

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 43/10
5274796

BETWEEN

BARBARA DOHERTY
Applicant

AND

PARKERS BUSINESS
SOLUTIONS LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Steve McManus, Advocate for Applicant
Susheel Dutt, Advocate for Respondent
Investigation Meeting: 1 February 2010 at Blenheim
Determination: 2 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Doherty) alleges both unjustified dismissal and disadvantage as a consequence of unjustified actions by her employer the respondent (Parkers). The disadvantage grievance revolves around her claim that she was subjected to bullying by a particular partner/director of Parkers, Mr Dutt. The dismissal grievance concerns her claim that, although she was dismissed for redundancy, that dismissal was not the decision of a fair and reasonable employer.

[2] Ms Doherty commenced her employment with Parkers in late July 2007 doing casual administrative tasks. I am satisfied that, on the evidence before the Authority, by the end of November that year she was in full time permanent employment with Parkers, notwithstanding Parkers' contention that Ms Doherty did not become a permanent member of the staff until the following February. That may well have

been the date at which matters were to some extent formalised in terms of the employment relationship, but certainly the facts disclose that a full span of regular hours was being worked from the end of November 2007.

[3] Ms Doherty kept a diary of her exchanges with Mr Dutt and that material was made available to the Authority. The effect of it is to catalogue a succession of unpleasant exchanges between Mr Dutt and Ms Doherty. Mr Dutt says that these exchanges were performance related while Ms Doherty argued that Mr Dutt's manner was offensive, demeaning and dismissive and was driven by her refusal to be compliant and do what she was told.

[4] In particular, Ms Doherty refers to Parkers' refusal to provide her with a completed employment agreement; for its part, Parkers says that it endeavoured to meet its obligations in this regard but that it could never reach full agreement with Ms Doherty with both issues to do with the hourly rate and the relevant start date remaining unresolved.

[5] In December 2008, Ms Doherty joined the Amalgamated Workers' Union (AWUNZ) because she felt that she needed the support of a union in her increasingly distressing engagements with Parkers. Immediately after joining the union, Ms Doherty made a further attempt to finalise her employment agreement dispute by speaking with Mr Dutt, and was unsuccessful. Mr McManus, AWUNZ's organiser, then rang Mr Dutt who hung up on Mr McManus once it became clear what the subject matter was.

[6] Eventually, a meeting was arranged between one of the other directors of Parkers (Mr Robbie) on 15 June 2009. The evidence available to the Authority suggests that this meeting, wherein Mr McManus represented Ms Doherty, went well save for the surprising revelation of a warning letter on Ms Doherty's personal file which she stoutly maintained (and I accept) she had never seen. In his evidence before the Authority, Mr Dutt was equally adamant that he had handed a copy of the letter to Ms Doherty but I have to say on this and a number of other important matters of difference between the two principal protagonists, I prefer Ms Doherty's recollection of events.

[7] There had been a first warning as well but there is no dispute that this warning was actually provided to Ms Doherty. There is dispute, however, about whether that

first warning was appropriate or not with Ms Doherty providing a spirited defence of her position and rejecting Parkers' various complaints as without foundation or, in all the circumstances, unreasonable.

[8] Then, on 14 July 2009, Ms Doherty was instructed by Mr Dutt to prepare a written explanation of her behaviour in leaving certain papers on a partner's desk. On 20 July 2009 a letter issued from Parkers indicated a restructuring proposal was under consideration and that meetings with staff would follow. Ms Doherty claims she was denied a private meeting with Parkers to comment on this proposal. Four days later, Ms Doherty was ordered from the premises by Mr Dutt and on 29 July 2009, there was a meeting between Mr Dutt and Ms Doherty with Mr McManus in attendance.

[9] On 18 August 2009, Ms Doherty was handed a letter by one of the other directors of Parkers dismissing her on the grounds of redundancy.

[10] Mr Dutt told the Authority that Ms Doherty was dismissed after a perfectly straightforward restructuring proposal was considered and implemented. He denied that there was anything untoward in Ms Doherty's termination and also denied her allegations of bullying.

[11] The matter proceeded to the Authority after a mediation had not been able to proceed because Mr Dutt sought to have an alternative mediator to the mediator supplied by the Department of Labour.

Issues

[12] The first issue for determination is whether Ms Doherty was bullied in her employment. Then the Authority must determine if the restructuring proposal by which Ms Doherty was dismissed from her employment was a genuine one, proceeded with using a fair process.

Was Ms Doherty bullied?

[13] I am satisfied on the evidence before the Authority that Ms Doherty was indeed bullied by Mr Dutt. There is ample evidence from Ms Doherty herself of the exchanges that she had with Mr Dutt and the unsatisfactory nature of those exchanges. I am not persuaded by Mr Dutt's evidence that these exchanges were a proper exercise of employer direction and prefer Ms Doherty's evidence.

[14] I am drawn to this conclusion partly because of the wealth of evidence produced by Ms Doherty on these unpleasant exchanges, partly by the evidence of Mr Boon and partly by Mr Dutt's own behaviour at the investigation meeting. I comment on each of these matters in turn now.

[15] As to Ms Doherty's own evidence, I note that she kept careful written records during the employment and has made these records available to me. I am satisfied that they are more or less contemporaneous accounts of her exchanges with Mr Dutt. I accept Mr Dutt's evidence that he was simply endeavouring to get Ms Doherty to address matters pertaining to the employment, but I do not accept that the nature and extent of his exchanges with Ms Doherty were the behaviour of a fair and reasonable employer. Even if it were true that each and every one of the occasions when Mr Dutt spoke to Ms Doherty related to poor or inadequate performance on her part, the fact that Mr Dutt went as far as he did in his exchanges with Ms Doherty seems to me to confirm the nature of her allegations. In particular, I note that there is no dispute that, for instance, Mr Dutt ordered Ms Doherty to leave the premises on one occasion, it seems because he was simply cross with her, and on another he demanded a written explanation for something that she had allegedly done. Taken by themselves, those examples might not seem too extreme, but in the context of the other evidence, I am satisfied that Mr Dutt went too far.

[16] That other evidence needs to be considered now. First, Mr Dutt's own behaviour at the investigation meeting tended to give powerful support to Ms Doherty's complaint. Mr Dutt spoke over me on a regular basis, spoke over Mr McManus who acted for Ms Doherty in the investigation meeting, and interrupted Ms Doherty on a regular basis during the course of the proceedings as well. Even when I politely drew to his attention the fact that he was demonstrating the very behaviour that Ms Doherty was complaining about, he seemed unable to rein himself in and continued with the behaviour complained of. During the course of the investigation meeting, Mr Dutt adopted an aggressive and hectoring tone, talked over the top of others, quarrelled with Ms Doherty's evidence while she was giving it and asserted from time to time that her evidence was a lie. As her evidence on his behaviour was consistent with the examples that he himself showed at the investigation meeting and the evidence of Mr Boon, which I come to shortly, I prefer the evidence of Ms Doherty rather than Mr Dutt.

[17] As to the evidence of Mr Boon, it is worth recording first that Mr Boon was a partner in Parkers at the time that Ms Doherty was in the employment and that he left the partnership about the time that she was dismissed, allegedly for redundancy. It follows that Mr Boon has, or may have, issues with the partnership which require the Authority to treat his evidence with some care. At the investigation meeting, a letter from Mr Boon dated 14 September 2009 (and thus written contemporaneously with Ms Doherty's dismissal) was tabled by Mr McManus. Mr Dutt for Parkers had not seen the letter before; nor was it filed in the Authority in advance of the investigation meeting. Copies of the letter were made for the Authority and for Mr Dutt and I undertook to speak with Mr Boon and to make available to the parties the results of that discussion. I spoke with Mr Boon by telephone on 5 February 2010, some few days after the investigation meeting. I made notes of what Mr Boon told me and I issued a minute to the parties dated 9 February 2010 in which I set out the substance of that telephone conversation. I invited the parties to consider that material in their closing submissions.

[18] Having spoken personally to Mr Boon, I am satisfied that the evidence that he tendered can be relied upon. In essence, Mr Boon says that Mr Dutt (his former partner) made his dislike for Ms Doherty well known and that he told the other partners of his (Mr Dutt's) intention to dismiss Ms Doherty. Mr Boon went on to say that *it became apparent to me that Mr Dutt had an intense dislike for Barbara [Ms Doherty]. He proposed to "restructure" her out of the office as an easier alternative to redundancy [sic] or dismissal.*

[19] Mr Boon also confirmed unequivocally that Mr Dutt *regularly bullied Barbara [Ms Doherty]*. Significantly, Mr Boon intimated to me in the telephone discussion I had with him that a major reason for his decision to quit the partnership was the way that Ms Doherty was treated by Mr Dutt.

Was Ms Doherty unjustifiably dismissed?

[20] The paper process which Parkers used for developing their restructure proposal appears, on its face, to be a standard and practical one. There is a first letter to staff written by the practice indicating the need for a restructure occasioned by the economic recession and proposing a timeline in which the issue could be developed and addressed and responses had from individual staff. Then, some time later, a

subsequent letter to Ms Doherty indicates that, after reflection, the partnership had decided to dispense with her services as a consequence of the restructure.

[21] The first of these letters was dated 20 July 2009 and the letter indicating that Ms Doherty was dismissed for redundancy is dated 18 August 2009.

[22] The difficulty with the paper process I have just described is that I am satisfied Ms Doherty never had an opportunity to have any genuine input into the restructuring proposal. As the Chief Judge held in *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825: *Consultation required more than simply a prior notification, and sufficient time was to be allowed. It was never to be treated as a mere formality. Sufficiently precise information was to be given to allow employees to state a view, together with a reasonable time and opportunity to do so. That might include an opportunity to state views in writing or orally. Genuine efforts had to be made to accommodate the views of the employees, and there was a tendency to at least seek consensus. A proposal was not to be decided or acted upon until after the consultation was completed, at paragraph 62.*

[23] Mr Dutt relied upon a staff meeting at which all the staff were present for the appropriate feedback to take place, but he seemed oblivious of the reality that, in a potential redundancy situation, staff were unlikely to address, in a pertinent way, issues to do with their continued employment in the presence of co-workers. This is particularly the case, of course, when staff may want to advance an argument to the employer that, by reason of their multi-skilling or other relevant factors, they should remain in the employment while some other co-worker should not. This is the reality of many redundancy situations and an employer who sets up a process that expects staff to speak candidly in front of their co-workers is simply not offering a fair process.

[24] It is noteworthy that Ms Doherty was the only person dismissed for redundancy and, given the remarks made in his evidence by Mr Boon, it is difficult to not conclude that this was simply a way of getting rid of Ms Doherty who, for whatever reason, had come to irritate Mr Dutt. I conclude on the evidence before the Authority that the redundancy was in truth not genuine, but I can certainly conclude that the process adopted by Parkers was completely unfair, giving Ms Doherty no genuine opportunity whatsoever to have input into the proposed restructure. Indeed, by virtue of my conclusion that the process was so fatally flawed as to be completely

unfair, I conclude that, applying the test required by the law set out in s.103A of the Employment Relations Act 2000 and the helpful observations of His Honour the Chief Judge in *Simpsons Farms Ltd v Aberhart*, this termination for redundancy was not a termination that a fair and reasonable employer would undertake in all the circumstances that applied at the relevant time.

Determination

[25] It follows from the foregoing sections of the determination that I conclude that Ms Doherty has both a personal grievance for disadvantage, as a consequence of unjustified actions by Parkers in respect of the bullying allegation which I find proved, and also has been the victim of an unjustified dismissal as a consequence of the failure of Parkers to meet the legal test required by s.103A of the Employment Relations Act 2000.

[26] In terms of s.124 of the Employment Relations Act 2000, I am required to consider whether Ms Doherty contributed to the situation giving rise to either personal grievance. It is clear to me that Ms Doherty stands up to herself and would question things that she does not think are right, but I do not consider that behaviour culpable. I do not consider that in this respect or indeed any other, Ms Doherty is in any way responsible for the circumstances giving rise to her personal grievances.

[27] To remedy those grievances, I direct that Parkers are to pay to Ms Doherty the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$5,000 in respect of the bullying allegation;
- (b) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$5,000 in respect of the unjustified dismissal;
- (c) A contribution to wages lost as a consequence of the dismissal in the sum of \$1,000 gross;
- (d) Reimbursement of the Authority's filing fee in the sum of \$70;
- (e) Unpaid holiday pay in the sum of \$111.70.

Costs

[28] Ms Doherty was represented by her Union in her successful prosecution of her grievance. By reason of Parkers' truculent attitude to her Union official, the Union was put to extra trouble and expense in dealing with this matter and I am satisfied that a contribution to the Union's costs is appropriate in all the circumstances. I direct that a sum of \$750 is to be paid by Parkers to the Amalgamated Workers' Union of New Zealand (AWUNZ) to partly compensate the Union for the costs incurred in representing Ms Doherty.

James Crichton
Member of the Employment Relations Authority