

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 9
5351974**

BETWEEN VERONICA KLOETEN
 Applicant

AND COMBINED TANNING
 SUPPLIES LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Geoff Downey, Advocate for Applicant
 Ritesh Chandra for Respondent

Investigation Meeting: 5 January 2012 at Auckland

Submissions received: 5 January 2012 from Applicant and Respondent

Determination: 13 January 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Veronica Kloeten, claims that she has been unjustifiably dismissed and unjustifiably disadvantaged in her employment by the Respondent, Combined Tanning Supplies Limited (“CTSL”).

[2] CTSL denies that Ms Kloeten was unjustifiably dismissed or unjustifiably disadvantaged in her employment, and claims that Ms Kloeten was justifiably summarily dismissed for serious misconduct.

Issues

[3] The issues for determination are:

- Whether Ms Kloeten was unjustifiably dismissed by CTSL

- Whether Ms Kloeten was unjustifiably disadvantaged in her employment by CTSL.

Non-Attendance by CTSL Witnesses

[4] Witness statements had been filed by Ms Wright, Ms Walsh, Ms Skyrme and Mr Henley for CTSL, however these witnesses did not attend the Investigation Meeting, and no explanation for their non-attendance was made by Mr Chandra.

[5] Mr Chandra said that it was his understanding that the Authority Support Officer had been informed by email of the non-attendance of CTSL's witnesses in advance of the Investigation Meeting, however there was no record that an email to this effect had been received by the Authority.

[6] Mr Chandra stated that he had authority to act on behalf of CTSL. Mr Chandra is the Accountant appointed in respect of CTSL and has previously represented CTS at a Directions Hearing Conference. On this basis, I proceeded with the Investigation Meeting.

Factual discussion

[7] I accepted the evidence of Ms Kloeten, Mr Abraham Kloeten, Ms Kloeten's father-in-law, and Mr Fady Sharby, owner operator of F M Automotive. I questioned Ms Kloeten, Mr Kloeten and Mr Sharby on the claims made by Ms Kloeten in the Statements of Problem as set out in paragraph [1] above. No reason was found for me to doubt their unchallenged evidence.

[8] I have found the facts to be as follows. CTSL is a business providing tanning services and supplying tanning and associated beauty products.

[9] Ms Kloeten commenced employment with CTSL in October 2009 as a Senior Beauty Therapist, specialising in spray tanning and lash extensions. The employment details were dealt with by Ms Wright, sole Director and shareholder of CTSL who was also Ms Kloeten's aunt. Ms Kloeten said that at the date of the commencement of her employment Ms Kloeten said that CTSL also employed a Junior Beauty Therapist.

[10] Ms Kloeten said that prior to the events in June 2011, she and Ms Wright enjoyed a good working relationship and a close familial relationship.

[11] On the evening of Sunday 5 June 2011, Ms Kloeten and her husband attended a family dinner at the home of Ms Wright and her mother, Ms Kloeten's grandmother. Ms

Kloeten said that on this occasion, she and her husband shared the news of her pregnancy with Ms Wright and Ms Kloeten's grandmother. Ms Kloeten explained that she considered that Ms Wright had reacted indifferently to the news of her pregnancy.

[12] Monday 6 June 2011 was a statutory holiday. Ms Kloeten said that the following day, Tuesday 7 June 2011, she had commenced work at her normal time and Ms Wright had arrived some time later. Upon her arrival, Ms Kloeten said that Ms Wright had asked her about her plans in regards to her pregnancy, and Ms Kloeten said she had explained that she intended taking maternity leave from early December 2011 until March 2012, when she intended returning to work.

[13] Ms Kloeten said that Ms Wright had become upset and agitated, asserting that Ms Kloeten would have no job to return to in March 2012 as CTSL would not be able to sustain the costs it would incur due to her pregnancy and maternity leave.

[14] Ms Kloeten said that Ms Wright had also told her that the CTSL clients would not like to have the services provided by a pregnant woman, as they would find this to be disgusting and repulsive.

[15] Ms Kloeten said that Ms Wright had mentioned that due to the increased costs CTSL would incur as a result of Ms Kloeten's pregnancy, it was necessary to increase the prices to be charged for the services provided, and had instructed her to increase the prices charged for the spray tanning and lash extensions. Ms Kloeten said that Ms Wright had then left the premises.

[16] Ms Kloeten explained that Ms Wright had arrived late the next morning, Wednesday 8 June 2011, and had barely acknowledged her. Ms Kloeten said that she had felt that Ms Wright's manner towards her was hostile.

[17] Ms Kloeten said that Ms Wright's attitude towards her had made her feel distressed and she had discussed this with her mother that evening. Later that same evening another family member had drawn Ms Kloeten's attention to a 'Status Update' posted on Ms Wright's Facebook internet site which read:

*A catastrophic event ... is watching everything you've worked for,
your entire networth, the thing that defines you as who you are & the
hopes & dreams you had ... all gone*

[18] Ms Kloeten said she had believed the comment referred to her, and had discussed the comment with her mother, who had texted Ms Kloeten's grandmother (Ms Wright's mother) to ascertain if she would speak to Ms Wright about the Facebook comment.

[19] Ms Kloeten stated that Ms Wright did not arrive at CTSL until the afternoon of the following day, Thursday 9 June 2011. Ms Kloeten said that she had just been finishing a treatment for her last client of the day and upon the client leaving, Ms Wright had locked the door behind the client and started to berate Ms Kloeten for involving an elderly lady in her affairs, and for having caused Ms Wright major problems in respect of the operation of CTSL.

[20] Ms Kloeten said that Ms Wright had been so enraged that she had been frightened that she would be physically assaulted by her. Ms Kloeten said that she had gathered her possessions including her laptop and sewing machine in her arms, and, due to Ms Wright standing in her way, had had to push past Ms Wright to get to the door. Upon exiting she had had to push a small trellis gate aside with her foot as she did not have a hand free to open it.

[21] Following this incident, Ms Kloeten said that her mother and grandmother had tried to resolve the situation with Ms Wright, and that she had been advised to attend for work as usual on Monday 13 June 2011. However her mother had subsequently received a text message cancelling this instruction.

[22] On Monday 13 June 2011 Ms Kloeten said she had received a letter from Ms Wright summarily terminating her employment on the basis of serious misconduct.

[23] On Saturday 25 June 2011 Mr Kloeten said that he had accompanied Ms Kloeten to the block of industrial units where CTSL was based as Ms Kloeten had wanted to speak with anyone at the industrial units who may have seen the incident which had taken place on Thursday 9 June 2011.

[24] Mr Kloeten said he and Ms Kloeten had spoken to Mr Laurie Henley, owner operator of Panmure Motorcycles who occupied premises sited at the rear of the block of industrial units; and Mr Henley had told them that he had not witnessed the incident. However Mr Henley said that he had learnt of the incident after talking to the employees of F M Automotive.

[25] Ms Kloeten said that she and Mr Kloeten had then spoken to Mr Sharby of F M Automotive and some of his mechanics who had by that time arrived at the block of industrial units.

[26] Mr Sharby said that Ms Kloeten had asked if he would write a note to state what he had witnessed, and that he had agreed to sign such a note if Ms Kloeten wrote it. Mr Sharby said that Ms Kloeten had subsequently written a note and he had signed it.

[27] Mr Sharby said he had not read the note before signing but agreed that what was read to him at the Investigation Meeting from the note submitted in evidence was correct. The written and signed note stated:

On Thursday 9th June around mid-afternoon.

Heard door open, saw Veronica get pushed out the door to leave. Janita said get out, Veronica crying, then getting into the car and leaving.

[28] At the Investigation Meeting Mr Sharby stated that on 9 June 2011 he had been working in his office which was opposite to the CTSL premises. Mr Sharby said that he had heard the door of CTSL opening and a commotion, and when he looked over he had seen Ms Wright holding Ms Kloeten's arm and saying "Out, out". Mr Sharby said that Ms Kloeten had been very distressed, she had been holding items in her arms, had kicked the trellis gate open, got into her car and had driven off.

[29] Mr Kloeten said he had visited the block of industrial units some weeks later, as he had an old motorbike to sell and also he had wanted to see if Ms Wright was still operating CTSL from the premises in the industrial units. Mr Kloeten said he had spoken to Mr Henley. Mr Henley informed him that the Council had put pressure on Ms Wright to close the CTSL premises due to restrictions on the type of premises which could operate from the block of industrial units.

Determination

Was Ms Kloeten unjustifiably dismissed by CTSL?

[30] Ms Kloeten was dismissed on 13 June 2011. The amended statutory test applicable with effect from 1 April 2011 therefore applies. The new Test as set out in s 103A of the Employment Relations Act 2000 ("the Act") states::

S103A Test of Justification

- iv. 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 applying the test in subsection (2).

- v. *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- vi. *In applying the test in subsection (2), the Authority or the court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- (5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
 - (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[31] The new Test of Justification still requires that the employer acted in a manner that was substantively and procedurally fair. CTSL must show that it carried out a full and fair investigation into the issue of whether Ms Kloeten's actions constituted serious misconduct, taking into consideration the factors in s 103A(3), statutory good faith requirements and natural justice. CTSL must also establish that dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[32] 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.

[33] The letter of 13 June 2011 advising Ms Kloeten of her dismissal gave the reason for dismissal as serious misconduct on the basis of physical assault and verbal abuse on the part of Ms Kloeten to Ms Wright.

[34] Serious misconduct is an offence for which summary dismissal is an outcome as outlined at clause 12.2 in Ms Kloeten's Individual Employment Agreement.

[35] However given Ms Kloeten's and Mr Sharby's unchallenged evidence, I find there to be no substantive justification for finding Ms Kloeten had committed serious misconduct.

[36] Further I find that in dismissing Ms Kloeten, CTSL did not adhere to the basic requirements of procedural fairness, specifically:

- a. Ms Kloeten was not provided with specific allegations of misconduct or told what the likely consequences would be if the allegations were established;
- b. Ms Kloeten 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 Kloeten to provide one.

[37] I find that in addition to the lack of substantive justification, CTSL departed so far from the basic requirements of procedural fairness as to render the dismissal of Ms Kloeten an unjustifiable dismissal.

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

Was Ms Kloeten unjustifiably disadvantaged in her employment with CTS?

[39] I find that Ms Kloeten's unchallenged evidence as to Ms Wright's treatment of her following the announcement of her pregnancy, involving Ms Wright being hostile to her, suggesting that clients would not want Ms Kloeten attending to them due to her pregnant condition, and being abusive towards her, constituted bullying and harassment.

[40] I find that CTSL did not act as a fair and reasonable employer towards Ms Kloeten. I determine that Ms Kloeten was unjustifiably disadvantaged in her employment as a result of her pregnancy.

Remedies

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

Reimbursement of Lost Wages

[42] Ms Kloeten is to be reimbursed for lost earnings from the date of her dismissal on 13 June 2011 until the date when she would have started her maternity leave in early December 2011. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority

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

[43] Ms Kloeten is also entitled to compensation for humiliation and distress. The grievances of unjustifiable dismissal and unjustifiable disadvantage arise from the outlined set of circumstances and these constituted a short period of time.

[44] I find that in respect of both matters giving rise to a personal grievance, these being the disadvantage grievance and the dismissal grievance, Ms Kloeten suffered hurt and humiliation.

[45] In respect of the dismissal and disadvantage grievances, CTSL is to pay Ms Kloeten the sum of \$3,000.00, pursuant to s 123(1) (c) (i) of the Act.

Compensation for Loss of a Benefit under s 123 (1) (c) (ii).

[46] Had she not been unjustifiably dismissed, Ms Kloeten would have had a reasonable expectation of obtaining entitlement to maternity leave of 14 weeks payment.

[47] Ms Kloeten is to be reimbursed for the maternity leave payments to which she had a reasonable expectation had her employment not been unjustifiably terminated. I would

anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

Contribution

[48] I have considered the matter of contribution as I am required to do under s124 of the Act. Ms Kloeten did not contribute to either of the situations which gave rise to the grievances. There is to be no reduction in remedies.

Costs

[49] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority