IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 119
5128382

	BETWEEN	SIMON MILLER Applicant
	AND	CAMBRIDGE PAINTERS (2008) LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	M Rush, Counsel for Applicant R Connell, Counsel for Respondent
Investigation Meeting:	12 October 2011 at Hamilton
Submissions Received	25 November 2011 from Applicant 21 November 2011, 25 November 2011 and 1 December 2011 from Respondent
Determination:	10 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Simon Miller, claims that he was unjustifiably dismissed, effective from 5 June 2008. Mr Miller asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of lost wages and compensation.

[2] The respondent, Cambridge Painters (2008) Limited, says the dismissal of Mr Miller was justified on the grounds of serious misconduct under the relevant provisions of the employment agreement.

Background facts and evidence

[3] Cambridge Painters (2008) Limited (CPL) is a painting and decorating company which carries out work in the Cambridge area. Mr David Searle is the managing director and a shareholder in the company. Mr Searle purchased the business, with effect from 14 April 2008. One of the previous owners of the business is the father of Mr Simon Miller and Simon Miller was employed by his father. Upon the purchase of the business by Mr Searle, Simon Miller became an employee of CPL along with four other employees.

[4] The evidence of Mr Searle is that he gave new employment agreements to all five employees, including Mr Miller, on 15 April 2008 and received the signed agreements back from the four other employees shortly after, but not from Mr Miller. However, Mr Miller subsequently signed his employment agreement on 3 June 2008. The employment agreement states that Mr Miller is employed as a painter, not a "paint hand" as he states in his evidence.

[5] The evidence of Mr Searle is that the employment agreements are *"exactly the same"* as the previous owners of the business had in place. Mr Miller says that he was pressured to sign the agreement but I do not accept this as so, given that the agreement is identical to the one he had when his father owned the business and then some six weeks elapsed before he eventually signed it.

The Leisurecom matter

[6] The evidence of Mr Searle is that on or about 14 May 2008, he was driving Mr Miller to work at the Leisurecom premises and received a call on his cellphone from one of the Leisurecom directors. The director required a meeting with Mr Searle before the painters employed by CPL started work for the day. Upon meeting with the Leisurecom people, Mr Searle was informed that Mr Miller was not permitted to work at the Leisurecom premises. Mr Searle says that he was told by the Leisurecom people that Mr Miller was not permitted on site because he had been observed by Leisurecom management reading the newspaper during working time and constantly using his cellphone during working time and using *"foul language"*. Apparently, the Leisurecom people saw Mr Miller as a bad example to their own staff.

[7] The evidence of Mr Searle is that, following his discussion with the Leisurecom people, he took Mr Miller aside from the other three employees working

there and informed him that he could no longer work at the Leisurecom premises because the Leisurecom people did not want him there. Mr Searle says that he told Mr Miller that he thought the requirement of Leisurecom was a bit harsh but CPL had to work on a job for Leisurecom and its requirements had to be observed. Mr Searle took Mr Miller to another work site where there was work for him.

[8] The evidence of Mr Miller is that Mr Searle told him of the Leisurecom requirements in front of other employees, but I prefer the evidence of Mr Searle about this matter. Mr Miller also alleges that Mr Searle knew that he [Mr Miller] was not permitted to work at Leisurecom from the time of the purchase of the business in May 2008. I do not find the evidence of Mr Miller to be convincing on this matter and I prefer that of Mr Searle.

The Shiells complaint

[9] The evidence of Mr Searle is that Mrs Shiells advised him that she did not want Mr Miller to continue working at her house on two grounds. First, that he had used offensive language while talking on his cellphone on one occasion and second, Mr Miller's workmanship was poor and she required the work that he had performed to be redone. Mr Miller says that Mr Searle came to the job and yelled at him and he was not permitted to return to the Shiells' house after that. Mr Searle denies that he yelled at Mr Miller.

[10] The overall evidence about the Shiells situation is uncertain. But in any event, as it does not appear to be relevant to the subsequent dismissal of Mr Miller, a conclusive finding is not required.

The dismissal

[11] On or about 29 May 2008, Mr Miller was working with another employee, Mr Richard Burrell, at the Leamington Football Club. It appears that there was something akin to a verbal disagreement between the two men. The evidence of Mr Searle is that he was within earshot and heard Mr Miller say to Mr Burrell:

> *I wish a Maori would fuck your little daughter therefore you would have Maori bloodlines in your family.*

[12] The evidence of Mr Searle is that Mr Burrell was upset about the comment and nearly in tears at one point and that Mr Burrell later told Mr Miller to "*keep my*

wife and family out of this". Mr Searle says that he immediately asked Mr Burrell to leave the area where they were working, that he thought Mr Burrell might hit Mr Miller.

[13] After Mr Burrell left the room where the men were working, Mr Searle spoke to Mr Miller. Mr Searle says that Mr Miller tried to brush the incident off and did not seem to care about what he had said and his attitude was one of *"total arrogance"*. Mr Searle's evidence is that he told Mr Miller not to use such language again and *"in my opinion that was a warning"*.

[14] The evidence of Mr Miller is that while he accepts that he made the comment in question to Mr Burrell, it was *"in jest"* and that he and Mr Burrell laughed about it. Mr Miller says that Mr Searle never advised him that his comments were inappropriate nor was he given a warning.

[15] Then there is a written statement from Mr Burrell. He states that he and Mr Miller were talking and joking when Mr Miller:

> *… made a comment to me about my daughter. I didn't take offence and laughed it off.*

[16] Mr Burrell states that he was not upset about it. Mr Burrell was not available to give evidence at the investigation meeting and the Authority understands that he currently resides in Australia and could not be contacted. His written statement is dated 29 January 2010.[1]

[17] The evidence of Mr Searle regarding Mr Burrell's written statement is that he believes Mr Burrell was paid $1,000 to *"sign"* his statement before he left to live in Australia. Mr Searle also takes issue with a number of other statements made by Mr Burrell.

[18] The Authority has also received a sworn affidavit from Simon Francis Scott, solicitor. He deposes that he used the services of CPL in approximately August 2009. Mr Burrell was wallpapering at Mr Scott's house and Mr Scott attests that Mr Burrell related to him an incident where Mr Miller had:

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[1] Due to Mr Searle being ill, the proceedings in the Authority had to be suspended awaiting his recovery. There were also some other reasons why this matter has taken so long to be completed.

> *… made derogatory and racist comments about Maoris with sexual overtones in respect of Richard Burrell's young daughter.*

[19] Mr Scott attests that Mr Burrell was *"clearly still upset"* about the comment made by Mr Miller. Mr Scott concluded that Mr Burrell was certainly not taking the comments of Mr Miller lightly.

[20] The Authority has also received a written statement from Mr Damien Broughton. He was unavailable to attend the investigation meeting due to illness and hence his evidence remains untested. Nonetheless, it is consistent with that of Mr Searle and Mr Scott in that he relates to observing that Mr Burrell was upset about the comments of Mr Miller, even several days later. Mr Broughton also comments on reading the written statement of Mr Burrell and says that it does not make sense given Mr Broughton's experience relating to the events in question.

[21] In summary, while there is some obvious conflict in the evidence regarding the effect upon Mr Burrell regarding the comments of Mr Miller as they pertained to the mention of Mr Burrell's young daughter, it is commonly accepted that Mr Miller made the comments and, in the round, I accept that Mr Searle's evidence pertaining to his perception of the inappropriateness of Mr Miller's comments, and the effect upon Mr Burrell, is credible and that he was entitled to treat this as potential serious misconduct requiring an investigation and potential disciplinary action.

[22] However, rather than conduct any further investigation into the circumstances pertaining Mr Miller's comments to Mr Burrell, Mr Searle dismissed Mr Miller on 5 June 2008.

[23] There is a conflict between the evidence of Mr Searle and Mr Miller in regard to how the dismissal was implemented. Mr Searle says that the staff were working at a Maori pa site and at the end of the working day he took Mr Miller aside to a distance some 80-100 metres from where the other employees were. Mr Searle's evidence is that he then gave Mr Miller a dismissal letter. The notification to Mr Miller of the termination of his employment can hardly be deemed to be a letter. Rather, it is a more rudimentary handwritten note. It is headed *"Cambridge Painters Limited"* with the date being *"Wednesday 4th Jan"*. Then:

> *To Simon A Miller*
> *Under clause (11) Termination of Employment I give (one) weeks notice in writing.*
> *Signed: D B Searle, Director*

[24] Mr Searle says he prepared the termination notice at his home the evening before.

[25] Mr Miller has provided the Authority with two witness statements. The first was received by the Authority on 2 February 2010 with a later version being provided on 23 September 2011. The later version was to supersede the earlier one but some credibility issues have arisen in regard to much of Mr Miller's evidence and I regret to say that where there is a conflict of various evidential matters, I have generally found Mr Miller's version of the respective events to be the least convincing on the balance of probabilities.

[26] Mr Miller's evidence about how his dismissal was actioned was a case in point. Mr Miller says in his first written statement that:

> *On 05 June 2008 following further pressure from David* [Mr Searle] *I signed the employment agreement and gave it back to him. He then began writing something down and then handed me a letter that was dated 04 June 2008. The letter terminated my employment under clause 11 of the employment agreement I had just signed.*

[27] In his written statement dated 23 September 2011, Mr Miller says:

> *After signing my employment agreement on 03 June 2008 David terminated my employment without reason or any notice. On 05 June 2008 after a discussion with him about my employment agreement I witnessed him write a letter and date it 04 June 2008 and handed it to me that terminated my employment.*

[28] Mr Miller then goes on to say:

> *David terminated my employment midway through the day and it was in front of other staff members. I was humiliated and completely confused as to why I was being treated like this.*

[29] In his oral evidence to the Authority, Mr Miller said that Mr Searle gave him *"a piece of paper"* in front of *"the other guys"*. Given the inconsistency in Mr Miller's evidence, I prefer the evidence of Mr Searle in regard to how the dismissal of Mr Miller came about. However, there are other matters that follow pertaining to the justification of the dismissal of Mr Miller.

[30] Mr Miller's evidence is that he requested from Mr Searle the reasons for the dismissal and the response was that Mr Searle told him that he was not required to give a reason. But Mr Searle attests that he informed Mr Miller that the reason for the

dismissal was because of Mr Miller's comments to Mr Burrell a few days previously at the Leamington Football Club.

[31] While Mr Miller was given one week's notice which he was expected to work out, there is some confusion in the overall evidence about how much work he actually performed in that week. The evidence of Mr Searle is that he became aware that Mr Miller had claimed for time worked when in actual fact he was job hunting and seeing his solicitor. Mr Searle also informs that he arranged for Mr Miller to work at a King Street, Cambridge address, which is within easy walking distance from Mr Miller's home as Mr Miller does not have a driver's licence. However, Mr Miller declined to work at this site as he did not want to work with the other three employees due to a physical altercation that had apparently occurred some time earlier. Under the one week's notice period that Mr Miller received, his last day of employment would have been 12 June 2008 but it is entirely uncertain as to when he worked (or did not work) during that week and I am unable to reach any conclusions about whether or not he is owed any wages for that last week of employment.

Analysis and conclusions

[32] Mr Miller says that his dismissal was unjustifiable specifically because:

(a) The actions and behaviour of Mr Miller did not amount to serious misconduct warranting dismissal;

(b) Mr Searle failed to act in a manner that a fair and reasonable employer would have done in the circumstances. This is because:

(i) There was not a fair and reasonable investigation undertaken in regard to the Leamington Football Club incident;

(ii) Mr Searle failed to follow a proper process in that he failed to put any allegations to Mr Miller for his response;

(iii) Some of the reasons put forward for the dismissal of Mr Miller had only arisen subsequent to the dismissal and were never raised with him during his employment;

(iv) Dismissal was the only option considered by Mr Searle and any alternative to this sanction was never discussed.

[33] Section 103A of the Employment Relations Act 2000 provides the test to be applied to a dismissal. In determining whether a dismissal or an action was justifiable, the Authority is required to consider, on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would[2] have done in all the circumstances at the time the dismissal or action occurred.

[34] Applying the s.103A test, I find that the actions of Mr Searle pertaining to the dismissal of Mr Miller were not what a fair and reasonable employer would have done in all the circumstances. Unfortunately, Mr Searle failed to observe any of the basic minimal requirements that must be followed in regard to a fair and reasonable procedure before dismissing Mr Miller. It is well established that the minimum requirements are:

(a) Notice to the employee of the specific allegation of misconduct to which the employee must answer and of the likely consequences if the allegation is established;

(b) An opportunity, which must be a real as opposed to a nominal one, for the employee to attempt to refute the allegation or to explain or mitigate his conduct; and

(c) An unbiased consideration of the employee's explanation in the sense that that consideration must be free from predetermination and uninfluenced by irrelevant considerations.[3]

[35] As was held in the *Unilever* case:

> *Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair minded but not over indulgent person.*

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2 Because the dismissal of Mr Miller occurred prior to 1 April 2011, the new provisions of the Employment Relations Amendment Act 2010 are not applicable.

3 *NZ (with exceptions) Food Processing etc IUOW v. Unilever New Zealand Ltd* [1990] 1 NZILR 35

[36] While I recognise that Mr Searle does not have access to the resources that a more substantial employer may have, it appears that he did not see fit to seek any legal or human resources advice before dismissing Mr Miller. On the stark evidence before me, I can only find that the dismissal of Mr Miller was undoubtedly unjustifiable on procedural grounds.

[37] In regard to the substance of the dismissal, Mr Miller was informed by Mr Searle that his employment was being terminated *"under clause (11)"* of the employment agreement. Clause 11 of the employment agreement provides that:

> *Either party may terminate this agreement on not less than one week's notice in writing to the other party.*
>
> *11.1 Termination for serious misconduct. Notwithstanding any other provision in this agreement, the employer may terminate this agreement summarily and without notice for serious misconduct on the part of the employee. Serious misconduct includes but is not limited to:*
>
> *(i) Theft;*
> *(ii) Dishonesty;*
> *(iii) Harassment of a work colleague or customer (physical, verbal or sexual);*
> *(iv) Operating machinery or driving a vehicle under the influence of drugs, alcohol or prescribed medication;*
> *(v) Serious or repeated failure to follow a reasonable instruction;*
> *(vi) Actions which seriously damage the employer's reputation;*
> *(vii) A positive result to a drug test.*

[38] It appears that Mr Searle treated the conduct of Mr Miller relating to the matter involving Mr Burrell as something less than serious misconduct as notice of one week was given as compared with the provision in clause 11 for summary dismissal, without notice for serious misconduct.

[39] Nonetheless, notwithstanding Mr Burrell's rather odd statement against the overall weight of the evidence, I find that given the gross inference contained in the comments made by Mr Miller, Mr Searle was entitled to treat the matter as serious misconduct for which the sanction of summary dismissal was something that could reasonably have been an option.

[40] However, given that Mr Searle failed to observe any element of the basic fundamentals of a fair process as generally recognised, the substance of the dismissal

is a matter for consideration of appropriate remedies and the application of s.124 of the Employment Relations Act 2000 (the Act).

Remedies

[41] Given that I have found that the dismissal of Mr Miller was clearly unjustifiable on procedural grounds, under the provisions of s.123(1) of the Act the Authority may, in settling the grievance, provide for one or more remedies, including, as sought by Mr Miller, reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings.

Reimbursement of lost wages

[42] Pursuant to s.128(2) of the Act, if the Authority determines that an employee has a personal grievance, and there has been lost remuneration because of the grievance, the Authority:

> *… must, whether or not it provides for any of the other remedies provided for in s.123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.*

[43] Mr Miller asks to be reimbursed for lost wages but he has not submitted any details of such loss. It is commonly accepted that Mr Miller commenced working at a local business (Quack-a-Duck) shortly after his dismissal but he resigned shortly thereafter. Mr Miller told the Authority that he *"couldn't handle it"* due to being depressed and this also affected his ability to obtain other work. But he has not produced any medical evidence pertaining to a diagnosis of depression or any other condition that would prevent him from working, albeit he says that he is currently taking medication for depression.

[44] It has also been submitted for the respondent that Mr Miller was working as a self-employed painter trading as S and M Painting but the evidence about this is inconclusive. Mr Miller told the Authority that he commenced a course of study at Waikato University in the first semester of 2009 but he has not produced evidence of any attempt to mitigate his loss from mid-June 2008 to when he commenced his studies.

[45] On the whole, I found the evidence of Mr Miller regarding his purported loss of income to be most unreliable and I am left to conclude that he has been less than

forthcoming about what he did to mitigate his loss of income following his dismissal. I conclude that the only certainty in the evidence relating to mitigation of loss is the fact that Mr Miller obtained employment at Quack-a-Duck, approximately two or three weeks after his dismissal. Mr Miller was unable to maintain his employment there but that is not the fault of the respondent and Mr Miller's evidence about suffering from depression due to his dismissal was not convincing or proven.

[46] Therefore, I conclude that the causative link between Mr Miller's dismissal and gaining new employment at Quack-a-Duck existed at most for a period of three weeks and that is the period that the loss of income is proven for. There is no tangible evidence that Mr Miller sought to mitigate his loss after that employment nor is there any medical evidence to suggest his dismissal had some effect on his mental health.

Compensation

[47] Mr Miller seeks an award of compensation for hurt and humiliation but there is no evidence of such. On the contrary, my observations of Mr Miller are that he is most unlikely to be hurt or humiliated by anything other than some degree of gross behaviour by an employer and I do not find any such behaviour to be proven in this case; hence I decline any award under this head.

Contribution

[48] Pursuant to s.124 of the Act, when considering the nature and extent of the remedies to be provided in respect of a personal grievance, the Authority is required to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and if those actions so require it, reduce the remedies that would otherwise be awarded accordingly.

[49] Given the degree of culpability in regard to Mr Miller's comments about Mr Burrell, I find that the remedy of three weeks' wages should be reduced by 50% and this will be reflected in the final orders.

[50] The evidence of Mr Searle referred to a range of performance and attitude issues involving Mr Miller and it is clear that he was a troublesome employee. But given that there is no conclusive evidence of Mr Miller ever being counselled and/or disciplined about the matters in question, I am unable to reach any firm conclusions about those matters.

The wage arrears claim

[51] Mr Miller alleges that he did not receive any wages for the one week notice period or his accrued holiday pay. But he has not produced any calculations relating to any moneys he says he is owed. On the other hand, the respondent has produced some reasonably tangible evidence that Mr Miller has received his due entitlements and given that Mr Miller has been unable to show that the employer's calculations are wrong, I must decline his claim for wage arrears and holiday pay.

Determination

[52] For the reasons set out above, I find that:

(a) The dismissal of Mr Miller was unjustifiable on procedural grounds;

(b) Pursuant to ss.123 and 128 of the Act, Cambridge Painters (2008) Limited is ordered to pay to Mr Miller reimbursement of loss of wages for three weeks. Mr Miller was paid $16 per hour. Therefore, based on a 40 hour week, the gross sum of Mr Miller's entitlement would be $1,920 ($16 x 40 x 3 weeks) less 50% for contribution pursuant to s.124 of the Act. Therefore, Cambridge Painters (2008) Limited is ordered to pay to Mr Miller the sum of $960 less PAYE to arrive at a net amount;

(c) There shall be no order for compensation pursuant to s.123(1)(c)(i) of the Act as there is no evidence that Mr Miller was affected in such a manner to warrant this remedy;

(d) The wage arrears and holiday pay claim fails due to the entitlement not being proven.

Costs

[53] Given the outcome of these proceedings, I conclude that it is appropriate that costs should lie where they fall. It is so ordered.

K J Anderson
Member of the Employment Relations Authority