

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:

WA 165/07

File Number: 5090442

BETWEEN Amber McKee
Applicant

AND Corringham Investments
Limited
Respondent

Member of Authority: Denis Asher

Representatives: John Unsworth & Baden Meyer for Ms McKee
David Booth for the Company

Investigation Meeting Wanganui, 29 November 2007

Submissions Received By 10 December 2007

Determination: 11 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In her application filed on 15 June 2007 Ms McKee said she had been unjustifiably dismissed by the Company. She sought unspecified lost wages and costs, and compensation for humiliation, etc of \$15,000.

- [2] In its statements in reply received on 26 July the Company said, amongst other things, that Ms McKee was warned for failing to complete rostered hours of work, for failing to comply with security procedures, for inappropriate and unacceptable behaviour, attitude and failing to follow a reasonable instruction, and that she abandoned her employment. The Company also claims Ms McKee lied to it by claiming she had a duty manager's certificate when she did not.
- [3] The statement in reply did not make clear how those matters related to the applicant's claim; nor did it comment on whether or not it had dismissed Ms McKee or advance a view that she had abandoned her employment.
- [4] The parties subsequently underwent mediation but their employment relationship problem remained unresolved.
- [5] Following telephone conferences the parties were directed to an investigation in Wanganui on Thursday 29 November 2007. The Company was also directed to provide to the applicant and her counsel, and to the Authority, copies of all documents it intended relying on in the investigation as well as material specified in a letter from counsel for the applicant, Mr John Unsworth, dated 3 August 2007. An earlier investigation was abandoned following the supply of a medical certificate by the Company's director (and shareholder) Mr David Booth, who is also its representative in these proceedings.
- [6] The parties provided witness statements and documents in advance of the investigation. Efforts to settle this matter on their own terms were unsuccessful.

Background

- [7] The Company owns and operates Vincent's Yellow House Café, a Wanganui restaurant.
- [8] Ms McKee commenced employment with the Company on or about 27 February 2007.
- [9] The applicant's terms and conditions of employment were not recorded by the Company by way of a written agreement.
- [10] The Café was closed for renovation from on or around 30 April until 7 May. Both Ms McKee and her father, Steve, assisted in those renovations.

- [11] Ms McKee's employment came to an end toward the end of that period in circumstances disputed by the parties: Ms McKee and her father says it was made clear to her by the son of the Company's directors, Geoffrey Booth, on 5 May that she was dismissed, whereas Geoffrey Booth says he let the applicant go for the day but did not answer her query, was she being dismissed?

Parties' Positions

Applicant's Position

- [12] Ms McKee says the employment relationship problem developed on Thursday 3 May 2007 when she was telephoned by Ms Elene Bullock. Ms Bullock is an employee of the Company; she is also the partner of Mr Geoffrey Booth.
- [13] The applicant says that, on a later date and after commencing employment, Ms Bullock verbally abused her, swore at her and blamed her for the loss of \$1200 worth of defrosted meat, by failing to plug in a recently moved freezer.
- [14] Ms McKee says she raised her concern about Ms Bullock's actions with Geoffrey Booth but was told, "*that's just Elene*" (par 30 of the applicant's statement). Ms McKee was unhappy with his response and sought a meeting with him and his father, Mr David Booth: no meeting eventuated.
- [15] Steve McKee says he was approached by Geoffrey Booth on the morning of Saturday, 5 May, who told him that everything was not alright because, "*... I have to fire your daughter*" (par 13 of Mr McKee's statement). According to Mr McKee, Mr Booth Jnr. said the applicant was being dismissed for failing to do her job properly, that she had not done a stock take. Mr McKee says he refused Geoffrey Booth's request that he tell his daughter she was dismissed. Shortly afterwards he heard Mr Booth Jnr. tell his daughter she was dismissed.
- [16] Ms McKee says that, on Saturday 5 May Geoffrey Booth approached her and said, "*Once you have finished in there that's it*" (par 35, above). On seeking clarification, the applicant says Mr Booth made it clear she was fired. She says he said she had not been performing her job properly, including not undertaking a stock take and stepping on other employees' toes by doing their jobs.

- [17] Ms McKee's lawyer wrote to the respondent on 10 May asking for the reason for his client's dismissal. A reply dated 19 May was sent by Mr David Booth to Ms McKee and not her lawyer. It did not reply to the request for reasons for Ms McKee's dismissal as it did not say whether or not the applicant was dismissed. It did include a fresh allegation that the applicant had lied about having a duty manager's certificate when she did not, and claimed she had obtained a job with the respondent "*under false pretences*" (statement of problem).
- [18] Ms McKee says she was upset by the differing accounts for her termination. She proceeded to file an application in the Authority when her request for mediation or a meeting was refused.
- [19] Ms McKee says she received no warnings while employed at the Café. She says she was "*absolutely shocked*" (par 46, above) by her treatment and the manner of her dismissal. Ms McKee says she has been seeking alternate employment since her dismissal, has undertaken several interviews and that she started work in late October in a new position.

Respondent's Position

- [20] Amongst other things the Company says that, in preliminary discussions between Ms McKee and Ms Bullock, the applicant asked that the job be kept open for two weeks so that she might renew her liquor licence.
- [21] The respondent agrees that Ms Bullock and Mr Geoffrey Booth offered the applicant employment.
- [22] The Company says Ms McKee saw her job description, had access to all other employee contracts and job descriptions and said on different occasions that she was willing to wait for her specific contract and that it did not bother her if she did not have one.
- [23] The Company agrees it was willing to give Ms McKee an opportunity to renew her liquor qualification.
- [24] The Company says Ms McKee failed on several occasions to do her rostered 30 hours Monday to Friday, 12-6pm, and that "*her terms were stretched to accommodate her personal problems*" (par 2.7 of Ms Bullock's statement) including her baby being sick, her partner leaving the navy, her mother having an operation and house-hunting.

- [25] The Company says Ms McKee was warned on 7 March for failing to complete rostered hours. It says she was warned again on 2 April for failing to comply with security procedures. A third warning followed in respect of unacceptable behaviour by the applicant after her baby gear, which had been left in the workplace, was packed away. A fourth warning followed in respect of Ms McKee's attitude. The Company say that Ms McKee failed to follow a reasonable instruction arising out of the refurbishing of the Café, in particular that she invoice or log work that she or her father were doing.
- [26] The Company claims that Ms McKee had difficulty working to its management structure and that she spoke inappropriately about its managers, in particular Mr Geoffrey Booth. It says the applicant was also asked, but failed, to undertake stocktaking.
- [27] The Company alleges Ms McKee attempted to obtain its agreement to effectively defraud the NZ Navy, by signing off a bogus training manual in respect of her husband while the Café got the benefit of his unpaid services.
- [28] According to the respondent, between 29 April and 3 May, Ms McKee failed to complete a repainting of the Café (when it was due to reopen on the following day) or to plug in a freezer, thereby wasting \$1200 worth of ice-cream and other products.
- [29] The Company says that, on Friday 4 May, Ms McKee advised other staff she intended taking the respondent *"to the cleaners (as the owners) had more money than sense"* (par 2.21 of Ms Bullock's witness statement).
- [30] The respondent says that, on the same day, while signing off at 5.30 p.m., Ms McKee did not set the Café's alarms until 10.30 p.m. during which time all and any files or correspondence relating to the applicant were erased from the computer hard drive and any hard copies removed from a filing cabinet.
- [31] The Company says that Mr Geoffrey Booth was approached by Ms McKee's father on the following Saturday morning, who asked what was happening in respect of his daughter. Because of an alleged previous violent encounter with Ms McKee, Mr Booth Jnr. sought Mr McKee's assistance in approaching her. The former says the McKees' behaviour was intimidating.
- [32] Mr Geoffrey Booth denies dismissing the applicant but says instead he let her go for the day. He also says that he did not understand she was quitting her job when she asked if

she could gather her belongings from upstairs. Later efforts by Company representatives to speak to Ms McKee were unsuccessful.

[33] The Company says that, when Ms McKee failed to attend the workplace, and after several unsuccessful attempts to make contact with her, it assumed she had left.

[34] In its closing submission the Company describes Ms McKee's departure as "*arbitrary (and unexpected*" and that her counsel's letter of 10 May came as "*a complete surprise to all concerned*".

Discussion and Findings

[35] For the reasons set out below I find that the Company's conduct throughout Ms McKee's employment has been less than satisfactory and its witnesses' account of relevant events not credible.

[36] First, the Company is in breach of its obligation to provide an employment agreement under s 65 of the Act. Despite the respondent's submission, the responsibility to provide a draft written agreement was its and not Ms McKee's. A comprehensive written employment agreement could have addressed the disputed issue of whether or not Ms McKee's employment was dependent on her holding a duty manager's certificate. I note that no penalty has been sought in respect of that breach.

[37] Second, the evidence by the Company in respect of the termination of Ms McKee's employment – if it is to be believed – is unreliable and unsatisfactory. That is because Mr Geoffrey Booth's version of events is that, at the time of letting her go for the day, he gave no reply to Ms McKee's query, was she being dismissed? If his version is correct, silence would have fairly and reasonably confirmed in the applicant's mind and that of her father, who overheard the exchange, that Ms McKee was being sent away, i.e. a dismissal in law.

[38] There is anyway no reason to doubt Mr McKee's evidence as to what was said in that conversation, notwithstanding the fact he is supporting his daughter's version of events. That is because the two men agree Geoffrey Booth first spoke to Mr McKee, before speaking to his daughter: Geoffrey Booth agrees he sought the assistance of the applicant's father. On a balance of probabilities basis, by way of a credibility finding, and in the absence of any reason to doubt Mr McKee's evidence, I am satisfied that the applicant and her father were well placed, and accurately recall, hearing Geoffrey Booth

unambiguously communicate to the applicant clear advice that her employment had been permanently terminated.

- [39] Third, the evidence of the Company in respect of the termination of Ms McKee's employment is also unsatisfactory because of the respondent's subsequent conduct, in particular its less than half-hearted efforts to make contact with her when – consistent with its claimed view – she did not return to work after 5 May despite being expected back. The respondent says it attempted to contact Ms McKee by way of voice messages, on her and her parent's phones. Ms McKee denies receiving any messages. No effort was made to put in writing to the applicant an assurance her job remained available to her. Just as I found that Geoffrey Booth's evidence in respect of the termination of Ms McKee was not credible, I find similarly not credible his claims of attempting to contact the applicant.
- [40] Fourth, the damage caused Ms McKee by the respondent's conduct was compounded by David Booth's belated letter of 19 May, in reply to her counsel's correspondence of 10 May: not only was it addressed to the applicant instead of her counsel, but it neither expressly denied nor confirmed the applicant's termination. It also raised a fresh allegation, that Ms McKee had obtained her job under false pretences: that claim is also at odds with the respondent's account of events as set out in its statement in reply, when it says the parties agreed Ms McKee would be given time to renew her certificate. I find that the Company's position, as set out in its letter of 19 May, was not consistent with an employer who was seeking the return of an employee.
- [41] The respondent's reply was also less than satisfactory because, after receiving the comprehensive letter of 10 May, Mr Booth Snr. would have been under no illusion as to Ms McKee's belief she had been dismissed. Mr Booth's letter made no attempt to convey the Company's subsequent claim that Ms McKee had abandoned her employment. It also made a fresh allegation against the applicant that it later contradicted.
- [42] I am satisfied that a fair and reasonable third party, objectively assessing David Booth's letter of 19 May, would conclude that not only did it impliedly confirm the applicant's termination but that it also clumsily warned her were she to pursue the matter then the issue of the duty manager's certificate and a claim of false pretences would be used against her.
- [43] Finally, no effort was made by Mr Booth Snr. to respond to the invitation set out in the 10 May letter from the applicant to undertake mediation. The reason given by the witness was that he expected Ms McKee's counsel to initiate mediation. I do not accept that claim. It is,

like the respondent's overall approach to Ms McKee's employment and her termination, disingenuous and self-serving.

- [44] As explained to the respondent's representatives during the investigation, s. 4 (1A) of the Act sets out some of the parameters of the duty of good faith, including the requirement that the parties to an employment relationship are:

"... active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".

- [45] In this case, and for the reasons set out above, the Company has failed throughout to meet reasonable standards in its communication with the applicant. I am satisfied Mr Booth Snr's. letter of 19 May reflects a deliberate pattern of evasive conduct by the respondent that – put into a measured context – confirms the applicant was unjustifiably, summarily dismissed.
- [46] Efforts by the Company to raise performance issues (which are disputed by the applicant) also leave the same impression. The records kept by the respondent are unreliable as to date and content and are not counter-signed by the applicant. I am satisfied they were never put to the applicant and amount to another attempt to intimidate Ms McKee, and that they unfairly attack her credibility.
- [47] It follows that, in the absence of any attempt to argue substantive justification, and because of serious procedural breaches including the absence of any notice and fair process, and in light of my fact and credibility findings set out above, I find Ms McKee was unjustifiably summarily dismissed.

Remedies

- [48] Ms McKee seeks \$15,000 compensation for humiliation, etc. The evidence from the applicant and her father as to the former's distress is not extensive. Ms McKee said she was *"shocked and hurt and ... angry"* about the things that were said of her, that her credibility was damaged and that she was *"absolutely shocked at the manner in which (she) was treated and especially in the manner (she) was dismissed from employment"* (pars 44 and 46 of her witness statement). This was confirmed by her father.
- [49] I do not doubt that, coming as it did without any warning and leaving her no option but to go, Ms McKee's dismissal was shocking and therefore all the more painful to her. I am also

satisfied that the respondent's failure to subsequently address her legitimate concerns would have worsened the applicant's level of distress. Having regard to Ms McKee's evidence, including that on the day of the investigation that her and her partner encountered financial strains because they had bought a home just prior to her dismissal, and that her dismissal contributed to a temporary separation from her partner, I am satisfied that \$8,000 is an appropriate level of compensation for humiliation, etc.

[50] Ms McKee seeks 30 weeks lost pay, or \$14,400. At the Authority's investigation she gave oral evidence of efforts via the internet to obtain employment, including at The Warehouse and a packing factory. Ms McKee says she also made use of the Trade Me Jobs search facility. The applicant says she has found work and expects to commence it shortly, following refurbishment of the premises.

[51] I am not persuaded by the evidence of Ms McKee's effort to find employment that in this instance she should benefit from more than lost remuneration of 3-months' ordinary time remuneration, particularly as the breakdown of her relationship would have caused Ms McKee to use some of that time for child caring purposes and she would then have not been available for paid employment: s. 128 of the Act applied. Accordingly I find the applicant is entitled to lost wages originally claimed in her statement of problem of \$6,240.00.

Contributory Fault

[52] It follows from the findings set out above that I am satisfied Ms McKee did not contribute in any way to the situation that gave rise to her personal grievance.

Determination

[53] The Company unjustifiably dismissed Ms McKee and is therefore directed to pay to her the following remedies:

- a. Compensation for humiliation, etc of \$8,000 (eight thousand dollars); and
- b. Lost remuneration equivalent to 3-months' ordinary pay, i.e. \$6,240.00 (six thousand, two hundred and forty dollars).

[54] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority