

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 117
5355175**

BETWEEN AEDENE MASSIE
 Applicant

AND ALLAN & NEENEE ONG t/a
 PHARMACY 72
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Stephen Tee, Counsel for Applicant
 Allan Ong for Respondent

Investigation Meeting: 23 March 2012 at Auckland

Submissions received: 23 March 2012 from Applicant
 23 March 2012 from Respondent

Determination: 10 April 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Aedene Massie, claims that she has a personal grievance under s103A of the Employment Relations Act 2000 (“the Act”), in that she was unjustifiably dismissed on 27 June 2011. Ms Massie claims that the dismissal was unjustifiable both substantively and procedurally.

[2] The Respondents, Mr Allan Ong and Mrs Neenee Ong, trading as Pharmacy 72, (“Mr and Mrs Ong”) deny that Ms Massie was unjustifiably dismissed, claiming that she was justifiably dismissed as a result of their having lost trust and confidence in her as an employee.

Issue

[3] The issue for determination is whether Ms Massie was unjustifiably dismissed from her employment with Mr and Mrs Ong.

Background Facts

[4] Mrs Ong explained that during 2011 she had been recruiting a Pharmacy Technician and Ms Massie's name had been mentioned to her by a tutor working at Academy New Zealand as someone who might be suitable for the position. Mrs Ong said that she had worked with Ms Massie on a previous occasion at another pharmacy and after an interview in early April 2011, had offered Ms Massie employment as a Pharmacy Technician at Pharmacy 72 ("the Pharmacy").

[5] Ms Massie stated that the terms of employment which had been discussed and agreed with her at the interview in April 2011 were that she was to work Monday to Friday from 10.00 a.m. to 4.00 p.m. with an unpaid half hour lunch break and that she would be paid an hourly rate of \$15.00 per hour.

[6] Ms Ong said that Ms Massie had demanded an hourly rate of \$18.00 per hour; Ms Massie denied this but explained that she had informed Ms Ong that tutors on the technician's course at Academy New Zealand had told the trainees that they could expect an hourly rate of \$17.00. Ms Ong stated that she had agreed to review Ms Massie's hourly rate after 2 to 3 months service.

[7] Ms Ong said that she had explained to Ms Massie that it would be expected that she would have to deliver medicines to some patients, however Ms Massie said that as she did not have car at that time, the discussion had not progressed to cover reimbursement of petrol expenses.

[8] Mrs Ong stated that Ms Massie's employment had been subject to a trial period. Ms Massie stated that she had not been appointed on a trial period basis. At the Investigation Meeting Mrs Ong accepted that there had not been a valid trial period entered into with Ms Massie, explaining that she had misunderstood the rules relating to trial periods and confirmed that a trial period had not been agreed in writing with Ms Massie prior to her employment commencing.

[9] Ms Massie said that she had not been provided with a written employment agreement despite the fact that she had requested one on several occasions.

[10] Mrs Ong agreed that this was the case and explained that as Ms Massie had commenced her employment on 2 May 2011, and she and Mr Ong had left New Zealand for

Malaysia on 17 May 2011, there had not been sufficient time available to deal with the provision of a written employment agreement.

[11] Following Mr and Mrs Ong's return from Malaysia on 17 June 2011, no employment agreement had been provided to Ms Massie.

[12] Mrs Ong said that it had been made clear to Ms Massie at the time when she had commenced employment that one of the duties of the Pharmacy Technician was to vacuum the pharmacy floors and to clean the shelves when the pharmacy was quiet.

[13] Ms Massie said that she had vacuumed the floor during the week, but she had not undertaken the shelf cleaning as there was a young girl who came into the Pharmacy a few evenings a week and carried out the shelf cleaning.

[14] Ms Massie said that during the period of her employment prior to Mr and Mrs Ong leaving for Malaysia, she had received very positive feedback about the standard of her work from both Mrs Ong and Mr Jay Seol, a locum pharmacist who worked in the pharmacy one day a week.

[15] Mrs Ong agreed that she had given positive feedback to Ms Massie but claimed that Ms Massie had also made some errors which she (Mrs Massie) had tried to correct in a very positive and encouraging manner.

[16] Ms Massie said that she had developed a good working relationship with Mr Seol prior to Mr and Mrs Ong going to Malaysia, and that the relationship continued to be good during the period of Mr and Mrs Ong's absence. Ms Massie stated that during this period Mr Seol had not made any adverse comments to her regarding her performance.

Memorandum of 17 June 2011

[17] On 17 June 2011 Mr and Mrs Ong returned from Malaysia. On their return Mr Seol had provided them with a signed memorandum dated 17 June 2011 in which he had written:

Report on an incident regarding Aedene Massie and the till

I am writing this letter to inform you of what I have observed of Aedene's action at work.

I cannot recall the exact date when this happened but it was on the week of 6 June 2011, at about 12.00 pm. On the day the incident occurred, I was about to go out to get something to eat for lunch and Aedene was standing right at the till. As I left the shop, I realized that

I didn't bring my wallet with me, so I turned around and went back into the store.

As I entered the pharmacy, I heard the sound of the till closing, and Aedene quickly turning around and walking into the dispensary. I did not actually see Aedene take any money as my view was blocked by the counter, but I immediately sensed that the behaviour was very suspicious. There was no one in the shop for at least 10 minutes prior to that moment and there was no legitimate reason for Aedene to open the till.

After this incident, I didn't feel comfortable leaving her alone in the shop whenever I had to leave Aedene alone in the shop either to buy lunch, or to go to toilet to relief myself. I feel that I should inform you of this matter in view of it's seriousness.

[18] Mrs Ong stated that she had not shown the memorandum to Ms Massie, nor discussed the allegation of dishonesty with her as she believed that this would have made the working situation stressful and uncomfortable.

[19] Mr Ong agreed that they (Mr and Mrs Ong) had wanted to avoid any embarrassment which raising the matters in the memorandum with Ms Massie might cause. Mr Ong explained that he had accepted Mr Seol's allegation that Ms Massie had behaved in a dishonest manner as being valid solely on the basis that Mr Seol as a registered pharmacist, was more likely to be truthful in the matter than Ms Massie, a Pharmacy Technician.

[20] Mr and Mrs Ong said that they had discussed the situation over a period spanning two weekends and they had reached the decision that it was necessary to terminate Ms Massie's employment and that Mr Ong would interview Ms Massie.

Pregnancy situation

[21] Ms Massie explained that shortly after she commenced employment at the Pharmacy she had become pregnant. Ms Massie said she had immediately informed Mrs Ong, who appeared to have been pleased for her.

[22] Ms Massie said that she had had a pregnancy scan on Wednesday 15 June 2011, prior to commencing work for the day. The scan had revealed an abnormal pregnancy and Ms Massie said she had been advised by her doctor that she would miscarry. Ms Massie explained that she had been extremely upset by this news, and as Mr Seol had been appointed to manage the pharmacy in Mr and Mrs Ong's absence, she had telephoned him to request a day of unpaid leave. Mr Seol had confirmed to her that this would be acceptable.

[23] On Saturday 18 June 2011 Ms Massie said that she had started to miscarry, and had been treated at North Shore Hospital over the weekend. On Monday 20 June 2011 Ms Massie

had returned to work at the pharmacy, despite being in severe pain as a result of her continuing miscarriage.

[24] Ms Massie stated that she had remained working normally at the Pharmacy until the morning of Thursday 23 June 2011. Ms Massie said that at her doctor's appointment that morning, prior to her commencing work for the day, her doctor had made the decision to have her admitted to hospital for a medical procedure, as her miscarriage had not medically completed.

[25] Ms Massie said that the doctor had faxed a medical certificate to Mrs Ong confirming that she would not be able to return to work until 27 June 2011. Ms Massie explained that as she had been concerned that she would not be able to return to her employment at the Pharmacy until Monday 27 June 2011, she had telephoned Mrs Ong to check that she had received the medical certificate and Mrs Ong had confirmed that she had done so.

[26] On Friday 24 June 2011 Ms Massie said that, following a successful medical procedure, she had been discharged from the hospital, and had called at the Pharmacy on her way home to pick up a prescription. At the Pharmacy she had seen Mrs Ong who had wished her well and said that she would see Ms Massie on Monday 27 June 2011.

[27] On 27 June 2011 Ms Massie had returned to work. On 29 June 2011 Mr Ong arrived at the Pharmacy. Ms Massie, who had not previously met Mr Ong, said she had introduced herself following which Mr Ong had called her into a meeting with him which he had described as being a 'performance appraisal'.

[28] Ms Massie said that she was surprised by this, especially as she did not know Mr Ong and had not worked with him, but that she had been expecting a salary review as promised at her initial interview by Mrs Ong.

[29] Ms Massie said that she had understood Mrs Ong to have been pleased with her performance, and whilst she expected that there would be some constructive as well as positive feedback as that was the nature of a performance appraisal; her expectation had also been that her salary was to be increased.

[30] During the meeting Mr Ong read a pre-prepared letter to Ms Massie. The letter commenced with the positive observation that:

We recognize your strengths in dealing with patients and customers of the pharmacy. You have excellent communication and customer handling skills. Your knowledge of the store items and OTC items are quite current. You serve customer very well.

[31] Ms Massie said that this was the positive feedback she had been expecting. However as Mr Ong had continued reading the letter it had become apparent to her that Mr Ong was not pleased either with her work standards or the amount of sick leave she had taken.

[32] The letter had proceeded to cover areas in which there was concern with Ms Massie's performance including:

- *Lack of commitment to work;*
- *Filling of prescriptions;*
- *Lack of initiative;*
- *Sick Leave;*
- *Deliveries to patients; and*
- *Purchases for the Pharmacy.*

[33] The letter also stated that Mr and Mrs Ong had made a change to the procedure regarding the cash till in that the key to manually open the till had been removed. There was no reference in the letter to Mr Seol's memorandum of 17 June 2011 or to his suspicions regarding Ms Massie's dishonesty.

[34] The letter concluded by stating:

.... we regret that we will have to give you notice of termination of your services at Pharmacy 72. We will give you 4 weeks notice and opportunity to seek alternative employment. Your last day at Pharmacy 72 will be 27 July 2011.

[35] Ms Massie said that the comments in the letter about her having taken sick leave greatly upset her given that her miscarriage had not only been an unplanned event but it had left her in an extremely distressed and vulnerable emotional state. Ms Massie stated that she had ensured that on each occasion on which she had taken sick leave, her absence had been approved.

[36] In respect of the comments in the letter regarding purchasers she had made for the Pharmacy being made without receipts being provided, and the petrol reimbursement, Ms

Massie said that she had never been provided with the policy relating to these procedures, but that she had provided the requisite receipts in respect of the purchases made, although she accepted that there had been a delay in her buying some rubbish bags for which purchase monies had been provided.

[37] Ms Massie stated that she believed it had been reasonable for her to be reimbursed for the deliveries she had made to patients which she had undertaken after work, especially as these were not on her route home and had been at the request of Mr Seol.

[38] Ms Massie stated that the sick leave she had taken totalled 5 days, 4 days of which had been as a result of her miscarriage. The remaining 1 day consisted of a few hours taken on a few occasions. All the days taken as sick leave had been approved in advance and all had been unpaid.

[39] Following the meeting with Mr Ong, Ms Massie said she was upset and shaking and had gone to the bathroom to compose herself before returning to her duties. Ms Massie said at this point Mrs Ong had approached her, and apologised for having to terminate her employment.

[40] Ms Massie said she had asked Mrs Ong if her dismissal had been as a result of her becoming pregnant and having a miscarriage, and that Mrs Ong had replied that the Pharmacy was a small business and as Ms Massie wished to have a family, she was unsure that that would suit the practice.

[41] Mrs Ong denied that she had made reference to the Pharmacy requirements in relation to Ms Massie's pregnancy, but rather that she had provided Ms Massie with the advice that if Ms Massie wished to start a family; she should find a less stressful position, especially if she had a propensity to miscarry.

[42] Ms Massie said that there had been no opportunity provided for her to give an explanation in respect of the allegations set out in the letter. Mr Ong agreed that he had not provided Ms Massie with such an opportunity during the meeting.

[43] Mrs Ong stated at the Investigation Meeting that following Ms Massie's meeting with Mr Ong, she had told Ms Massie that it was for her to decide if she wanted to follow the 4 weeks' notice route, or discuss the situation with her.

[44] Ms Massie explained that she had carried out her normal duties for the rest of the day on 29 June 2011, including serving customers and her usual pharmacy duties of filling prescriptions, and dispensing.

[45] Ms Massie said that she had intended to work out her 4 weeks' notice, however when she had arrived at the Pharmacy the following day there was a student who was carrying out the pharmacy duties normally undertaken by her and she (Ms Massie) had been asked by Mrs Ong to do cleaning in the Pharmacy

[46] Mrs Ong stated that she had been training the student and the date of the student's arrival at Pharmacy 72 had been arranged some time earlier. Mrs Ong said she had asked Ms Massie to carry out the cleaning when Ms Massie had asked what to do as the pharmacy was quiet.

[47] Ms Massie stated that on each occasion she had tried to serve a customer, Mrs Ong had immediately taken over the process, which Ms Massie had found embarrassing as these were customers she knew quite well.

[48] Ms Massie said that she had felt humiliated and degraded by these events and she had tried to discuss the situation with Mrs Ong, but that Mrs Ong had been abrupt and hostile towards her. Ms Massie said that she had tried to discuss her final pay with Mrs Ong and had been informed that petrol expenses which she had claimed in respect of the medication deliveries to patients would be deducted from her final payment.

[49] Ms Massie said she had left the Pharmacy at lunch time feeling fragile and depressed and had gone to see her doctor. Ms Massie said she had felt unable to continue to work out her notice and had left her employment at the Pharmacy.

[50] Ms Massie explained that she had been able to obtain some part-time work at a call centre almost immediately, but had felt unable to seek employment in a pharmacy as her confidence had been badly eroded by the events which had taken place at Pharmacy 72.

[51] Following this part-time employment, Ms Massie had been approached to provide cover in a Pharmacy Technician role for a two weeks period, and had subsequently been offered a permanent position as her new employers had been pleased with her performance in the role.

The Law

[52] Ms Massie was dismissed on 29 June 2011. The amended statutory test applicable with effect from 1 April 2011 therefore applies. The new Test states::

S103A Test of Justification

- i. 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).*
- ii. 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.*
- iii. 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.*
- iv. In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- v. 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.*

Determination

[53] The new Test of Justification still requires that the employer acted in a manner that was substantively and procedurally fair. Mr and Mrs Ong must show that they carried out a full and fair investigation into the issue of whether Ms Massie's actions constituted serious misconduct, taking into consideration the factors in s 103A(3), statutory good faith requirements and natural justice. Mr and Mrs Ong 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.

Procedural Justification

[54] Whilst I accept that Mr and Mrs Ong were a small employer and as such lacked the resources normally available to a larger employer when dealing with disciplinary matters, I consider that that there were major rather than minor flaws in the procedure adopted in terminating Ms Massie's employment which cannot be explained merely by the fact that Mr and Mrs Ong were a smaller employer.

[55] I find that the dismissal of Ms Massie fell so far short of the requirements of procedural fairness and the concept of natural justice as to be considered as virtually no procedure at all. Specifically:

- There was no investigation: The allegation of dishonesty in fiscal matters was accepted on the basis of Mr Seol's memorandum of 17 May 2011, I further note that the events detailed in the memorandum are Mr Seol's suspicions only;
- Ms Massie was not advised of the disciplinary nature of the meeting held on 29 June 2011; or provided with the details of the allegations against her, or that she could have a support person with her at the meeting;
- Ms Massie was not provided with an opportunity to offer any explanation;
- There was no consideration given to a possible explanation which could have been made by Ms Massie prior to the announcement of the decision to terminate her employment, because no opportunity to offer one had been provided; and
- The decision to dismiss had been pre-determined, Mr and Mrs Ong's evidence confirmed that the decision to dismiss had been made at some time during the preceding 11 days to 29 June 2011, and was evidenced by the fact that Mr Ong read from a pre-prepared letter.

[56] This latter observation is underpinned by the observation made by Mr Ong at the Investigation Meeting that he had thought it to be more compassionate to proceed directly to a dismissal decision rather than to undertake a formal disciplinary procedure. This was on the basis that the process would upset Ms Massie and affect her reputation, Mr Ong stating that the outcome of any disciplinary process would in any event have been the termination of Ms Massie's employment.

[57] I further find that the timing of the disciplinary meeting fell far short of the standard expected of the fair and reasonable employer. Ms Massie had, just prior to the meeting on 29 June 2011, experienced a miscarriage which was a fact well known to Mr and Mrs Ong.

[58] Ms Massie was still in a fragile and vulnerable state to which Mr and Mrs Ong agreed that they had given no consideration on the day of the meeting on 29 June 2011. I consider that in these circumstances the fair and reasonable employer would have delayed a disciplinary or any other meeting until the employee was better able to address the issues raised.

[59] I find that Mr and Mrs Ong departed so far from the basic requirements of procedural fairness and the concept of natural justice as to render the dismissal of Ms Massie an unjustifiable dismissal.

Substantive Justification

[60] I further find no evidence of substantive justification for Ms Massie's dismissal.

[61] With the exception of the allegation of dishonesty raised on Mr Seol's memorandum, none of the issues raised by Mr Ong could be regarded as serious misconduct such as to merit summary dismissal. Significantly Ms Massie had received no formal warnings; on the contrary Ms Massie had received positive feedback about the quality of her work.

[62] In this respect I note that the provision of an employment agreement to Ms Massie, and a job description together with policies of the Pharmacy would have ensured that Ms Massie was fully aware of Mr and Mrs Ong's requirements and expectations of her. It was not reasonable for Mr and Mrs Ong to rely upon duties and procedural policies which had never been provided to Ms Massie.

[63] As regards the dishonesty allegation, which was referred to obliquely in the dismissal letter by way of reference to the change in the till procedure, this was a serious allegation which it would appear had clearly influenced Mr and Mrs Ong in making the decision to

dismiss Ms Massie. As was held in *Honda NZ Ltd v NZ (with Exceptions) Shipwrights etc Union*¹ the more serious the allegation of misconduct, the greater will be the expectation of its proof.

[64] In this case, there was no investigation to ascertain if any money had been removed from the till and if so, by whom, and as previously observed, Mr Seol had offered no substantive evidence in this respect. Further I find Mr Ong's explanation that he had accepted Mr Seol's allegations that Ms Massie had behaved in a dishonest manner as being valid solely on the basis that Mr Seol, as a registered pharmacist, was more likely to be truthful in the matter than Ms Massie, a Pharmacy Technician, to be beyond any form of natural justice.

Remedies

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

Reimbursement of Lost Wages

[66] Ms Massie was able to obtain employment almost immediately following the termination of her employment at the Pharmacy, albeit on a part-time basis. After a two week period Ms Massie had obtained full-time employment.

[67] Ms Massie is to be reimbursed for the shortfall between the earnings she would have been paid for working in the Pharmacy and in her part-time employment.

[68] I make the following award: Ms Massie is to be reimbursed for 36 hours at \$15.00 per hour, a total of \$540.00

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

[69] Ms Massie is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Ms Massie suffered significant distress.

[70] The unfounded accusations that Ms Massie may have been pilfering monies from the pharmacy till, monies to which she was not entitled, I consider to have had the effect of unjustifiably besmirching Ms Massie's honesty

¹ [1990] 3 NZILR 23

[71] Ms Massie was deprived of any opportunity, not only to clear her name of what was a most serious accusation of theft, but to refute the allegation that her standard of work was poor. This had the effect not only of distressing Ms Massie, but of undermining her confidence as a newly qualified Pharmacy Technician to the extent that she subsequently accepted, albeit for a short period of time, employment in a much less qualified position..

[72] I find that the timing of the meeting held on 29 June 2011 which coincided with Ms Massie's very recent miscarriage and surgical procedure further compounded her distress.

[73] I order Mr and Mrs Ong pay Ms Massie the sum of \$15,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i).

Contribution

[74] I have considered the matter of contribution as I am required to do under s124. Ms Massie did not contribute to the situation which gave rise to illness and personal grievance. There is to be no reduction in remedies.

Costs

[75] 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