. In the circumstances, I think it is appropriate that Ms Clifton be paid \$750.00 from the penalty.

Costs

[77] Costs are reserved.

[78] The parties are encouraged to try and resolve any issue of costs between themselves.

[79] If a determination on costs is needed, then either party seeking costs may serve a memorandum within 28 days of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply. I will not consider any application for costs outside this timetable unless leave is sought and granted.

Peter van Keulen
Member of the Employment Relations Authority