

[5] Ms French was employed as one of those sales account managers after an interview in November 2010 and it is common cause that she commenced her employment with WBP on 24 November 2010.

[6] Not much else is agreed between the parties. While Ms French maintains that she was not provided with an employment agreement, WBP says that she was; while Ms French maintains that there were no issues with her performance until 21 March 2014, WBP says there were.

[7] According to WBP, there were ongoing concerns with Ms French's performance (meeting sales targets), with the issuing of credits to customers without authority, with timekeeping, with customer complaints, and with poor interpersonal relationships in the office.

[8] WBP maintains that it attempted to deal with these ongoing issues during the course of the employment using a variety of more or less informal tools.

[9] Moreover, WBP maintains that from a meeting on 16 December 2013, it commenced to endeavour to deal with the issues it says were raised by Ms French's performance, using more formal means. Despite the evidence of three persons present at the 16 December 2013 meeting that it took place, that Ms French was there and that there were outcomes of the meeting which all parties present agreed on, Ms French's evidence was that the meeting simply did not take place.

[10] In particular, the 16 December 2013 meeting, according to WBP, dealt with an ongoing issue where WBP says Ms French was giving away credits to clients of the business without appropriate authorisation. WBP's evidence on the point was that the 16 December 2013 meeting resulted in an agreement between Ms French and WBP that she would get approval from one of the directors before giving away credits to clients.

[11] Notwithstanding that putative agreement (and remembering Ms French denies the meeting ever took place), WBP says that Ms French continued to give away credits to clients without authorisation including on 20 March 2014 when she gave away a credit to a client, Taylor Bricklaying, without authorisation.

[12] While the question whether the 16 December 2013 meeting took place or not remains an issue that I need to determine, there is no dispute between the parties about

a 5 December 2013 email from WBP to Ms French (amongst others) making a similar point about the need to obtain permission from management before credits were agreed to.

[13] While Ms French agreed she had seen the 5 December 2013 email, her explanation of why she avoided its force and effect was not accepted by WBP.

[14] On 21 March 2014, there was a performance appraisal conducted by WBP for Ms French during which various alleged deficiencies in Ms French's performance were flagged by the employer. It is common ground that towards the end of the performance appraisal meeting, WBP advised that a disciplinary process would be initiated.

[15] A letter dated 1 April 2014 initiated that process.

[16] Ms French instructed a lawyer and despite the efforts of WBP to engage appropriately with Ms French in pursuit of its disciplinary process, Ms French, acting on advice, refused to ever meet the employer to respond to the allegations made against her. She chose to rely exclusively on her lawyer's extensive written rebuttal of the various allegations that she faced.

[17] Included amongst the allegations Ms French confronted was an allegation contained in a letter dated 22 April 2014 wherein serious misconduct was alleged resulting from Ms French's crediting a client (Taylor Bricklaying) without obtaining the prior consent of a director of WBP as the email of 5 December 2013 required and the allegedly agreed process from the putative 16 December 2013 meeting also required.

[18] Ms French's lawyer proposed mediation during the disciplinary process; WBP took the view that mediation prior to the completion of the disciplinary process was premature and it declined to participate.

[19] On 24 April 2014, WBP confirmed that Ms French had been issued with a first warning concerning the initial allegations (excluding the allegation of serious misconduct).

[20] On 4 May 2014, WBP notified Ms French of its preliminary decision to terminate her employment for serious misconduct, a final response from Ms French's

lawyer was received by WBP on 8 May 2014 and on 9 May 2014 WBP notified Ms French that she had been summarily dismissed from the employment for serious misconduct.

[21] By letter dated 11 May 2014, six personal grievances were raised with WBP and in a letter dated 15 May 2014, WBP resisted all of those claims.

Issues

[22] It will be helpful if I assess the nature of the employment relationship prior to 2014, then assess the performance appraisal of March 2014, next look at the disciplinary process undertaken by the employer and finally consider whether any of Ms French's claimed personal grievances are made out.

[23] It follows that I will need to address the following questions:

- (a) What happened in the employment prior to December 2013; and
- (b) What happened during December 2013; and
- (c) What happened at the performance appraisal; and
- (d) What was the disciplinary process like; and
- (e) Are any of Ms French's personal grievances made out?

What happened in the employment prior to December 2013?

[24] It is necessary for me to deal with the various points of difference between the parties and the easiest way to do this is chronologically. On that footing, the first issue is the provision of an employment agreement. Ms French is adamant that she did not receive an employment agreement. This is so, despite the evidence before the Authority that on two separate occasions, the employment agreement was provided to Ms French electronically, and separate evidence that a hard copy was also provided.

[25] This evidence is quite clear; there are two separate emails sent by Kim Higgie, the Administration Manager for WBP, the first sent at 1.20pm on 16 November 2010 and the second sent on the same date at 2.20pm, the latter email attaching the employment agreement with a small correction. Moreover, after the employment started, the evidence is a further hard copy was provided by Ms Higgie.

[26] Ms French's evidence is that, while she acknowledges that the emails, with the attachments were sent, she never received them and she denies receiving the hard copy as well.

[27] But that evidence is not consistent with the evidence of Ms Higgle who first of all confirmed in evidence that she had sent the emails that the written record disclosed and secondly recalled a follow up conversation she had had with Ms French just after Ms French had commenced her employment wherein Ms Higgle asked Ms French if she had received the email attaching the contract and other employment related documents. Ms Higgle's evidence is that Ms French said something to the effect "*yes but I haven't had time to look at it ... better get onto it and get it signed*".

[28] Then on 30 November 2010, just six days after the employment commenced, Ms Higgle followed up with Ms French again and asked her to complete her IR330 form so that Ms French could be paid and that was attended to. According to the hard copy record of the emails before the Authority, that IR330 form was attached to the first of the emails sent by Ms Higgle to Ms French.

[29] Ms French claims that she was handed the IR330 form in isolation and never received the other material.

[30] Mr Alan Neben, the General Manager of WBP, says that he also had followed up with Ms French the fact that she had never signed her employment agreement and returned it to the employer. Mr Neben also makes the point in his evidence that there was never any issue raised by Ms French during the employment about her not having received the employment agreement and that the matter only came into issue when these proceedings were on foot.

[31] Although nothing turns on the question, I think it inherently unlikely that Ms French did not receive the employment agreement forwarded to her electronically twice on 16 November 2010. While it is certainly technically possible for emails to be sent and not received, this particular situation involved not one but two emails attaching the same document (or broadly the same document). Moreover, WBP's evidence from Ms Higgle is consistent with Ms French having received the documentation; Ms Higgle told the Authority that she had followed up with Ms French shortly after the employment commenced and that Ms French said something to the effect that she better get on with signing it.

[32] That evidence is also consistent with Mr Neben's evidence that he personally followed up with Ms French and there is no evidence before the Authority of any contemporaneous complaint by Ms French that she did not receive the employment agreement for execution.

[33] Accordingly, I think it more likely than not that Ms French did receive the employment agreement, that she neglected to sign it, and that her evidence on the point is accordingly mistaken. Whatever the position with Ms French's receipt of the document is, there is no doubt in my mind that the agreement in question is the agreement which determines the basis of the employment.

[34] Next, Ms French alleges that there was a difficult working environment at WBP which impacted on her employment. She claims that her relationship with Deidre Morris was especially unsatisfactory. Ms Morris was Mr Neben's partner, co-owned the business, and effectively managed the sales team.

[35] Ms French's evidence is that Ms Morris was almost never in the office, that there were no regular sales meetings, that there were "*negative undercurrents*" in the office, that "*interactions were not comfortable with the employer*" and that WBP did not want Ms French in the employment and that "*by the end of 2013, a general feeling that I had was that the employer was trying to get rid of me*".

[36] WBP resists all of those claims by Ms French. In particular, it denies there was a difficult working environment and the evidence of the procession of other staff members from WBP supports the broad contention that no one else felt the working environment was unsatisfactory. Even if that evidence is treated circumspectly because the bulk of it comes from employees still in the employment with WBP, Ms French's specific claims around the management of the sales team are also resisted.

[37] The suggestion Ms Morris was almost never in the office, for instance, is disputed by all of the other evidence before the Authority; Ms Morris herself acknowledged that she had young children and that her commitment to her family was such that she would typically only work between 8.30am and 2.30pm. That said, Mr Neben was there for normal business hours each day and while Ms French maintains that she had "*no relationship with Alan Neben*" his evidence is different and, for the avoidance of doubt, I prefer his recollection of events on this point.

[38] This was a small workplace with a small tightly integrated team. Ms French was in that workplace from the end of 2010 until the middle of 2014 and it seems to me inconceivable that she would have had no relationship with Mr Neben as she claims in her evidence.

[39] Even if it were accepted that Ms French's principal relationship was with Ms Morris, there is ample evidence that Ms Morris ran the sales team effectively and efficiently. Her own evidence is redolent with her sales background and given her personal ownership of the business and its survival in a tough marketplace, it is difficult to see how a sweeping claim of the sort Ms French makes about the inadequacy of sales management, can be made out.

[40] On the specific point about sales meetings and their regularity, the evidence from Mr Neben for example is that there were regular sales meetings, that they were held every couple of days, but he agrees that by virtue of the necessity for sales staff to be out on the road engaging with clients, they were not scheduled but tended to take place as and when the bulk of staff were available.

[41] Mr Neben also makes the point in his evidence that the office was open plan, that all the sales staff were together and that there was regular discussion about business issues on an informal basis as one might expect in a business of this size.

[42] Turning now to the contention Ms French makes that interactions were not comfortable with the employer, that the employer did not want her there and that the employer was trying to get rid of her, at least from the end of 2013, those sweeping allegations are not supported by evidence but may be explicable by WBP's increasing anxiety about Ms French's sales performance. This after all is a business which exists by selling advertising and its continued existence is only possible if the advertising sold by staff members such as Ms French provides sufficient revenue to cover the overhead of the business (including staff salaries) and a profit for the owners.

[43] Ms French says that Ms Morris would come into the office and "*throw tantrums about the lack of sales*" and that "*her accusations were typically a barrage of words directed at all of us*". The difficulty with that evidence is that no one else remembers Ms Morris throwing tantrums.

[44] I am satisfied the employer became increasingly concerned about Ms French's sales performance against target and her poor interpersonal relationships with other staff

[45] WBP says that it endeavoured to support Ms French through informal guidance believing throughout that her experience in sales would ultimately win through. Ms Morris says that she would schedule meetings with Ms French to try to support her work but that Ms French would not make herself available or cancel the arrangement. Given that the two women worked in an open plan office and sat within a few feet of each other, one would have thought that if there were a need for further engagement between the parties, that should not have been difficult to organise. The evidence for WBP is that it endeavoured to make those arrangements to support Ms French's work but that she (Ms French) would not cooperate.

[46] Ms French draws my attention to the general absence of documentary evidence of meetings between her and the employer and asks me to draw the conclusion that there was no proper engagement between the parties and that in particular, concerns about her sales performance were never properly flagged to her.

[47] I do not accept the premise of Ms French's claim although I accept without reservation that there are limited examples of documentary evidence supporting the existence of the sorts of meetings she refers to.

[48] For instance, Ms French says that the only one-on-one meeting that she ever had with Ms Morris was on 21 June 2012 at a café called Vetro. Even if the allegation Ms French makes is true (and I do not accept that it is), the evidence for WBP is that it did its level best to engage with Ms French to support her work but that Ms French simply would not engage.

[49] The email exchange between Ms Morris and Ms French relating to the Vetro meeting confirms that the two women spoke about achieving sales budgets with Ms Morris noting that Ms French had achieved six monthly budgets out of the previous 16 months and in addition, there was discussion about Ms French's difficult interpersonal relationships in the office.

[50] More importantly for present purposes, the email from Ms Morris to Ms French refers to previous meetings. Ms Morris says "*we have had more than three meetings now*" and while the context of that observation is in respect to

complaints from the employer about Ms French's unsatisfactory relationships with other staff, it seems inconceivable to me that if Ms Morris had met with Ms French on more than three previous occasions the discussion would not have included expressions of concern about sales performance as well. Certainly that interpretation of mine is consistent with the evidence from Mr Neben and Ms Morris to the Authority.

[51] Finally, I need to address Ms French's contention that the employer had somehow made it clear that she was not wanted and that, at least from the end of 2013 onwards, it was trying to get rid of her. I have to say that this is again another sweeping generalisation that Ms French makes without any evidential support. It is true that the employer sought to improve Ms French's sales performance. It is probably fair comment that the employer did not document those attempts as well as it ought, but that says nothing terribly original about the challenges of running a small business. Most small businesses pay less attention to careful documentation of human resources matters than they ought to.

[52] It is also true that the employer had cause to speak to Ms French on a number of occasions about her attitude to other staff and the allegation that Ms French was "*rude*" to colleagues is made by WBP witnesses.

[53] But the short point is that the employer is entitled to raise issues of concern with an employee and these issues both went to the heart of the employment relationship. One impacted negatively on other staff and the second impacted negatively on the financial success of the business.

[54] But to say, as Ms French does, that those concerns meant that WBP was trying to "*get rid of*" her is simply not supported by the evidence. Indeed, the evidence is that WBP tried very hard to make Ms French a successful member of its team and I am simply not persuaded by Ms French's contention that there was some sinister agenda.

What happened in the employment during December 2013?

[55] According to the employer, there were two significant developments in December 2013 which inform WBP's behaviour in the early part of 2014 and set the scene for those events. Ms French does not accept that these two December events

are as important as WBP maintains and indeed, in respect to one of them, Ms French denies that the event happened at all.

[56] However, in respect to the first of those events in time, it is common cause that the event happened and even that it is relevant to the employment relationship problem. By email dated 5 December 2013, Ms Morris sent an email to Ms French, copying Ms Higgle, the Business Manager, and Mr Neben, the General Manager, regarding advertising for a particular client, Steel Sheds. The 5 December 2013 email is clearly the end of an exchange between Ms Morris and Ms French about credits given by Ms French to Steel Sheds and the importance of the email from WBP's perspective is the final sentence which, by common consent, gives a direction from WBP to Ms French.

[57] That final sentence is in the following terms:

If we need to do "make goods" these need to be discussed and approved by me before they appear in the paper – also credits need to be authorised by myself or Alan [Mr Neben] in my absence.

[58] In her evidence to the Authority, Ms French drew a distinction between credits, write-offs and "make goods". She defined each category and commented on each category.

[59] In respect to the first, she defined a credit as a situation where an invoice was provided to a client, the invoice was paid, but the client was issued with a credit to use in the future purchase of advertising. Ms French's evidence is that she never gave a credit to a client and understood that she had no authorisation to do so.

[60] A write-off, on the other hand, was where an invoice had been issued to a client and the invoice was not paid and the debt at some point was written-off by WBP. Again, Ms French says that she had no authorisation to agree to a write-off on behalf of the employer and never did.

[61] A "make good" is where a client has ordered advertising, an invoice has been issued, but the client is dissatisfied with the service for some reason and in order to get the client to pay the invoice, the client is given a "make good" to compensate them. Typically, I was told that a "make good" would usually be another advertising opportunity in a future publication.

[62] In relation to make goods, Ms French's evidence is that she was authorised to grant them, she did in fact grant make goods from time to time, and that they had no impact on the bottom line because in her view, the amount of advertising any publication carried could be artificially increased or decreased without affecting the profit margin.

[63] The distinction between the three kinds of situations is not accepted by WBP. It says that in each case, the short point is that advertising is being sold for less than what it is worth and specifically in relation to "make goods", it says that it does not accept Ms French's characterisation that this has no impact on the bottom line and advances the alternative proposition that rather a "make good" has the effect of reducing the profit margin on a particular advertisement and thereby reducing revenue and the overall viability of the particular publication and ultimately the business itself. More importantly, it rejects out of hand Ms French's contention that she was somehow authorised to issue "make goods" but not authorised to write-off invoices or give credits. In WBP's view, all of those devices result in a loss of revenue for its business and in consequence require one of the owners to sign off.

[64] Despite the clear words in the 5 December 2013 email that I have just referred to, which specifically refers to "*make goods*" and specifically outlaws "make goods" without the sign off of one of the directors, WBP says that Ms French continued after this email to behave as if the email had not been received.

[65] A very clear example of the evidence for the view that WBP wanted to try to support Ms French rather than get rid of her comes from the striking and persuasive evidence of Ms Jasmine Sampson. Ms Sampson is a professional mediator and life coach who, at the direction of WBP, worked extensively with the staff in the business and had done so since the middle of 2008.

[66] It was clear to me from the evidence I heard from Ms French that she trusted Ms Sampson in her interactions with her and felt that she (Ms Sampson) had assisted her in managing her relationships with work colleagues.

[67] Notwithstanding that, Ms Sampson gave the clearest evidence possible that she was her own person and that she formed her own views and was not able to be shaken in them. In particular, her view, expressed with absolute clarity, was that Mr Neben and Ms Morris were good caring employers who were keen to try to retain

the services of Ms French, and to be supportive of her in achieving her full potential in the organisation, and were absolutely not engaged in any sort of process designed to remove her from the employment.

[68] Ms Sampson was asked by WBP to work creatively with staff to try to improve working relationships which Ms Sampson's own evidence said were being negatively impacted by Ms French's behaviour.

[69] Ms Sampson accepted the assignment, and clearly formed a positive working relationship with Ms French. Ms Sampson proposed that she effectively convene a meeting to try to progress the interpersonal difficulties. The meeting in question took place on 20 November 2013 and Ms French acknowledges that she attended that meeting, convened by Ms Sampson and with Mr Neben and Ms Morris also in attendance. While Ms French does not agree with this characterisation, Ms Sampson's evidence is clear that Ms French's account of various significant matters was different from the account of other people involved and that Ms French at various times gave different versions of events to different people. The meeting was not successful in resolving the outstanding issues.

[70] Given the failure of that 20 November 2013 meeting to resolve the issues that were concerning WBP, Ms Sampson proposed that there be a second meeting and her evidence is that that meeting took place on 16 December 2013. Mr Neben and Ms Morris were also in attendance at that meeting and they also say the meeting took place on 16 December 2013. Ms French is adamant there was no such meeting and relies on the fact that there were no notes taken of the meeting to support her thesis that the meeting did not take place.

[71] For the avoidance of doubt, I did not find Ms French's evidence on this point credible. I was struck by the clarity of Ms Sampson's testimony, her degree of discomfort about having to betray confidences, and the fact that Ms Sampson's evidence of the 16 December 2013 meeting is supported by the evidence of Mr Neben and Ms Morris satisfies me that the meeting did take place.

[72] After all, the alternative to that conclusion is that three witnesses before the Authority have perjured themselves and that the written evidence submitted to the Authority in anticipation of its investigation by Ms Sampson herself is also a tissue of imaginative reconstruction.

[73] I think that Ms Sampson's evidence and recollection is to be preferred over Ms French's and I conclude accordingly that the meeting on 16 December 2013 did take place and that its conclusions, as described by Ms Sampson, Mr Neben and Ms Morris can be relied upon.

[74] Ms Sampson provided a written account to the Authority of her recollection of that meeting and it is supported in its conclusions by the evidence of Mr Neben and Ms Morris.

[75] According to Ms Sampson, the genesis of the 16 December 2013 meeting was a complaint from Ms Morris to Ms French that the latter had given away free advertising to clients.

[76] Ms Sampson records that the meeting heard Mr Neben's and Ms Morris' view that Ms French had been dishonest with them in her responses, that she had given away free advertising without appropriate authorisation and that she had done that on more than one occasion.

[77] There was also concern raised by the employer about Ms French's communication style, her poor interpersonal relationships and "*general unreliability*". Perhaps of most importance, though, in terms of outcome, was an agreement between the persons present that Ms French would cease giving away credits of any description to clients, without first having obtained the consent so to do from one of the directors of the employer.

[78] The impression I have from Ms Sampson's evidence, which is supported by the evidence of Ms Morris and Mr Neben, is that the 16 December 2013 meeting effectively drew a line in the sand by outlining the minimum requirement that WBP sought from the employment relationship with Ms French and that with the turn of the year (the commencement of 2014) there would be, to quote Ms Morris, "*a fresh start*" with Ms French "*being honest*", not giving away any further credits and communicating clearly and positively with the employer.

[79] The importance of this meeting and its place in the chain of evidence is first that I am satisfied the meeting took place, despite Ms French's vehement protestations to the contrary. The evidence is as plain as can be that Ms Sampson responded to an email from Ms French herself dated 5 December 2013 in which Ms French expressed dismay at being criticised by WBP for, to use Ms Sampson's phrase, "*giving away a*

freebie unnecessarily". Ms Sampson responded the same day by email in which she opined that her interpretation of WBP's email to Ms French was that Ms French had been giving credits to clients unnecessarily and that this had happened before. Ms Sampson then goes on to say:

If so I can understand why the company has an issue.

[80] Then the following day, Ms Sampson sent an email to Ms French and to Mr Neben and Ms Morris proposing another meeting. One of the dates Ms Sampson says she is available is 16 December 2013.

[81] That email traffic seems to me to be persuasive evidence that the genesis of the meeting on 16 December 2013 was Ms French herself and her anxiety about a complaint from WBP about her giving a credit to a client without authorisation. Certainly it is indisputable that Ms Sampson sent an email to Ms French, Ms Morris and Mr Neben proposing a meeting and that one of the dates she suggested was 16 December 2013.

[82] Moreover, Ms Sampson, Mr Neben and Ms Morris all say that the meeting took place and all provide the Authority with similar evidence about what was discussed at the meeting and what the outcome was.

[83] Equally important for our purposes is the importance of this discussion in the context of Ms French's persistent refrain that WBP had made no attempt to manage her perceived inadequacies prior to suddenly appearing to be seized of the matter in early 2014.

[84] As I have already indicated, I do not accept that claim at all; I think the evidence suggests that WBP had a longstanding anxiety about Ms French's performance, both in terms of her sales and her interpersonal skills and that it had tried throughout the employment to appropriately engage with Ms French informally so as to address both of those perceived deficits.

[85] Certainly it is true that there was a lack of formal process and a lack of appropriate recordkeeping.

[86] But if the evidence for WBP is to be accepted, WBP was anxious to retain Ms French in the employment, always thought until the eleventh hour that her behaviour was redeemable, and did its level best through various informal channels to

try to address the deficits it perceived. Certainly that conclusion is supported by the evidence of Ms Sampson whose clear and settled view was expressed in the following answer to a question from me during the investigation meeting:

My overall impression was that they [Mr Neben and Ms Morris] were falling over themselves to keep her [Ms French] employed.

What happened at the performance appraisal?

[87] From WBP's perspective, it is apparent that it sought to commence calendar 2014 with a fresh start and hoped that the understandings it thought it had reached with Ms French at the 16 December 2013 meeting would enable both parties to put past difficulties behind them and literally start again.

[88] One of the devices WBP used to assist in managing the sales force was a document called a Call Sheet which was effectively a record of contacts made with potential clients, however those clients were engaged with.

[89] In order to manage the sales force appropriately, Mr Neben's evidence, for instance, was that it was necessary for him and Ms Morris to analyse the call sheets to establish where- improvement was required.

[90] Ms French says that she had always used call sheets and so the instruction from WBP issued to her and other staff on 21 January 2014 to ensure that call sheets were completed, would not have created any additional onus on her. Certainly, even on Ms French's evidence, it is apparent that the employer made use of this device not just in respect to managing Ms French but in respect to managing other sales staff as well.

[91] Contemporaneously with that 21 January 2014 instruction to be sure to complete call sheets, WBP elected to commence a performance appraisal system for all staff. The system used was the 360 degree process where both employer and employee have an opportunity of expressing their issues about the other and to that end, Ms French, and other staff, were asked to complete their part of the performance appraisal form and return it to the employer. WBP says that Ms French was the only staff member who did not return her form on time but nothing turns on that. WBP got Ms French's appraisal form back in February 2014 and the formal meeting took place on 20 March 2014.

[92] Present at the meeting were Ms French together with Mr Neben and Ms Morris.

[93] Ms French's evidence is that the meeting was "*a personal attack on every category*", that Ms Morris "*shot me down*" when Ms French made points in rebuttal, that the whole meeting was a completely unbalanced attack on her interpersonal skills and her sales performance.

[94] Ms Morris says that WBP went through each of the responses made by Ms French where she completed the initial responses on the form. Ms Morris says that they went through those responses and were concerned to focus on the deficits they identified, namely Ms French's interpersonal skills with other staff and the unsatisfactory performance they discerned from her sales activities.

[95] Of course, neither Mr Neben nor Ms Morris accept Ms French's characterisation of the performance appraisal meeting. Their view of the matter is simply that they raised areas of concern as they are entitled to do and that those matters were discussed between them during the meeting without apparent rancour at the time.

[96] It is the case that at the end of the meeting there was an intimation from WBP that a disciplinary process would need to be initiated because of continuing issues WBP had with Ms French which were evidenced by the lack of insight they felt Ms French showed in her self assessment.

[97] The implication from Ms French's evidence on the point is that it was inappropriate of the employer to give her notification at the performance appraisal meeting that a disciplinary process would be undertaken, but I do not accept that view. The employer's obligation is to alert the employee, at the earliest possible time, of its intention to pursue a disciplinary process and the fact that that intention formed contemporaneously with the undertaking of the performance appraisal meant that the first opportunity that the employer had to signal to Ms French that she needed to prepare for a disciplinary inquiry was during the performance appraisal meeting.

What was the disciplinary process like?

[98] It is common cause that there were effectively two separate disciplinary processes, the first of which was foreshadowed at the performance appraisal meeting I

have just outlined, which resulted in a letter dated 1 April 2014 being issued to Ms French which set out in standard form the concerns the employer had and sought a meeting between the parties to discuss matters.

[99] It is the essence of Ms French's claim in respect to this first allegation that at the time it was first foreshadowed and discussed at the performance appraisal meeting, she had no idea that WBP was as unhappy with her performance as it now appeared it was. This of course is based on Ms French's contention that there had been no previous warning about her performance (which is accepted) but also that there had been no earlier intimation that the employer was unhappy with aspects of her performance or behaviour (which is not accepted).

[100] All the evidence I heard confirmed that there were multiple signals from WBP that all was not well. Like many small employers, WBP sought to deal with the matter informally rather than by a more formalised disciplinary process resulting in a warning.

[101] WBP says (and I accept) that its attempts to deal with matters informally were frustrated by Ms French's persistent unwillingness to engage and by her "*denial*" behaviour to use the expression adopted by Mr Neben in evidence.

[102] The short point was that from the standpoint of the employer, it had attempted to counsel Ms French to improve her interpersonal relationships, encourage her engagement with the in-house mediation provided through Ms Sampson and tried to work with Ms French collaboratively to get her sales performance to improve.

[103] I simply do not accept Ms French's contention that there was no notification to her prior to the performance appraisal meeting that all was not well. I do accept her claim that WBP did not properly document all of the engagements that it had with Ms French, but I do not accept that as evidence for the view that there were no engagements between the parties.

[104] From the evidence there is before the Authority it is quite plain that there were meetings wherein WBP had sought to address Ms French's interpersonal failings and her sales failings and that those meetings dated back as far as calendar 2012.

[105] I am satisfied that the evidence before me allows me to assert there was a meeting at the Vetro Café on 21 June 2012 wherein these issues were discussed and,

contrary to Ms French's adamant assertion, the documentation about that meeting is absolutely clear that there had been a number of previous meetings between the parties on the same subject matter.

[106] Moreover, I am satisfied there was a meeting between the parties commissioned and effectively directed by Ms Sampson on 16 December 2013 at which the same issues were canvassed again. Ms French denies that meeting took place; I do not believe her evidence.

[107] I am satisfied the 16 December 2013 meeting canvassed precisely the same issues that the employer was troubled by during the disciplinary process in 2014 and that there were various understandings reached between the parties at the 16 December 2013 meeting which WBP anyway thought would result in a corner being turned.

[108] The first specific issue raised in the 1 April 2014 disciplinary letter related to deficiencies in the provision of call sheets. The second issue related to inadequate sales performance, the third concerned the lack of follow up with unhappy clients and the final issue was around productivity and time management.

[109] A first written warning was issued in respect to the first disciplinary process on 24 April 2014 with WBP concluding particularly that Ms French's sales performance against budget together with her recordkeeping and timekeeping were deficient.

[110] WBP sought engagement from Ms French by way of attendance at a meeting to discuss the allegations that were of concern to the employer; Ms French chose to not attend any disciplinary meeting and rather to engage with the employer via correspondence from her lawyer. The device of refusing to engage face-to-face with the other party is not often used in employment matters and rightly so; it is a foolish strategy because it removes the prospect of direct engagement between the protagonists. There is simply no basis on which a lawyer acting for a client can adequately convey the client's position. The lawyer was not physically present and can only express matters second hand.

[111] Moreover, the refusal to meet takes away any prospect of the ready interaction between people in a meeting situation.

[112] I am satisfied also that a good and fair employer, having conducted a proper investigation, could conclude that a written warning be issued to an employee in Ms French's situation in the particular circumstances of this case: s.103A of the Employment Relations Act 2000 (the Act) applied.

[113] That conclusion is informed by the refusal of Ms French to meet face-to-face with the employer at any time during either the first or the second disciplinary process. While it is speculative to consider what might have happened had Ms French engaged with the employer as she should, it is certainly possible that this first written warning would not have been issued had she been prepared to engage face-to-face with the employer and address its legitimate concerns.

[114] The second disciplinary process commenced by letter dated 22 April 2014. The second disciplinary process was predominantly concerned with an allegation that Ms French had issued a "make good" to a client, Taylor Bricklaying.

[115] Again, Ms French's response is, rather than address the allegation head on, to seek to question WBP's motives.

[116] Amongst other things, Ms French alleges that the reason this second disciplinary process was initiated was because of the employer's failure to get any engagement from Ms French in the first disciplinary process where she refused to meet them and that WBP had known about the facts which underpinned the Taylor Bricklaying allegation for over a month.

[117] I do not accept those submissions. WBP says that it is entitled to deal with the first bundle of complaints (which it did), and then tackle the second and arguably more serious allegation.

[118] It may be that WBP was frustrated by Ms French's refusal to engage with it during the first disciplinary process, but it is a bit rich of Ms French to complain about any possibility of WBP being frustrated by her behaviour when the remedy was in her own hands; she could at any time have engaged with the employer, as she ought to have, but she chose not to and effectively left the employer during both disciplinary processes with less satisfactory evidence of her position than would have been the case if she had engaged with the employer face-to-face.

[119] That particular point is illustrated with clarity by the evidence that Ms French gave the Authority on the detail about the “make good” with Taylor Bricklaying. She says that throughout the discussion around the issue, she was erroneously focusing on a June 2013 advertisement and invoice whereas Taylor Bricklaying’s complaint was about an October 2013 advertisement and invoice. The difference between the two dates is relevant because the size of the advertisement was different and therefore the value of the advertisement was different.

[120] Put simplistically, if Ms French had discussed the matter face-to-face with WBP, as she ought to have, that matter would have been resolved very quickly. While the clarification of which date is actually in issue may not have impacted dramatically on the outcome, it is nonetheless illustrative of the sort of confusion which can be generated innocently in an employer’s mind when they are not confronted by the best evidence available of what their employee said or did and inevitably, voluminous correspondence from a lawyer about what the lawyer’s client said or did is much less satisfactory evidence than the evidence of the client herself or himself.

[121] The point is simply that whatever size the advertisement was and whatever advertisement it was that was actually in dispute, by the time Ms French was proposing a “make good” to Taylor Bricklaying, she had been instructed not to give “make goods”. She herself acknowledges that she was given that instruction in the 5 December 2013 email I have already referred to; in addition, I am satisfied that that outcome was agreed as part of the conclusion from the 16 December 2013 meeting which did no more than reinforce what already had been determined.

[122] Ms French’s defence of her position was that she had not failed to follow her employer’s lawful and reasonable instruction because until she had finalised the proposed “make good” with Taylor Bricklaying, she could not refer it to the employer for sign-off.

[123] With respect to Ms French, that is sophistry. The employer issued a directive that staff were not to give away advertising to clients unless and until that had been approved by the employer. I am satisfied that any reasonable person apprehending that instruction would consider that the proper order of business was for the discussion with the employer to be the first part of the process before there was any contact at all with the client.

[124] To suggest as Ms French does that it is appropriate for the employee to first engage with the client, get their agreement to the proposal that the client not pay the money that they were properly invoiced for and then go to the employer and get the employer to sign off on that arrangement is putting the employer in the position of being faced with a fait accompli and that is certainly not what WBP intended and I am satisfied that any sensible, reasonable person apprehending WBP's instruction would view it in the way that I do here.

[125] Again, WBP's investigation of the circumstances in issue in regard to this complaint against Ms French was not assisted by Ms French's refusal to engage directly with the employer.

[126] Instead, she instructed her lawyer to engage in voluminous correspondence with the employer which, as I have already noted, is not giving the employer the best evidence of what actually happened in its workplace perpetrated by its employee.

[127] Again, I conclude that a good and fair employer in the particular circumstances of this case, which include the refusal of the employee to engage face-to-face with the employer, could conclude that a finding of serious misconduct was available to it: s.103A of the Act applied.

[128] I need to make the self-evident observation that had Ms French engaged with the employer directly in face-to-face meetings, as she ought to have done, she may well have been able to persuade the employer that the matter was not as serious as the employer ultimately decided.

Are any of Ms French's personal grievances made out?

[129] I have not been persuaded that Ms French has any viable personal grievance. In my considered opinion, in respect to each of the personal grievances raised, a good and fair employer could conclude that the action it took in each of the circumstances relating to each of the grievances was an action available to it within the law.

[130] It is necessary for me to consider each of the personal grievances in turn. I have already commented generally on my disquiet about the process Ms French adopted in responding to the legitimate inquiries of her employer. I do not need to reiterate the points I have already made about the failure to provide the employer with the best evidence of what happened by refusing to engage directly with the employer.

[131] The first grievance alleges that in raising an allegation of poor performance, the employer has, by an unjustified action, caused Ms French disadvantage.

[132] It is a truism that in order for a grievance relying on unjustified action to be made out, there must be both a disadvantage to the grievant and an unjustified action or series of actions by the other party.

[133] While it might be contended that a disciplinary investigation is a disadvantage to a grievant, it is difficult to see how the right of an employer to raise performance concerns about an employee can be properly characterised as an unjustified action.

[134] In the alternative, if a proper construction of the initial grievance letter from Ms French's lawyer is that Ms French is complaining about the range of matters pertaining to her version of the history of the employment relationship, then such a grievance is out of time insofar as it falls outside the justiciable period and even where it is inside the justiciable period, as I have been at pains to set out in this determination, I have not found Ms French's evidence particularly credible.

[135] As I have already noted, I simply do not accept Ms French's contention that she has not been put on notice that her performance was causing the employer concern although I accept her observation that WBP was less than adequate in its recordkeeping obligations.

[136] As I have already made clear, the proper approach where an employee is confronted with performance concerns, is to address them head on with the employer rather than to shelter behind a lawyer's correspondence which, by its very nature, is likely to inflame matters and certainly cannot provide the level of engagement face-to-face discussion between the protagonists would achieve.

[137] The fact that Ms French has a different point of view from WBP about the various matters it complain about is hardly surprising; what is surprising is that she should see that difference as a basis for contending that she has suffered a personal grievance. That simply misunderstands the law. Her recourse ought to have been to engage with the employer face-to-face and talk about the issues, not contend that she had suffered an unjustified disadvantage grievance because the employer was raising performance concerns with her.

[138] The second personal grievance concerns an allegation that WBP failed to provide Ms French with a safe workplace after 15 April 2014.

[139] Ms French maintains that the workplace felt unsafe to her and her evidence to me was that she felt she could “*cut the atmosphere with a knife*” when she entered the workplace and as a consequence chose to spend as much time as she could outside of the office seeing clients.

[140] While Ms French gave evidence that she saw the workplace as a hostile environment, that view was not supported by evidence from other witnesses. Ironically, Ms French also complained about WBP producing its other staff to give evidence at my investigation meeting apparently on the footing that such evidence was inappropriate.

[141] But Ms French had put that issue of the nature of the workplace firmly into focus and of course WBP would want to counter that evidence if it was able to.

[142] In the result, I was not persuaded by Ms French’s claims that she was subject to a hostile environment. I accept that she was stressed by the disciplinary inquiries being made in respect to her performance; that is natural. But she did little to ameliorate that stress by failing to confront the employer and engage directly. As I have already noted, correspondence between representatives is no substitute for face-to-face discussion by parties and is likely to only exacerbate a tense situation.

[143] While I accept that Ms French may have been subject to stress and therefore could claim to have been disadvantaged, I am not persuaded that that was a consequence of an unsafe workplace; indeed, as I have already noted, the evidence suggests that the workplace was anything but unsafe and that the disadvantage, if any, was a consequence of the stress associated with having the employer complaining about her performance.

[144] The third disadvantage grievance proceeded on the basis that when WBP determined to give Ms French a warning as its conclusion to the first disciplinary process, she suffered a disadvantage because WBP had refused her request to attend mediation.

[145] There was much debate at the investigation meeting about the propriety of the employer declining to mediate during its disciplinary inquiry. For the employer, it

was made plain that WBP wished to complete its disciplinary process rather than have that process confused or deflected by mediation.

[146] Conversely, Ms French maintained that by refusing to mediate during the disciplinary process, WBP had disadvantaged her and that that grounded the third disadvantage grievance.

[147] Again, even if it could be contended that the completion of a disciplinary process and an adverse finding against Ms French from that process created a disadvantage for her, I am not persuaded that the refusal of the employer to attend mediation was an unjustified action. Mediation is a voluntary process; there is no requirement that any party attend mediation unless it is directed by the Authority or the Court, and certainly it is an understandable stance of an employer that it wishes to complete its own disciplinary inquiries before undertaking dispute resolution. After all, the whole process of a disciplinary inquiry is designed to elicit facts in response to a concern and then make judgments about what should happen next. Arguably, only when those conclusions have been made can parties properly mediate in a useful way.

[148] The persistent allegation Ms French makes that WBP was trying to get rid of her and that its behaviour throughout was consistent with that is simply not demonstrated by the evidence. I am satisfied that what WBP wanted to do was engage with her frankly, face-to-face, so that it could discuss with her its concerns about her performance and because of her refusal to ever do that throughout the totality of the disciplinary process, the employer was always deprived of the best evidence about the employee's position and, worse than that, by virtue of the extensive, detailed correspondence from Ms French's counsel, the temperature was constantly being raised.

[149] The fourth disadvantage grievance alleges that the allegation of serious misconduct contained in WBP's letter of 22 April 2014 is itself a disadvantage grievance. Again, I have to make the point that the employer is entitled to raise matters with the employee and such raising is not of itself an unjustified action.

[150] I do not accept the submission that the very fact of making an allegation of serious misconduct somehow evidences a determination to bring the employment relationship to an end.

[151] Rather, the evidence suggests that, having dealt with a group of allegations in the first disciplinary process, the employer then sought to address a single and far more serious allegation and it raised this separately by letter dated 22 April 2014.

[152] Again, Ms French's solution ought to have been by face-to-face engagement with her accusers rather than by encouraging correspondence between the representatives. Had she met face-to-face with WBP, Ms French might well have been able to deal with some of the factual differences between the parties on the central issue.

[153] She makes much of this in her evidence and spent a great deal of time dwelling on the factual differences between her position and the employer's position but, as I have already been at pains to emphasise, if she had simply talked to the employer face-to-face during its disciplinary inquiry, she might well have been able to remove that confusion rather than spend time debating the issue months later at the investigation meeting of the Authority.

[154] The fifth disadvantage grievance alleges that WBP's conclusion that Ms French had committed serious misconduct was also a disadvantage grievance because Ms French had sought mediation and been denied that process and had maintained that there was no basis for a finding of serious misconduct.

[155] As I have already made clear, I am satisfied that based on the evidence available to WBP (evidence that was by its very nature imperfect because of Ms French's refusal to engage with the employer), a good and fair employer could have concluded that Ms French had committed serious misconduct in seeking to obtain a commitment from Taylor Bricklaying to meet their existing invoice for advertising in return for a concession from her by way of a "make good" when she knew or ought to have known that there was a clear and explicit direction from WBP that such an arrangement was not to be proposed or contemplated without the consent of one of the directors of the employer.

[156] Ms French again labours the point about the failure of WBP to mediate when she requested it; WBP's response was that it wanted to complete its disciplinary inquiry and I am satisfied that it was entitled to take that stance. It may well be that if it had had more engagement from Ms French in the two disciplinary processes, WBP might well have been more inclined to accede to her request and go to mediation in

the midst of its disciplinary inquiry, but given her stance of refusing to engage, it is difficult to see how it is unreasonable of the employer to decline to engage in what is, by its very nature, a voluntary process.

[157] Nor am I persuaded by Ms French's argument that she was "*blamed*" by the employer for the employment relationship problem that ultimately came before the Authority; what the employer did is it raised legitimate performance and interpersonal concerns with Ms French and sought her engagement in responding to those. Her response was to direct her lawyer to write extensively on the subject but Ms French never once engaged face-to-face with the employer to confront any of the allegations it sought to have a response to.

[158] Lastly, Ms French says that she has a personal grievance by reason of having been unjustifiably dismissed from her employment on 9 May 2014. I am satisfied on the evidence before me that Ms French does not have a personal grievance because a good and fair employer, in the particular circumstances that WBP was in at the time, could have concluded that Ms French had committed serious misconduct in relation to her behaviour with a particular client, Taylor Bricklaying, which the employer found was in direct contravention of its specific and reasonable instruction.

[159] The issue of Ms French giving unauthorised credits to clients had been the subject of discussion for some time and I am satisfied that on and from the two crystallising events in December 2013, Ms French could have been in no doubt about the employer's requirements.

[160] Those two crystallising events were first the email of 5 December 2013 and second the meeting on 16 December 2013.

[161] I am satisfied that Ms French could have been in no doubt about the employer's requirements and yet despite that, the employer satisfied itself that she had entered into a provisional arrangement with Taylor Bricklaying in direct antithesis to the employer's lawful and reasonable instruction and on that footing, I am satisfied I can conclude that one of the decisions available to an employer in WBP's position at that time and after the sort of inquiry that WBP was able to undertake without any proper engagement from Ms French, was that Ms French had committed serious misconduct and that the appropriate sanction for that was dismissal.

Determination

[162] For reasons which I have canvassed at length in this determination, I have not been persuaded that Ms French has any viable personal grievance.

Costs

[163] Costs are reserved.

James Crichton
Member of the Employment Relations Authority