

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 179
3002431

BETWEEN FRANCES HALL
 Applicant

A N D TAUMARUNUI CHRISTIAN
 EDUCATION TRUST
 Respondent

Member of Authority: T G Tetitaha

Representatives: S McKenna/J Alchin-Boller, Counsel for Applicant
 K Ngatai, Counsel for Respondent

Investigation Meeting: 20 June 2017 at Taupo

Submissions Received: 20 June 2017 from both parties

Date of Determination: 23 June 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Frances Hall was unjustifiably disadvantaged by the Trust's action in suspending her on 23 May 2016.**
- B. Although there was substantive justification for dismissing Ms Hall, the Trust's process leading to dismissal was procedurally flawed. Those defects were not minor and did cause unfairness. As a result Frances Hall was unjustifiably dismissed.**
- C. I decline to award any lost remuneration.**
- D. I award the sum of \$1,000 compensation to be paid to Ms Hall. This includes a reduction of 50% for her contributory conduct.**
- E. Costs are reserved.**

Employment relationship problem

[1] Frances Hall claims she was unjustifiably disadvantaged by her suspension and subsequent dismissal following two incidences involving alcohol.

Relevant facts

[2] Ms Hall was employed by the Taumarunui Christian Education Trust (the Trust) on 19 October 2015. The Trust is a charitable organisation originally set up for the purposes of providing education. It now provides hospitality training to disadvantaged youth. It operates a café was known as The Training Café (the Café). Trainees are referred by WINZ to learn basic skills in operating a café business. At the end of a 7 month period they can obtain an NZQA qualification.

[3] Ms Hall was employed by the Trust as a junior supervisor. Her role required she oversee customer service at front of house area of the Café. She also provided mentoring and supervision for the trainees in this area.

[4] Ms Hall signed an employment agreement. This required that she would comply with all policies and procedures, including any codes of conduct¹. Attached to her employment agreement was a code of conduct that provided amongst other things:

6. No drugs or alcohol permitted on the premises at any time.
Breach of this house rule will result in instant dismissal.

Beer incident

[5] On 22 December 2015 a local man known as “Grunter” came to the Café to collect pig scraps. He brought several bottles of beer as a Christmas gift for the staff.

[6] It is accepted Ms Hall directed the beer be taken onto the premises to the back of the kitchen. She then directed a trainee to pour an opened beer into a takeaway coffee cup to serve to Grunter in the Café courtyard. Later Ms Hall divided the beer amongst the staff and herself.

¹ Clause 4.2(v) employment agreement signed 19 October 2015.

Vodka incident

[7] In February 2016 Ms Hall and her partner, “A”, parked outside the café on her day off. She had been grocery shopping. She had bought a bottle of vodka and shot glasses that she had placed on the dashboard of her car. Two trainees working at the Café saw her parking and approached the car. They saw the vodka and asked if they could have a shot. Her partner A gave the trainees shots of vodka. Ms Hall and A eventually left.

Suspension

[8] Ms Hall did not report either incident to her employer. It was not until 19 May 2016 that Raewyn West, chairperson of the Trust, became aware of the incidences. This occurred during a disciplinary meeting with a trainee, “H”. Ms West was investigating an allegation made by Ms Hall that H had brought marijuana to work twice.

[9] Following H’s revelations, Ms West was given authority by the Trust to investigate and consider disciplinary action including suspension and dismissal.

[10] On 23 May Ms West and another trustee met with Ms Hall. She advised Ms Hall she was suspended on pay pending her investigation into the above incidences. She provided a letter setting out the Trust’s concerns that the incidences were serious breaches of clause 11.3(vi) of her employment agreement and the code of conduct. A further meeting was to occur on 25 May. Ms Hall left then later went to Ms West’s place of business. She requested a copy of her employment contract which was provided.

[11] On 24 May 2016 Ms West returned a call to A. A stated they would not be attending any meeting amongst other things.

Disciplinary process

[12] The Trust convened the disciplinary meeting on 25 May but Ms Hall failed to attend. Ms West rang her and was told she would not be attending and that A now spoke for her. A then advised their lawyer would contact the Trust. The Trust wrote to Ms Hall that same day seeking a further meeting on 30 May 2016.

[13] On 27 May 2016 A dropped off a medical certificate stating Ms Hall was unwell following “work related stress” that “impacted negatively on her ability to function”. He advised they were having difficulty finding legal advice and that they would not be attending the meeting on 30 May.

[14] On 30 May the Trust met and waited for Ms Hall who did not attend. It then decided to send a third letter the following day.

Preliminary decision to dismiss

[15] A letter dated 31 May 2016 was sent by the Trust to Ms Hall. The letter noted a “preliminary decision to dismiss” due to concerns about breaches of the café’s code of conduct regarding the presence of alcohol. The Trust found Ms Hall’s intention to serve the alcohol in both instances was “deliberate” and this caused a breach of trust and brought disrepute to the Café. It was also concerned the incident involved trainees. It gave her a further opportunity to meet and provide any information that may “affect this decision” by 3 June.

[16] On 2 June 2016 the Trust met with Ms Hall. Ms Hall had a support person with her. Notes were taken of the meeting. Unbeknown to Ms Hall, the Trust had also gathered three written statements from the trainees. No copies were provided to Ms Hall until after her dismissal.

Dismissal decision

[17] On 3 June 2016 Ms Hall was sent a letter giving notice of her termination of employment. The letter of termination confirmed the following allegations had been proven:

- On the occasion that alcohol (a pack of Tui beer) was brought into the training café premises by [Grunter] who picks up the pigs’ scraps
- On the same occasion you instructed a trainee to serve this alcohol in a café cup to a client in the courtyard at the training café
- On another occasion, while you were not on duty, you were involving supplying alcohol (vodka) to two trainees from your vehicle parked outside the training café, while they were on duty.

[18] The Trust considered these allegations breached clause 11.3(vi) of Ms Hall's employment agreement ("actions which serious damage the Employer's reputation"), the code of conduct ("No drugs or alcohol permitted on the premises at any time ...") and her job description ("to work with the Trust in regard to the continuation of the Training Café and all it stands for"). This amounted to serious misconduct and undermined the parties trust and confidence.

[19] Ms Hall was unhappy with that decision. She raised a personal grievance on 11 August 2016 of unjustified disadvantage regarding the suspension and unjustified dismissal.

The issues

[20] Although the issues had originally been confined to unjustified dismissal, the unjustified suspension was pursued at hearing. There was no detriment to the Trust to include this matter because the events leading to suspension were not contested. Accordingly the issues for hearing were:

- (a) Was Ms Hall unjustifiably disadvantaged by the Trust's actions in suspending her from her employment on 23 May 2016; and
- (b) Was Ms Hall was unjustifiably dismissed on 3 June 2016?

Law

[21] The fact Ms Hall was suspended and her employment terminated is accepted. The Trust must justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the action or dismissal occurred.²

[22] In determining whether the action or dismissal was justified there are certain matters to be taken into account. These include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond, and genuinely considered the employee's explanation prior to dismissal or taking action against the employee.³ A failure to meet any of these is likely to result in a dismissal or action being unjustified.⁴ However a dismissal may be justified if the

² Section 103A(2) Employment Relations Act 2000 (Act).

³ Section 103A(3) of the Act.

⁴ *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26].

procedural defects were minor and did not result in an employee being treated unfairly.⁵

Was there conduct for which she could have been dismissed or suspended?

[23] **Beer Incident:** Ms Hall accepted she allowed beer to be brought onto the premises and directed a trainee serve beer to Grunter. This was serious misconduct. It breached the code of conduct. The code stated these actions could result in instant dismissal. Ms Hall was aware of this because the code was attached to her employment agreement that she signed. Concealing the beer in a takeaway coffee cup also indicated she knew drinking alcohol on the premises was not permitted. The Café was not licensed to serve alcohol. There was a liquor ban in force in the Cafe at the time this occurred.

[24] **Vodka incident:** Although Ms Hall was at pains to emphasise her lack of knowledge about what her partner was doing at the time, it does not assist her credibility to have brought alcohol to a Café where it was clearly banned from the premises. I have to wonder why she had vodka with shot glasses clearly visible on her car dashboard at the Café if not for the purposes of offering it to the staff. That is what the other witnesses statements confirmed she and her partner did. There was sufficient evidence before the Trust to reasonably conclude this is what occurred at the time.

[25] That Ms Hall arrived with alcohol clearly on display in a liquor ban area was risky behaviour. All of these actions took place in a public area and involved Café staff. These actions can cause reputational harm to the Café and the Trust which is founded upon Christian values.

[26] In my view, the Trust could have reasonably concluded Ms Hall's conduct was serious misconduct.

Was the process leading to Ms Hall's suspension and dismissal fair?

[27] It was unfortunately not. In respect of the suspension, Ms West accepted the Trust had made the decision to suspend without hearing from Ms Hall. Her employment agreement provided that she be given the opportunity to dismiss the

⁵ Section 103A(5) of the Act.

proposed suspension before it occurred.⁶ It did not matter that the suspension was on pay as opposed to without pay. This decision to suspend breached her contractual and statutory right⁷ to have any concerns raised and an opportunity to be heard before the decision to suspend occurred. This was not a minor defect and did cause her unfairness.

[28] The process leading to dismissal was also defective. The Trust reached a preliminary decision to dismiss Ms Hall before it had heard from her. She was unwell and had provided a medical certificate. There was no reason for any preliminary decision to be made. Her contract did not provide for this process. The Trust also intended offering her a further opportunity to meet. This did little other than create anxiety for Ms Hall.

[29] A more fundamental flaw was the failure to provide Ms Hall with all of the information the Trust had before it when making its decision. The Trust had taken statements from three of the staff involved in both incidents. It did not supply copies of those statements to Ms Hall prior to taking action against her. It also did not reveal their content to her for comment other than in a generic way.

[30] I do not accept the Trust's belief there were safety risks to the staff who had made statements justifying withholding them. There was evidence one of the staff witnesses had received a phone call threatening her sister but this occurred after dismissal. Any safety concerns ought to have been raised with Ms Hall prior to the decision to withhold the statements. There may have been a method for providing the information in a safe way. This was unfair and was not a minor defect.

[31] There was substantive justification for dismissing Frances Hall. However the process leading to dismissal was procedurally flawed. Those defects were not minor and did cause unfairness.

Remedies

[32] Having proven she has two personal grievances, Ms Hall seeks remedies of three months' lost wages or remuneration and compensation of \$15,000 for hurt and humiliation.

⁶ Clause 11.4 Suspension, Employment Agreement dated 19 October 2015.

⁷ See above paragraph [24] and s103A(3) of the Employment Relations Act 2000 (Act).

Lost remuneration

[33] Ms Hall lost no remuneration during the period of suspension because she was paid. No award is appropriate for that grievance.

[34] Any award for lost remuneration must be as a result of the grievance.⁸ Procedural errors do not result in lost remuneration. Any actual loss suffered cannot arise from the decision to dismiss if it was substantially justified. Consequently, no award for lost remuneration is appropriate.⁹ Here the decision to dismiss would have been justified if not for the procedural flaws.

[35] Even if there had been substantive justification, there was little in the way of evidence of mitigation of loss. In considering an order for lost wages, the employee has an obligation to mitigate loss by seeking alternative paid employment.¹⁰ Otherwise an employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. In these circumstances there is no statutory requirement to order reimbursement.¹¹ In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like¹².

[36] At hearing she told me she had moved to Dargaville to find work in October 2016. I had no other evidence of her efforts to find work. In this case I decline to award any lost remuneration both because the dismissal arose from procedural flaws and the failure to mitigate her losses.

Hurt and humiliation

[37] An employee who seeks relief must lay an evidential foundation for an award in their favour. Simply establishing the basis for a personal grievance does not suffice.¹³

[38] There was very little information about the hurt and humiliation Ms Hall suffered. She told me at hearing this was the first time she had been dismissed and it

⁸ Section 123(1)(b) and s 128(1) of the Act.

⁹ *Waterford Holdings Limited v Nathan Morunga* [2015] NZEmpC 132 at [37].

¹⁰ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

¹¹ *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

¹² *Allen v Transpacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]

¹³ *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39 at [45] citing *Department of Survey & Land Information v NZ Public Service Assn* [1992] 1 ERNZ 851 (CA) at 857, 861.

created some financial concerns for her. She gave evidence about her stress and inability to get out of bed during the disciplinary process. She produced a medical certificate for that period only. She also spoke of relocating to find work and the stress involved.

[39] Where an employee's distress and emotional consequences were largely due to the loss of employment, and not to the procedural defects large amounts of compensation is unjustified.¹⁴

[40] Recent cases where there have been procedurally flawed unjustified dismissals have resulted in compensation awards from \$750 to \$4,000.¹⁵ The slim facts of this case justify an award of \$2,000 subject to any reduction for contributory conduct.

Contributory Conduct

[41] I must consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance.¹⁶ Reduction is appropriate where the actions of the employee were both causative of the outcome and blameworthy.¹⁷

[42] There is contributory conduct. Given I have made a finding there was serious misconduct Ms Hall's remedies must be reduced. In my view, an appropriate reduction is 50%.

Determination

[43] Accordingly the following orders are now made:

- a) Frances Hall was unjustifiably disadvantaged by the Trust's action in suspending her on 23 May 2016.
- b) Although there was substantive justification for dismissing Ms Hall, the Trust's process leading to dismissal was procedurally flawed. Those defects

¹⁴ *Mazengarb* online ed ERA123.9 Factors relevant to compensation citing *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 (CA).

¹⁵ *Yang v GMP Dairy Ltd* [2016] NZERA Auckland 232 (\$750); *Reveley v Mike Gallop Builders Ltd* [2016] NZERA Christchurch 223 (\$3,000); *Mooar v Pennylane Records Ltd* [2016] NZERA Christchurch 138 (\$4,000).

¹⁶ Section 124 of the Act.

¹⁷ *Goodfellow v. Building Connexion Ltd trading as ITM Building Centre* [2010] NZEmpC 82 at [49].

were not minor and did cause unfairness. As a result Frances Hall was unjustifiably dismissed.

- c) I decline to award any lost remuneration.
- d) I award the sum of \$1,000 compensation to be paid to Ms Hall. This includes a reduction of 50% for her contributory conduct.

Costs

[44] Costs are reserved. Counsel have 14 days from the date of this determination to file submissions on costs.

T G Tetitaha
Member of the Employment Relations Authority