

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 500
5421423

BETWEEN BETTINA LATHAM
 Applicant

A N D MALCOVE DISTRIBUTORS
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: C T Patterson/AM Halloran, Counsel for Applicant
 G Pollock, Counsel for Respondent

Investigation Meeting: 5 - 6 November 2013 at Auckland

Submissions Received: 1 November 2013 from Applicant
 1 November 2013 from Respondent

Date of Oral
Determination: 6 November 2013
Date of Written
Determination 7 November 2013

DETERMINATION OF THE AUTHORITY

- A. Ms Latham is not estopped from bringing a personal grievance before the Authority.**
- B. There was no mutual agreement to terminate Ms Latham's employment. In the circumstances her dismissal was unjustified.**
- C. Malcove Distributors Limited did not breach its obligation of good faith owed to Ms Latham.**
- D. Ms Latham has lost remuneration under s123(b) and 128 Employment Relations Act 2000 for the period 13 May to 4 June 2013 totalling \$3,312.36 net.**

- E. Malcove Distributors Limited paid an additional four weeks wages to Ms Latham at the conclusion of her employment totalling \$4,436.48 net. This additional payment is offset against the remedies payable. No further award under s123(b) Employment Relations Act 2000 shall be made.**
- F. An order for compensation of \$5,000 for hurt, humiliation and distress pursuant to s.123(1)(c)(i) Employment Relations Act 2000 would have been made. However, Ms Latham's behaviour was causative and blameworthy and warranted a reduction in compensation payable by 100%.**
- G. Costs are reserved. If the parties seek costs, submissions are to be filed within 15 days of the date of this determination. The other party shall have 15 days thereafter to file submission in reply. The decision shall be dealt with on the papers.**

Employment relationship problem

[1] Bettina Latham was employed on 3 December 2012 as a finance administrator by Malcove Distributors Limited (MDL). The employment was subsequently terminated on or about 3 May 2013. Ms Latham says she was dismissed because of an affair with a co-worker. MDL submits Ms Latham is estopped from raising a personal grievance because she accepted and retained four weeks additional pay. Alternatively, her employment ended by mutual agreement. Even if she was unjustifiably dismissed, no remedies are payable.

Issues

- [2] The following issues arise:
- (a) Is Ms Latham estopped from bringing a personal grievance before the Authority by her retention of the additional payment?
 - (b) Was there mutual agreement for Ms Latham's employment to terminate on 3 May 2013?
 - (c) Was there a breach of the duty of good faith by MDL failing to be active and constructive?

- (d) If unjustifiably dismissed, what remedies (if any) should be awarded?

Legal Framework

[3] The fact Ms Latham's employment was terminated is accepted. The onus falls upon MDL to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*¹ In applying this test, the Authority must consider the matters set out in s.103A.

[4] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly.² A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.³

[5] There is a substantial conflict of evidence between the parties. This requires express findings of credibility⁴ upon evidence given by brief and orally at hearing.

[6] Credibility can be assessed on two bases – the witness personally⁵ and the story the witness tells. Some factors relevant to personal credibility are:

- (a) Demeanour⁶;
- (b) Inconsistencies and contradictions of all kinds⁷;
- (c) Prevarication⁸;
- (d) Reasons to lie⁹;
- (e) Concessions made where due, despite any perception by the witness of a risk to credibility in giving that evidence¹⁰.

¹ Section 103A(2)

² Section 103A(5)

³ *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

⁴ *RNZAF Museum Trust Board v Hunter* Employment Court Wellington WC11/00, 1 March 2000 at p6

⁵ *Kelly v Accident Rehabilitation & Compensation Insurance Corporation* EMC Wellington WC 13/99, 24 March 1999 at p69

⁶ *Hakaraia v Foodstuffs (Wellington) Co-operative Society Ltd* Employment Court, Wellington WC6/01, 22 February 2001 at [14]; *T v SAR Ltd* ERA Christchurch CA126/05, 23 September 2005; *Young v Venables t/a Mt Eden Bakery & Delicatessen* Employment Court Auckland AC88/00, 7 November 2000 at p 6

⁷ *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 252

⁸ *Griffith v Sunbeam Corporation Ltd* EMC Wellington WC13/06, 28 July 2006 at [108]

⁹ See above at [109]

[7] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?¹¹

[8] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.¹²

Is Ms Latham estopped from bringing a personal grievance before the Authority by her retention of the additional payment?

[9] Ms Latham submits she did not accept any sum from MDL in full and final settlement of her employment matters. She confirmed she received and retained an additional four weeks wages. She submits she was entitled to retain the payment in lieu of MDL giving 1 month notice following her dismissal under her employment agreement (clause 22).

[10] MDL disagreed. It sent a letter on 7 May 2013 setting out the basis for payment. When Ms Latham declined to be bound by the agreement, it sought its return. The retention of the payment meant she was estopped from raising her personal grievance. Further, it was not payment in lieu of 1 month notice because she was not entitled to receive it. There was no compliance with clause 22, she was unfit to work and had no paid sick leave as at 3 May 2013.

[11] At hearing Alan Pilbrow, owner of MDL, said the payment was initially to settle this matter. When the letter was not returned signed, it was an ex-gratia payment i.e. without legal obligation to assist her following the abrupt termination. This was corroborated by Charlotte Kingston, MDL Business Development Co-ordinator, who made the payment.

[12] Silence is equivocal as to consent.¹³ MDL cannot seek to unilaterally impose an obligation upon Ms Latham through silence or acquiescence. Estoppel may arise where A has led B into a belief on which B had relied to such an extent that it would

¹⁰ See above at [110]

¹¹ See above at [111]; *Corbett v National Mutual Finance Ltd* (CA 172/91, 10 February 1992, p10

¹² *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587 (LC), at 603

¹³ Burrows Finn & Todd *Law of Contract in New Zealand* Third Ed Lexis Nexis para. 3.4.1 Effect of Silence p 58 citing *Felthouse v Brindley* (1862) 11 CBNS 869; Miller 35 MLR 489.

be unconscionable for A to assert their strict legal rights. Estoppel requires, amongst other things, a clear and unambiguous promise by one party to another and reliance upon that promise to such an extent it would be inequitable or unconscionable to allow the promisor to go back on their word.¹⁴

[13] There was no clear and unambiguous promise by Ms Latham to MDL. MDL sought a promise from Ms Latham she forgo her rights to bring proceedings before the Authority in return for payment of four weeks wages *once [she had] signed our letter accepting final settlement.*¹⁵ Ms Latham never signed the letter. MDL could not have relied upon any promise because it was never given. MDL made the payment anyway without further correspondence. At best MDL took a chance she may not prosecute her rights by making the payment. This is not detriment the Authority is required to remedy to prevent inequity.

[14] The Authority determines Ms Latham is not estopped from bringing a personal grievance before the Authority. The payment may be offset against remedies.

Was there mutual agreement for Ms Latham's employment to terminate on 3 May 2013?

[15] Ms Latham submits there was no mutual agreement for her employment to terminate at the 3 May 2013 meeting with Mr Pilbrow. She submits she was dismissed and MDL was motivated to get rid of her because of her affair with the General Manager. She further submits MDL dressed up her personal purchases as an abuse of privilege to terminate her employment. She believes her dismissal was unjustifiable both substantively and procedurally. Even if her behaviour gave the impression of agreement, it cannot be relied upon because her medical certificate showing she was stressed and unfit for work to 13 May. Although she did not give it to MDL, it should have known she was distressed from her conduct.

[16] MDL submits there was a mutual agreement at the meeting on 3 May 2013 because Ms Latham's evidence is not credible and the Authority should prefer Mr Pilbrow's evidence. He believed there was a mutual agreement and had no knowledge of Ms Latham's personal circumstances.

¹⁴ See footnote 13 *Law of Contract in New Zealand* at p 124 ff.

¹⁵ Applicants Bundle of Documents (ABD) Document 11 Letter MDL to B Latham undated

[17] MDL accepts no disciplinary process was followed prior to termination. It submits Ms Latham's personal purchases were serious misconduct. The dismissal was substantively justified even if procedurally flawed.

[18] If the Authority determines there was no mutual agreement, the dismissal shall be unjustified. If it determines there was, this application shall be dismissed.

[19] At hearing Ms Latham accepted it was possible (but not probable) she may have given Mr Pilbrow the impression she had agreed to leave. She gave evidence she was stressed and confused to the point where *people do all sorts of things*.¹⁶ Despite being stressed, she was advised by her former boss, Kevin Paxton, to attend the 3 May meeting.

[20] Ms Latham gave no explanation why she did not give Mr Pilbrow her medical certificate at the 3 May meeting. She gave little evidence of how he should have known her personal circumstances other than his conversation with her the day before and her demeanour. Mr Pilbrow accepted she had been distressed the day before, but thought she was calm and rational at the 3 May meeting. His purpose in calling the meeting was to discuss her unauthorised purchases, not terminate employment. Ms Latham told him she always intended to pay for her purchases. She then raised her affair with the General Manager. She said *one of us have [sic] to go* and because he was the General Manager, *it had to be her*. Mr Pilbrow believed this evidenced a mutual agreement for her to leave or resign.

[21] Text messages from Ms Latham to a co-worker from 3 to 5 May 2013¹⁷ indicated she was considering or had decided to leave. On 3 May she says *don't know if I will even be back*. On 5 May she states *now that I don't have to go back or see him I am already getting back to normal*. She denied this referred to her leaving permanently. Another text message on 5 May referred to an *interview*. This inferred she was looking for alternative employment. She was interviewed on 14 May 2013 and started her new job 2 weeks thereafter.¹⁸ Her evidence prevaricated. Initially Ms Latham could not recall what the text about interview referred to. Under cross-examination she stated it did not refer to an interview for her current job which she

¹⁶ Oral evidence B Latham 5 November 2013

¹⁷ Exhibit 4 Brief B Latham in reply; Exhibit C Brief C Kingston

¹⁸ Applicants Exhibit B Diary Entry V Mudie 14 May 2013; Document 13B ABD

started on 4 June 2013. When her previous evidence was re-read to her, she changed her evidence to state she did not recall what this referred to.

[22] Ms Latham then received from an unidentified colleague an MDL email dated 6 May 2013 stated she *was found to have abused a Malcove privilege and her employment was ceased*¹⁹. Upon receipt she did not raise an issue about her termination. Instead she emailed Mr Pilbrow her ‘notes’ from the 3 May 2013 meeting and sought copies of his. Her explanation was that she was still uncertain if she was employed. Her notes recorded her employment *was at an end*²⁰ but she still denied she was aware her employment had ended.

[23] The evidence does not support any motive by MDL to dismiss because of an affair with the General Manager. The evidence supports the inference Ms Latham, more probably than not, had come to some decision about her continued employment at the meeting on 3 May. There is a reasonable suspicion following her receipt of the MDL 6 May email she resiled from her previous position. However the evidence falls short of any certainty of mutual agreement to the required threshold. Subsequent to 3 May 2013 Mr Pilbrow instructed the email of 6 May be sent and drafted a letter dated 7 May 2013 advising her termination was *due to the abuse of a Malcove privilege*²¹ not mutual agreement. The termination letter sought further agreement to settle in return for payment of four weeks wages. If there had been mutual agreement to end her employment as at 3 May 2013, no further payment to settle matters would have been required.

[24] The Authority determines there was no mutual agreement to terminate Ms Latham’s employment. In the circumstances her dismissal was unjustified.

Was there a breach of the duty of good faith by MDL failing to be active and constructive?

[25] Ms Latham submits MDL failed to be responsive and communicative towards her. This was evidenced by the failure to immediately raise the concerns about her staff purchases and to advise she was dismissed. MDL denies any breach.

¹⁹ Document 9 ABD
²⁰ Document 10 ABD
²¹ Document 11 ABD

[26] There is insufficient evidence of a breach on the balance of probabilities. Ms Latham was well aware she had made staff purchases without authorisation on 27 March 2013, did not record them in the MDL accounting system, and had not paid for them by 2 May and that MDL would be concerned if they found out. She equally failed to bring her behaviour to MDL's attention. MDL became aware of her staff purchase two weeks prior to raising it with her on 2 May 2013.

[27] There is evidence Ms Latham was aware her employment may be terminated on 3 May 2013. Her own notes record her employment was at end. She had received a copy of the email 6 May and a letter 7 May advising the same.²² Any delay by MDL in raising those concerns was minimal and did not result in unfairness to Ms Latham.

[28] The Authority determines Malcove Distributors Limited did not breach its obligation of good faith owed to Ms Latham.

If unjustifiably dismissed, what remedies (if any) should be awarded?

[29] Ms Latham seeks remedies of four weeks lost wages (s123(1)(b) and \$15,000 hurt and humiliation compensation (s123(1)(c)(i)). She submits her medical certificate stating she was unfit for work until 13 May 2013 does not affect her ability to claim four weeks wages. Her evidence of hurt and humiliation was the medical certificate obtained prior to dismissal and a letter confirming she was receiving counselling for stress.²³

[30] An award under s123(1)(b) is for lost remuneration. This is capped at "... *the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*" (s128(2)). The period Ms Latham was fit to return to work was 13 May to 4 June 2013. She did not have any paid sick leave available at the time. Lost remuneration must be confined to the period an employee is fit to return to work. Ms Latham acted reasonably to mitigate loss of wages by obtaining a job within 1 month. Ms Latham has lost remuneration under s123(b) and 128 Employment Relations Act 2000 for the three week period 13 May to 4 June 2013 totalling \$3,312.36 net (\$1,109.12 net per week).²⁴

²² Documents 9 – 11 ABD

²³ Documents 13 to 13A.

²⁴ Oral evidence C Kingston Ms Latham paid \$1,109 net per week

[31] Malcove Distributors Limited paid an additional four weeks wages to Ms Latham at the conclusion of her employment totalling \$4,436.48 net.²⁵ This additional payment is to be offset against the remedies payable under s123(b) and 128. No further award under s123(b) shall be made.

[32] Given the brevity of evidence, an appropriate award for hurt and humiliation compensation is \$5,000 subject to contributory behaviour. The evidence is her shock at the loss of the job was temporary. There was evidence she did work for her previous boss and kept physically active going for a bike ride and doing weight training. She also applied for and obtained employment relatively quickly. She told a friend she was getting back to normal.

[33] The Authority must consider the extent to which Ms Latham's actions contributed towards the situation that gave rise to the personal grievance and if required, reduce the remedies that would otherwise have been awarded (s.124). Contributing behaviour is behaviour which is causative of the outcome and blameworthy.²⁶

[34] There was contributory behaviour by Ms Latham including:

- a) purchasing goods totalling \$2,232.29 upon MDL's account without authority²⁷, failing to account and pay for the goods until 2 May 2013;
- b) creating the impression she had agreed to terminate her employment at the 3 May meeting;
- c) failing to advise or provide MDL with evidence she was sick to the extent now alleged to have contributed to her behaviour.

[35] Subsequently discovered misconduct can be taken into account in reducing remedies.²⁸ There was subsequently discovered misconduct by Ms Latham including:

- a) colluding with unidentified employees of MDL to obtain access to internal emails;

²⁵ Oral evidence C Kingston Ms Latham

²⁶ *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

²⁷ At hearing Ms Latham accepted in hindsight she should have gotten Mr Pilbrow's authority prior to making her staff purchases using MDL's account.

²⁸ *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155 at [104]

- b) deleting information from MDL's computers showing further contributory behaviour;
- c) providing prescription drugs to another employee whom was under the influence of the drugs while at work for MDL.

[36] An order for compensation of \$5,000 for hurt, humiliation and distress pursuant to s.123(1)(c)(i) Employment Relations Act 2000 would have been made. However Ms Latham's behaviour was causative and blameworthy and warranted a reduction in compensation payable by 100%.

[37] Costs are reserved. If the parties seek costs, submissions are to be filed within 15 days of the date of this determination. The other party shall have 15 days thereafter to file submission in reply. The decision shall be dealt with on the papers.

T G Tetitaha
Member of the Employment Relations Authority