

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 202/08
5104992

BETWEEN ALISON EDMONDS
Applicant

AND ADLYNS CLEANING SERVICES
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Alison Edmonds in person
Adam Tumai for Respondent

Investigation Meeting: 5 June 2008 at Hamilton

Determination: 9 June 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Edmonds was employed as a cleaner working 22 hours per week on a wage of \$12.50 per hour. Adlyns Cleaning Services Limited ("Adlyns") has contracts with a Hamilton school to provide cleaning services. There was no written employment agreement.

[2] In her statement of problem, lodged in the Employment Relations Authority on 18 February 2008 Ms Edmonds says she was unjustifiably dismissed from her employment and seeks remedies, including the payment of outstanding holiday pay.

[3] The parties have not attended mediation. In a Minute dated 13 March 2008 the parties were provided with a copy of the Practice Note of the Authority which sets out the steps to be followed in the Authority. The Minute advised the parties that a Support Officer from the Authority would be in touch to convene a telephone conference call for the purposes of discussing mediation and a timetable for the Investigation Meeting.

[4] After numerous unsuccessful attempts to make contact with the respondent to arrange a telephone conference call a further Minute was sent to the parties advising that the matter had been set down for an Investigation Meeting.

[5] As this is a claim for unjustified dismissal, I am required to examine the actions of the respondent in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[6] The section requires me to scrutinise Adlyns' actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

Events leading to termination

[7] Ms Edmonds was employed from July until 19 September 2007 when she was dismissed by Mr Adam Tumai, a Director and Shareholder of the company.

[8] On the afternoon of Monday 17 September 2007 Ms Edmonds was contacted by her babysitter and advised that her babysitter could not work for her that afternoon. Ms Edmonds went to Mr Tumai's house and requested the day off which was granted. Ms Edmonds gave Mr Tumai her keys so that he could undertake her duties that afternoon. Arrangements were made for Ms Edmonds to collect her keys from Mr Tumai's house the following day.

[9] On 18 September, when she went to collect her keys as arranged, Ms Edmonds was advised Mr Tumai had already left to undertake Ms Edmonds cleaning duties and that she was no longer required that day.

[10] The next day, 19 September, Ms Edmonds visited Mr Tumai's home to deliver a medical certificate showing that her partner will sick. As a result of his illness Ms Edmonds had to stay home to look after her children. After hearing that Ms Edmonds could not work that day, Mr Tumai advised Ms Edmonds that he had to let her go as she was too unreliable.

[11] That afternoon Ms Edmonds made contact with Mr Alan Taylor, an employee advocate, who attended a meeting with Mr Tumai on her behalf. Mr Tumai admitted that Ms Edmonds position had been terminated and that he had been heavy handed in dismissing her. There was also discussion about the poor financial state of the company. An offer to resolve the problem was made, but later rejected by Ms Edmonds.

[12] The respondent had an obligation to seek Ms Edmonds response to the reasons why the respondent thought she should be dismissed before dismissing her. Mr Tumai admits that opportunity was never provided to her. The respondent has therefore, failed to undertake a full and fair investigation.

[13] No fair or reasonable employer would dismiss an employee without seeking such explanations in circumstances such as this. Ms Edmonds dismissal was unjustified.

Remedies

Lost wages

[14] Ms Edmonds had an obligation to mitigate her loss following her dismissal. I am not satisfied Ms Edmonds has discharged that obligation to its fullest extent. Immediately after her dismissal Ms Edmonds wrote to Novotel seeking alternative employment and made some general enquiries about cleaning jobs in her local area.

[15] Ms Edmonds sister, Ms Lyn Edmonds, was a 50% shareholder and also a Director in the company. At the time Ms Edmonds was dismissed Lyn was overseas on holiday. On her return in about September or October 2007, Lyn offered Ms Edmonds her job back, however, that offer was refused.

[16] Ms Edmonds told me that she was refused the offer of her job back because by then she was unable to work as she was looking after her ill mother. That continues to be the case today.

[17] I am not satisfied that Ms Edmonds did all she could reasonably be expected to do to mitigate her loss, to the extent that Adlyns should make good the entire loss or even a substantial part of it. Ms Edmonds had an opportunity to mitigate her loss completely by accepting the offer of reinstatement. There is no evidence that the offer was not genuine or unreasonable. The reason Ms Edmonds refused the offer related to her changed personal circumstances. Ms

Edmonds had become responsible for her mother's care and it was that, which prevented her from accepting the offer of reinstatement. I have concluded that the offer of reinstatement came at the beginning of October. Ms Edmonds lost 2 weeks wages and will therefore receive an award for that amount.

Adlyns Cleaning Services Limited is ordered to pay Ms Edmonds the sum of \$550.00 gross pursuant to section 123(1)(b) of the Employment Relations Act 2000.

Compensation

[18] Compensation for non-economic loss is assessed as a matter of impression and discretion within recognised parameters (see *NCR(NZ) Corporation Limited v Blowes*, unreported, CA 23 September 2005, CA 186/04).

[19] Ms Edmonds was dealt with insensitively and I accept this resulted in humiliation, loss of dignity and injury to her feelings. Have regard to the particular circumstances and the general level of awards of compensation in cases of this type, Ms Edmonds is awarded \$3,000 (without deduction) under s.123(1)(c) of the Act.

[20] As required under s.124 of the Act I have considered whether any remedies should be reduced because of actions of the employee contributing towards the situation giving rise to the personal grievance. I am satisfied there was no blameworthy conduct of a level requiring reduction for contribution.

Adlyns Cleaning Services Limited is ordered to pay Ms Edmonds \$3,000 pursuant to section 123(1)(c) of the Employment Relations Act 2000.

Arrears of Holiday Pay

[21] Ms Edmonds claims payment for outstanding holiday not paid at the time of her dismissal. Ms Edmonds holiday pay has not been paid and continues to remain outstanding.

Adlyns Cleaning Services Limited is ordered to pay Ms Edmonds the sum of \$176.00 gross as outstanding holiday pay.

Interest

[22] Ms Edmonds seeks the payment of interest. The Authority has discretion to award interest on orders involving the recovery of any money.

[23] The interest calculated under clause 11 of Schedule 2 of the Employment Relations Act is to be at a rate not greater than the 90-day bill rate at the date of the order plus 2 per cent. Interest is to be paid on the outstanding Holiday Pay at the rate of 9% per annum.

Adlyns Cleaning Services Limited is ordered to pay to Ms Edmonds, interest on the sum of \$176.00 at the rate of 9% per annum for the period 19 September 2007 down to the date of payment.

Costs

[24] Costs are reserved and the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority