

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 206
5300767**

BETWEEN DESIREE KARENA
 Applicant

AND KCCS LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: David Feist, Advocate for Applicant
 No appearance for Respondent

Investigation Meeting: 13 May 2011 at Auckland

Submissions received: 13 May 2011 from Applicant
 No submissions from Respondent

Determination: 16 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Desiree Karena, claims that she was unjustifiably dismissed from her employment with the Respondent, KCCS Limited (“KCCS”) on 22 February 2010.

[2] KCCS lodged a Statement in Reply in which it claimed that Ms Karena had been justifiably dismissed, but advised that it would not be represented at the investigation meeting, which consequently proceeded without representation for KCCS.

Issues

[3] The issue for determination is whether Ms Karena was unjustifiably dismissed by KCCS.

Background Facts

[4] Ms Karena commenced working for KCCS, a cleaning company, on 22 December 2009, following an introduction by her Aunt, Ms Katie Karena, who was also employed by KCCS. Mr Scott Knight was the Director of KCCS and his mother, Mrs Joan Knight, was the Manager.

[5] Ms Karena, who was not given an employment agreement by KCCS, was employed as a part-time Cleaner, and carried out her duties at Glen Eden Intermediate School (“the School”). Ms Karena worked under the supervision of Ms Katie Karena.

[6] Ms Karena said that she mainly cleaned the School classrooms, and would occasionally talk with teachers who were working after the School day had finished. Ms Karena said that from time to time the teachers would give her lollies.

[7] Ms Karena said that prior to 19 February 2010 she had not received any formal or informal warnings, and considered her performance to be satisfactory.

[8] On Friday 19 February 2010 Ms Karena stated that she and Ms Katie Karena were cleaning in the School staff room. Ms Karena said her duties on that day were meant to be vacuuming and Ms Katie Karena’s clearing away rubbish, but Ms Katie Karena had asked Ms Karena to swop duties with her, and specifically requested Ms Karena to clean away the rubbish which was behind the dishwasher.

[9] Ms Karena said that there was a donation box on top of the dishwasher. As there was rubbish surrounding the donation box, and as Ms Karena who was not wearing gloves, had to reach behind the dishwasher, she had rested her hand on the donation box to avoid touching the food and other material surrounding it.

[10] Ms Karena said Ms Katie Karena had told her she should not have touched the donation box. Ms Karena stated that she had replied that the donation box, which had a lid on it and a slot for the insertion of money, should not in her opinion have been in the unlocked staff room.

[11] Following completion of her duties on Friday 19 February 2010 Ms Karena was due to start work again on the evening of Monday 22 February 2010.

[12] Ms Ellen Karena, Ms Karena's mother, said that during the morning of 22 February 2010 she had received a text from Ms Katie Karena, asking for Ms Ellen Karena to meet her at the bus stop, as she wanted to talk to Ms Ellen Karena about Ms Karena.

[13] When she met Ms Katie Karena, Ms Ellen Karena stated that Ms Katie Karena had told her that she had been at a meeting that morning with Mr Knight and Andrew, who was a Groundman at the School. Ms Katie Karena said that at that meeting it had been decided by Mr Knight to terminate Ms Karena's employment on the basis that a surveillance camera had shown Ms Karena with her hand on the donation box in the School staff room.

[14] Ms Ellen Karena said she had asked Ms Katie Karena if Ms Karena had lifted the lid of the donation box, to which Ms Katie Karena had responded "No". Ms Ellen Karena said she had then asked Ms Katie Karena if Ms Karena had removed the donation box from its original position and run away with it, and Ms Katie Karena had responded "No". However Ms Katie Karena offered by way of explanation for the dismissal decision that Ms Karena had been dismissed for "*theft as a servant*". Ms Ellen Karena stated that she had told Ms Katie Karena that Ms Karena should have been present at the meeting with Mr Knight and the Groundman, and she should have had representation at that meeting.

[15] Ms Katie Karena had given Ms Ellen Karena a letter to give to Ms Karena. The letter, which was dated 22 February 2010 and signed by Mr Knight, stated:

Dear DJ

This letter is to advise you that over the last few weeks the team has been forced to improve your standard of work at Glen Eden Intermediate School, forcing them to pick up your work as well as their own.

I have also received complaints from the client Re: the poor standard of work & also that Lollie's have been stolen from on sight [sic] which is also unacceptable.

Effective immediately as of the 22nd February 2010, employment with KCCS Ltd has ceased, & upon return of your uniform your wages will be direct credited into your account.

[16] Ms Ellen Karena explained that, being upset that her daughter had had no chance to defend herself, she had gone home and, after taking legal advice, had telephoned Mr Knight. At the commencement of the conversation Mr Knight had asked Ms Ellen Karena if she knew about the incident involving the donation box, to which she had responded affirmatively. Ms Ellen Karena said she had then proceeded to question Mr Knight about whether the surveillance evidence had shown Ms Karena lifting the donation box lid, taking any money

out of it, or running off with the money. Mr Knight had responded that to the effect that there had been no need for Ms Karena to have her hand on the box. Ms Karena requested Mr Knight to answer the questions she had asked him. However Mr Knight had terminated the call by hanging up.

[17] Ms Ellen Karena said that she had called Mr Knight a second time and enquired if he had deliberately hung up on her. Mr Knight's response had been that he had employed Ms Karena and not her (Ms Ellen Karena). Ms Ellen Karena said she told Mr Knight she was Ms Karena's mother and acting as her representative, and as such she was seeking answers to her questions. Mr Knight terminated the telephone call again by hanging up.

[18] Ms Ellen Karena gave the letter terminating her employment to Ms Karena on the same day, 22 February 2010. There was no meeting or other communication between Ms Karena and KCCS to discuss the dismissal, either on 22 February 2010 or thereafter.

Determination

[19] The decision to dismiss Ms Karena must be a justifiable decision in accordance with the test as set out in s 103A of the Employment Relations Act 2000 ("the Act"). Section 103A of the Act 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"

[20] The decisions must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice. The then Labour Court in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*¹ stated:

"That is not to say that the employer's conduct of the disciplinary action is to be put under a microscope and subjected to pedantic scrutiny..."

¹ [1990] 1 NZILR 35

However a process fundamentally and palpably unfair will have the effect of rendering a disciplinary action unjustifiable

[21] There are three major principles applicable to the disciplinary process: a duty to inform the employee of the allegations, an informed opportunity for the employee to respond, and a decision that is free from bias and pre-determination. Additionally the fair and reasonable employer will inform an employee of their entitlement to have a representation at a meeting of a disciplinary nature.

[22] The letter of 22 February 2010 advising Ms Karena of her dismissal does not refer to theft from the donation box as the reason for dismissal, which was by inference the reason for the dismissal orally referred to by Ms Katie Karena as having arisen at the meeting between her, Mr Knight and the Groundman. The reasons given in the letter are a poor standard of work and stolen lollies from the school.

[23] However all the allegations, whether made orally or in writing, were not advised to Ms Karena in order that she could address them prior to the dismissal decision being made, nor was Ms Karena given an opportunity to address these concerns at a meeting with KCCS. Ms Karena was not advised of the right to have representation at a meeting.

[24] I find that in dismissing Ms Karena, KCCS did not adhere to the basic requirements of procedural fairness, specifically:

- a. Ms Karena was not provided with specific allegations of misconduct or told what the likely consequences would be if the allegations were established;
- b. Ms Karena was not provided with a real opportunity to provide an explanation to refute the allegations; and
- c. There was no unbiased consideration of the explanation since no opportunity was given to Ms Karena to provide one.

[25] I find that KCCS departed so far from the basic requirements of procedural fairness as to render the dismissal of Ms Karena an unjustifiable dismissal.

[26] I further find no evidence of substantive justification for Ms Karena's dismissal:

- a. There was no evidence that money had been removed from the donation box. In fact Ms Karena having placed her hand on the lid of the donation box was all that had been referred to by both Ms Katie Karena and Mr Knight.
- b. There was no evidence that the School had complained about the standard of Ms Karena's cleaning work. Ms Karena said she had received no formal warnings, or written or verbal complaints about her standard of work. Ms Ellen Karena said that in answer to her queries as to how Ms Karena was performing at work, Ms Katie Karena had always responded positively.
- c. There was no evidence that Ms Karena, who stated that she was occasionally given lollies by teachers and frequently chewed gum at work, had stolen lollies whilst at the school.

[27] I determine that Ms Karena was unjustifiably dismissed.

Remedies

[28] I find that KCCS did not comply with either the basic tenets of natural justice or with the statutory good faith obligations. The decision by KCCS to dismiss Ms Karena was not a decision an employer acting fairly and reasonably would have made in all the circumstances. Ms Karena has been unjustifiably dismissed and is entitled to remedies.

Reimbursement of Lost Wages

[29] Ms Karena has been unable to obtain employment since her employment at KCCS terminated on 22 February 2010, despite having attempted to find alternative work via WINZ and the Seek website.

[30] I have no doubt that to have been dismissed for alleged dishonesty has not assisted Ms Karena in obtaining employment. However after an initial period Ms Karena has attended a 9 month pre-teaching training course accessed via WINZ.

[31] Ms Karena is to be reimbursed for lost earnings from the date of her dismissal on 22 February 2010 for a period of 12 weeks.

[32] I make the following award:

- a. A payment of \$2,625.00 gross in respect of 12 weeks salary payment at the rate of \$12.50 per hour x 17.5 hours.
- b. As interest on that amount, \$196.87 pursuant to s 11, Sch 2 of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[33] Ms Karena was 17 years old at the date of her dismissal from KCCS. Ms Karena was deprived of any opportunity to clear her name of what was a most serious accusation of theft, or to refute the allegation that her standard of work was poor.

[34] As a result Ms Karena became stressed and depressed. Ms Ellen Karena stated that Ms Karena became withdrawn, refusing to leave the house or to meet people for weeks. I accept that losing her job in such a manner was a traumatic experience for a young and vulnerable person.

[35] In respect of the dismissal grievance, KCCS is ordered to pay Ms Karena the sum of \$5,000.00, pursuant to s 123(1) (c) (i).

[36] I am required under s 124 Employment Relations Act 2000 to consider the issue of any contribution that may influence the remedies awarded. I find no contributory behaviour on the part of Ms Karena. There is to be no reduction in remedies.

Costs

[37] Mr Feist is seeking costs. The matter involved less than a half day of meeting time. The principles applicable to awards of costs in the Authority are well established. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² that costs are modest. A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending on the circumstances. For a 1 day Investigation Meeting this would normally equate to an award of \$3,000.00.

[38] Accordingly, KCCS is ordered to pay Ms Karena \$1,500.00 costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority

² [2005] 1 ERNZ 808