

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Robert Phillip Dilloway (Applicant)
AND Eurest New Zealand Limited (Respondent)
REPRESENTATIVES Robert Phillip Dilloway In person
David France, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 13 September 2005
DATE OF DETERMINATION 29 September 2005

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved by the following orders:-

- A. Eurest New Zealand Limited is ordered to pay to Robert Dilloway the net sum of \$3,059.06 as reimbursement pursuant to section 123(1)(b) of the Employment Relations Act 2000.**
 - B. Eurest New Zealand Limited is ordered to pay to Robert Dilloway the sum of \$10,000.00 as compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**
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The problem

[1] Eurest New Zealand Limited (“Eurest”) dismissed Mr Robert Dilloway (“Mr Dilloway”) from his employment as a Cook for serious misconduct. Mr Dilloway now challenges that dismissal and seeks orders for reimbursement and compensation. Eurest is contracted to provide food and catering services to Hodgson House, a retirement home in Tauranga. Mr Dilloway was employed by Eurest as a Cook at Hodgson House. He commenced the employment on 12 April 2002.

[2] The parties were unable to resolve the differences between them by the use of mediation.

The facts

[3] By letter dated 14 July 2004, Area Manager Mr Murray Deed (“Mr Deed”) confirmed the reasons for Mr Dilloway’s dismissal:-

In conclusion Robert we find that you have breached the Eurest code of Conduct by reason of serious misconduct in the following area.

Failure to follow safety requirements

Boisterous or disruptive behaviour, being discourteous, aggressive or argumentative to employees, management, clients or customers.

Actions of the employee deemed to damage the relationship between Eurest and its clients and or customers would be deemed to be serious misconduct resulting in instant dismissal.

We find that we have no other alternative but to dismiss you from your employment with Eurest.

Please return your uniforms and any keys as soon as possible in order that your final pay including holiday pay is processed.

Yours sincerely

*Murray Deed
Area Manager
Eurest New Zealand*

[4] Mr Deed had previously written to Mr Dilloway by letter dated 5 July 2004 specifying certain allegations against Mr Dilloway and requiring him to attend a disciplinary meeting on Thursday 8 July 2004. The allegations were specified as follows:-

The alleged incidents are:

Breach of Service standards - no snacks available for diabetic residents

Breaching Health and Safety standards by having a young child in the kitchen

Using threatening and intimidating behaviour towards a Hodgson House employee.

Harassing Eurest staff to write letters of support for yourself after the last time we spoke.

The above allegations must be taken seriously as they may constitute serious misconduct under Eurest’s code of conduct.

If the incidents are proven they could lead to your dismissal from Euresst employment.

*Yours sincerely
Murray Deed.*

[5] Mr Deed says he telephoned Mr Dilloway the same day to discuss the matters set out in the letter. Mr Dilloway denies any telephone discussion with Mr Deed on that day.

[6] Mr Dilloway's supervisor Ms Jacqueline Tracey Quinn ("Ms Quinn") had raised various matters about Mr Dilloway's performance with Mr Deed. Ms Quinn was happy for Mr Deed to have a "quiet word" with Mr Dilloway about such matters.

[7] Mr Deed met with Mr Dilloway on 11 June 2004 for what Mr Deed describes as a consultative discussion. Mr Dilloway largely rejected Ms Quinn's concerns about his performance. He made allegations against Ms Quinn saying that she bullied other workers and was bullying him. Mr Deed said he would pursue both Ms Quinn's and Mr Dilloway's concerns. Mr Dilloway subsequently sought references from his co-workers.

[8] When Mr Deed informed Ms Quinn of Mr Dilloway's allegations against her, she denied them.

[9] Ms Quinn tells the Authority that staff members then approached her telling her that Mr Dilloway had been harassing them for letters supporting his character. She says the staff members also told her Mr Dilloway had asked them to say bad things about her. Ms Quinn presented a letter to Mr Deed signed by herself and two employees Ms Jami Ebsworth (Ms Quinn's niece)("Ms Ebsworth") and Mr Robin Lovell ("Mr Lovell"). The signed letter states:-

*Rob following people out on breaks wanting them to write statements
Staff feels this is uncomfortable situation.
Rob trying to undermine me constantly
Telling staff to do things I have told them not to.
Telling Jami to use wand to mash potato - releases the starch makes them like glue.*

*H.H carer asked about Robin
Rob and Debbie have put across
That Robin attracted to older women
After some of the lady residents
Told carers to watch out or he
Will probably get into bed with them (residents)
Very dangerous accusation.*

[10] On Monday 5 July 2004, Ms Quinn received a telephone call from Hodgson House Senior Registered Nurse Ms Cecily Williams ("Nurse Williams"). Ms Quinn says that Nurse Williams complained that there had been no diabetic sandwiches for diabetics residents and that when she had raised the matter with Mr Dilloway, he had been abusive, intimidating and threatening towards her. Ms Quinn told Nurse Williams to file an incident report. Ms Quinn reported the matter to Mr Deed on 5 July 2004. Mr Deed then sent the letter of 5 July 2004 to Mr Dilloway.

[11] Nurse Williams faxed her incident report to Mr Deed at 10.20 am. That report outlined events at 2.35 pm on Sunday 4 July 2004 as follows:-

I approached Rob to check sandwiches would be available for PM diabetics as none had been left out for Sat Night. Rob said they were very busy on Sat night and indicated they had been overlooked. A(sic) I was talking with him I noticed a small girl of about 8 years old in and about the kitchen. I made the

statement that "The Kitchen was not the place for the little girl". At this point it was quite evident that he was no happy as he questioned my statement and said (I believe) "What do you mean" I then stated the kitchen was for authorised staff and boundaries marked and a red line across the doorway. I suggested she could watch TV or colour in. His posture and facial expression changed to one of someone becoming angry. He stepped towards me again asking me "what do you mean are you saying she should not be there?" I explained "it was a health and safety issue" and as I am on the committee we have to do our job. Rob was definitely wanting an argument as he stepped towards me with aggressive body language and pointing his finger. I told him as I stepped backwards away from him and my hands up palms towards him that I did not wish to argue about the matter and I would take the matter through the correct channels. He then shouted and pointed his finger as he said "Oh yes I know you this would be your style". Taken back by this I asked What? And he repeated what he had just said. I had backed off by several paces by this time then turned and walked away. I felt threatened intimidated and was left quite shaken. I like to think I am a fair and reasonable person and enjoy working in a team.

[12] The report was also completed by Hodgson House manager Mr Joop Weiringa ("Mr Weiringa") with the comment:-

This issue raises serious concerns about staff safety, H/S issues, and service performance.

Mr Deed discussed matters with Mr Weiringa prior to meeting with Mr Dilloway.

[13] Mr Deed spoke with Nurse Williams on the morning of 8 July 2004. Nurse Williams told Mr Deed that she was very frightened by Mr Dilloway's behaviour and said that she would have trouble working with him in the future, and if she did she would make sure that she had another Hodgson House or Eurest employee with her when speaking to him. She said that it was up to Eurest as to what action it would take against Mr Dilloway.

[14] Mr Deed says he also spoke with Mr Lovell who said he felt awkward about Mr Dilloway's approaches for a testimonial.

[15] The disciplinary meeting with Mr Dilloway was held at about 11.00 am on 8 July 2004. Ms Quinn attended as note taker. Mr Dilloway attended with his partner Ms Deborah Elizabeth Galbraith ("Ms Galbraith").

[16] Mr Dilloway was first asked about the sandwiches for the diabetic residents. Mr Dilloway said that staff were particularly busy on the evening in question and the situation was very stressful. He had overlooked the diabetic sandwiches but said that 99% of residents had received their meals. Mr Deed told him that failing to provide diabetic food was putting residents' health at a huge risk.

[17] In relation to the child in the kitchen, Mr Dilloway explained that there was no other carer available for the child and that while in the kitchen, the child had a hat on and was being supervised. He also said that none of the stoves were on. Mr Deed explained there were health and safety issues involved and only authorised personnel were permitted in the kitchen. I find that Mr Dilloway eventually acknowledged that it was inappropriate for a child to be in the kitchen.

[18] In relation to the allegation concerning Nurse Williams, Mr Dilloway denied any kind of unpleasant interaction with Nurse Williams. He confirmed that the nurse had enquired about the diabetic sandwiches but he denied any further discussion whether unpleasant or otherwise. He said the discussion terminated when Nurse Williams became indignant and declined to pursue the discussion with him any further. He said she then walked off in a huff.

[19] As concerns the allegation of harassing staff, Mr Dilloway denied the allegation.

[20] Mr Deed advised Mr Weiringa that Mr Dilloway had been suspended from Friday 9 July 2004 until Thursday 15 July 2004.

[21] Mr Deed says he met with Mr Dilloway and Ms Galbraith on 15 July 2004 to advise his decision that Mr Dilloway's employment was terminated. He also says he handed Mr Dilloway the termination letter dated 14 July 2004. Mr Dilloway denied that any such meeting occurred. He says he received the dismissal letter in the mail.

Discussion

[22] I accept Mr Dilloway's protestations that he was not presented with any evidence or information about the allegations that were made against him. I find that he was not provided in advance of the disciplinary meeting held on 8 July 2004, with any of the interviews Mr Deed tells the Authority he carried out before that meeting. Nor was Mr Dilloway provided with Nurse Williams' incident report or the complaint of harassment letter signed by Ms Quinn and the two other employees.

[23] Equally unacceptable was the lack of detail in the allegation letter of 5 July 2004. I do not see how Eurest could have expected Mr Dilloway to attend the disciplinary meeting and give any meaningful responses. The allegations in the letter were bare and unspecified.

[24] In my view that allegations relating to the sandwiches and the child in the kitchen do not constitute serious misconduct. I would not consider that any reasonable employer would regard those matters as sufficiently grave as to warrant immediate dismissal. They were matters that ought to have been dealt with by warning.

[25] As concerns the allegation of harassment, I do not consider it reasonable for Mr Deed to have concluded that Mr Dilloway had harassed staff because I do not accept that he had any evidence of that. The letter signed by staff is no evidence of harassment and nor was the statement from Mr Lovell.

[26] That leaves the remaining allegation of using threatening and intimidating behaviour towards Nurse Williams. What is apparent is that Mr Dilloway makes two statements to Nurse Williams "*what do you mean are you saying she should not be there?*" and "*Oh yes I know you this would be your style*".

[27] Nurse Williams says those statements were accompanied by Mr Dilloway stepping towards her and "*aggressive body language and pointing his finger*". She says she "*felt threatened intimidated and was left quite shaken.*"

[28] I tend to the view that there was a robust discussion between Mr Dilloway and Nurse Williams. Nurse Williams was sufficiently composed to declare resolutely that she would pursue matters through the correct channels. She was indignant enough to also inform Mr Dilloway that she would not discuss matters further with him. Considering matters objectively, I do not accept that Mr Dilloway's behaviour as alleged by Nurse Williams, was sufficiently serious as to warrant immediate dismissal.

[29] In deciding whether Mr Dilloway's overall actions can constitute good reason for summary dismissal, regard must be had to the nature and degree of the misbehaviour and to its significance in relation to Eurest's business and to Mr Dilloway's position as cook. In making the factual assessment, I weigh Mr Dilloway's conduct and, viewing the matter objectively, its effect on the maintenance of the confidential relationship between him and Eurest as against the severe

consequences of immediate dismissal. If it is to warrant that response the misbehaviour must go to the heart or root of the contract between them.

[30] There are varying degrees of misconduct and it is only serious misconduct that can justify termination of employment. Such actions must be ones which cause a loss of trust and confidence in the employee. This means not a loss of confidence in the employee's nous or competence but a loss of confidence in the employee's faithfulness.

[31] I do not regard it reasonable that Euresst could consider Mr Dilloway's actions as constituting a complete and irremediable loss of trust and confidence in him. Summary dismissal was not the appropriate response.

Determination

[32] I am unable to say that Mr Dilloway's conduct was sufficiently grave as to require his immediate dismissal. Nor do I consider that his actions can reasonably be regarded as evidencing a loss of confidence in his continuing faithful service. **I therefore conclude his dismissal was unjustifiable and he has a personal grievance. He is entitled to remedies in resolution of that personal grievance.**

Remedies

[33] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Employment Relations Act 2000 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 actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I am unable to say that Mr Dilloway's actions were blameworthy and nor do I consider that his actions require any reduction. There will be no reduction for contribution.

Reimbursement

[34] I am satisfied that Mr Dilloway has lost remuneration as a result of the personal grievance. He would have continued to earn his wages had Euresst not acted unlawfully. Mr Dilloway says that he became clinically depressed after his dismissal entitling him to a sickness benefit from late September 2004.

[35] He claims lost wages in the sum of \$3,059.16 being three months net wages. **I order Euresst New Zealand Limited to pay to Robert Dilloway \$3,059.16 net wages.**

Compensation

[36] Mr Dilloway gives evidence of the effect of the personal grievance on him. He tells me he suffers panic attacks and clinical depression. I accept however, that he suffered panic attacks prior to his dismissal. He says that he became depressed after his dismissal from Euresst. He has not worked since his employment with Euresst ended. He says he has lost his self-esteem and that his career in cookery is now at an end. He is receiving counselling and assistance to enable him to eventually return to the workforce.

[37] I accept that Mr Dilloway has suffered humiliation, loss of dignity and injury to his feelings. He claims \$10,000.00. **I order Euresst New Zealand Limited to pay to Robert Dilloway the sum of \$10,000.00 as compensation.**

[38] Mr Dilloway raised other grievances which he accepts he cannot pursue because they were not raised with Euresst within 90 days of them occurring.

[39] I do not expect that I should be asked to address costs as Mr Dilloway was not represented by professional advocate.

Leon Robinson
Member of Employment Relations Authority