

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 36/10
5162091

BETWEEN NASTASSJA FREDERICK
 Applicant

AND JOE-ANNE PASCOE
 Respondent

Member of Authority: R A Monaghan

Representatives: P Blair, advocate for applicant
 D Beck, counsel for respondent

Investigation meeting: 25 January 2010

Determination: 29 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nastassja Frederick says her former employer, Joe-Anne Pascoe, dismissed her unjustifiably.

[2] Mrs Pascoe says the dismissal was justified on the ground of Ms Frederick's repeated failure to follow instructions.

Preliminary matter

[3] Mrs Pascoe did not appear at the investigation meeting. Mr Beck, who was on record as Mrs Pascoe's representative, did not appear either and made no approach to the Authority prior to the meeting regarding his non-appearance.

[4] The Authority attempted to contact Mr Beck but was unable to do so. It also attempted to contact Alex or Joe-Anne Pascoe – Mr Pascoe being Mrs Pascoe's husband and representative prior to instructing Mr Beck. Mr Pascoe asserted that he

and his wife were unaware of the meeting date. Since the Pascoes are now resident in Christchurch and the meeting was in Rotorua, it was not possible to proceed.

[5] The date was set during a conference call with the parties on 13 October 2009, in which Mr Beck participated. The formal notice of meeting was sent to Mr Beck by letter dated the same day. Since Mrs Pascoe was represented by counsel, she is fixed with notice of the meeting. Moreover, a request that she be excused from attending the investigation meeting in person was made and declined in exchanges between 14 and 19 October 2009. The request was made on the ground that Mr and Mrs Pascoe could not afford to attend the meeting, but no supporting information was provided.

[6] I do not accept that the Pascoes were unaware of the meeting date.

[7] Mr Beck contacted the Authority in Auckland later on the day of the meeting and informed the Authority that he had no further instructions. He said he had advised his clients of the meeting date as well as the consequences of their non-attendance. For the reasons just set out, I had in any event concluded that the Pascoes knew the meeting date.

[8] I am not satisfied that the failure to attend or be represented was for good cause. Under Clause 12 Schedule 2 of the Employment Relations Act 2000 I therefore act as fully in the matter as if Mrs Pascoe had attended or been represented.

Background

[9] Mrs Pascoe employed Ms Frederick as a nail and beauty technician, commencing on or about 13 September 2008. According to the parties' written employment agreement, Ms Frederick's hours of work were for 39 hours per week, from 10 am to 5pm on Mondays to Saturdays. The rate of pay was \$12 per hour.

[10] According to the job description set out at clause 16 of the agreement, Ms Frederick's duties included making client bookings. Clause 16 (iv) stated that all bookings were to include a telephone number. Clause 16 (xi) required that Ms Frederick not smoke or smell of smoke whilst at work.

[11] Mrs Pascoe filed a statement of evidence in advance of the investigation meeting, to which Ms Frederick filed a full response. Since Ms Frederick gave evidence while Mrs Pascoe did not, I prefer Ms Frederick's account to Mrs Pascoe's unless there is some other reason for not accepting Ms Frederick's account.

[12] According to a set of documents filed in association with Mrs Pascoe's statement of evidence, and apparently in her handwriting, concerns were raised with Ms Frederick on or about 22 September 2008. A letter of that date headed 'written warning following verbal' recorded the raising of Ms Frederick's failure to record telephone numbers when taking bookings, as well as a concern about an overheard and inappropriate exchange about Mrs Pascoe's business with a friend who was also an employee of Ms Frederick's aunt. The letter noted that Ms Frederick 'did not take' it, meaning Ms Frederick declined to receive the letter when an attempt was made to give it to her.

[13] Ms Frederick denied receiving any warning on 22 September and denied declining to accept Mrs Pascoe's letter. She denied being spoken to about her failure to record telephone numbers, and denied Mrs Pascoe's account of the overheard exchange with her friend.

[14] A further letter from Mrs Pascoe dated 14 October 2008 appears to have been an appraisal of Ms Frederick's performance to date, in the light of the presence in the employment agreement of provision for a one-month probation period. It recorded a concern about Ms Frederick's phone manner and her failure to record telephone numbers when making bookings. It asked that Ms Frederick observe the provisions regarding smoking, and recorded that she smelled of smoke every day. Finally, it recorded a concern that Ms Frederick was passing information to her aunt and instructed Ms Frederick to cease visiting her aunt's business during her breaks. It warned that if these issues were not remedied Ms Frederick's employment would be terminated.

[15] Again, Ms Frederick denied receiving any such warning. Regarding the subject matter, Ms Frederick denied all of the allegations. As for her smoking, she accepted that she smoked, but said she did so down the street and away from the premises. She said this was acceptable to Mrs Pascoe. That explanation does not

address the fact that she must have smelled of smoke afterwards, and it is inherently unlikely that was acceptable in a beauty-related business requiring close contact with clients.

[16] By letter dated 15 October 2008, Mrs Pascoe warned Ms Frederick because she considered safety had been breached by the presence of a person who was 'drugged up and dangerous'. Mrs Pascoe was referring to the presence on the premises of Ms Frederick's boyfriend. In her written statement she expanded on the associated incident and her feelings of being intimidated. Ms Frederick said she did not know what Mrs Pascoe was talking about, and denied Mrs Pascoe's account of the incident and the subsequent exchanges.

[17] A note dated 22 October 2008 records that Ms Frederick again did not take phone numbers, and that there were two 'no shows'. Ms Frederick's explanation was said to be that she forgot.

[18] A note dated 23 October 2008 records that Ms Frederick had 3 – 4 'no shows', and was unable to explain why.

[19] A copy of the business' appointment book as it related to Ms Frederick was filed. There are many entries not accompanied by telephone numbers, but Ms Frederick said this was common where a client was a regular and the details were available on the client cards kept near the telephone. The record for 22 October identifies two 'no show, no phone no.' entries. Ms Frederick had prepared an explanation and said one was a 'walk in' so no phone number was necessary, while the other was a regular client who had telephoned and left a message. The record for 23 October has 6 entries, one of which has a phone number. Ms Frederick did not offer explanations for the remainder of the entries.

[20] Mrs Pascoe sought advice on what to do, and said in her statement she was told she was within her rights to dismiss Ms Frederick immediately for serious misconduct. She and Mr Pascoe decided to act accordingly.

[21] Unfortunately there is no reference to the receipt of advice regarding the procedure required to implement the dismissal. On 23 October Mr and Mrs Pascoe

asked Ms Frederick if they could speak to her on a private matter. The discussion occurred outside on the street. Mr Pascoe gave Ms Frederick a copy of clause 13 of the employment agreement, which refers to misconduct, and informed her that she was dismissed.

[22] A copy of Ms Frederick's letter of 23 October 2008 requesting reasons for the dismissal was sent back to her with handwritten responses noted on it. The reason given for the dismissal was:

'Repeated failure to follow a reasonable instruction. Recording phone numbers with each booking is a reasonable instruction which had been re-iterated on numerous occasions.'

Whether the dismissal was justified

[23] Even on Mr and Mrs Pascoe's account as set out in the written statements, an unsatisfactory procedure was followed in implementing the dismissal. While I bear in mind the limits of the business premises for such a purpose, it was not enough to indicate to Ms Frederick that a discussion on a 'private matter' was sought. Ms Frederick should at least have been informed that the discussion was to cover further concerns including her recording of telephone numbers and that her dismissal may result, and given an opportunity to obtain a representative. Secondly a more formal meeting should have been convened in order to put these matters to her and obtain an explanation before the decision to dismiss was made. Here the decision to dismiss had been made before Ms Frederick was spoken to, and the purpose of the meeting was simply to convey it. Finally, the discussion should not have been held out on the street, even if Ms Frederick indicated she was willing to have it there.

[24] Regarding the substantive reason for the dismissal, the formal written response to Ms Frederick's request for the reason cited only her failure to record telephone numbers. Ms Frederick said neither that nor any other matter was raised with her during the discussions on the street. Mrs Pascoe in particular raised a number of substantive concerns in her written statement, some of which were in addition to the matters set out in the handwritten documents also produced. Even if I were to infer that those concerns contributed in a cumulative way to the decision to dismiss, and

many were in any event raised during the alleged warnings, Ms Frederick denied the associated allegations.

[25] At most what remains is a dismissal imposed summarily for allegedly repeated failures to record telephone numbers when taking bookings. I am prepared to accept such failures occurred on occasion, but not to an extent that justified dismissal.

[26] For these reasons I find the dismissal unjustified.

Remedies

[27] Ms Frederick seeks the equivalent of three months' lost remuneration, less earnings received during that period.

[28] However Ms Frederick was in receipt of a sickness benefit from 22 December 2008. While there may be reasons why Ms Frederick received that benefit rather than an unemployment benefit, her receipt of such benefit must imply an inability to work for medical reasons. Indeed Ms Frederick said the benefit was based on information she provided to WINZ regarding her stress and depression. In turn, she said the stress and depression were associated with her relationship with her (ex) boyfriend, as well as her dismissal.

[29] I am not satisfied that the loss of remuneration during the entire three month period is attributable to the personal grievance. I find the effect of the grievance ceased from 22 December to be causative of the loss. Ms Frederick would be entitled to the reimbursement of her loss to that date.

[30] I must also consider whether Ms Frederick contributed to the circumstances of her grievance so that the remedies awarded to her should be reduced. Although Mrs Pascoe's allegations were denied I was not persuaded by Ms Frederick's account of what if any issues arose from her smoking, and nor was I satisfied with her account of why some telephone numbers were not recorded. Both of those matters were referred to expressly in the employment agreement as part of the job description. Accordingly a small reduction to the amount otherwise to be awarded is warranted. I set the reduction at 10%.

[31] Mrs Pascoe is therefore ordered to reimburse Ms Frederick for her lost remuneration calculated as follows:

8.5 weeks x [39 x \$12]	= \$3,978.00
Less 10%	= \$ 397.80
Total	= \$3,580.20 (gross)

[32] Ms Frederick also seeks compensation the injury to her feelings resulting from the personal grievance in the sum of \$7,500. That is a reasonable amount in the circumstances of a dismissal like this one. Taking into account the 10% reduction I order Mrs Pascoe to pay Ms Frederick \$6,750 as compensation for injury to feelings.

Summary of orders

[33] Mrs Pascoe is ordered to pay to Ms Frederick:

- a. \$3,580.20 (gross) as reimbursement of remuneration lost as a result of the grievance; and
- b. \$6,750 as compensation for injury to feelings..

Costs

[34] Mr Blair addressed costs. He accepted that a payment in accordance with the rates often applied in the Authority would be appropriate. As the successful party Ms Frederick entitled to a contribution to her costs. The investigation meeting took less than half a day. Mr Blair was instructed after the statement of problem had been filed but before preparation for the investigation meeting was required, with a corresponding small reduction in costs.

[35] Taking those matters into account Mrs Pascoe is further ordered to contribute to Ms Frederick's costs in the sum of \$750 plus the filing fee of \$70.

R A Monaghan

Member of the Employment Relations Authority