

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 28
5283785

BETWEEN

KAYE MOODIE
Applicant

A N D

THE MILL LIQUORSAVE
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Jenny Guthrie for Applicant
Christine Sargeson for Respondent

Investigation Meeting: 20 October 2010 in Dunedin

Submissions Received: 5 November 2010 from Applicant
8 November 2010 from Respondent

Date of Determination: 17 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kaye Moodie was employed as an Assistant Manager at The Mill LiquorSave Limited store in Andersons Bay, Dunedin from mid 2005 until July 2009.

[2] Ms Moodie wants the Employment Relations Authority to resolve three employment relationship problems. The first is that she considers a final written warning issued to her on 19 June 2009 unjustified and says that it disadvantaged her. The second is that Ms Moodie said that she was then unjustifiably dismissed from her employment on 24 July 2009. The third employment relationship problem is that Ms Moodie says there was a breach of the duty of good faith on the part of The Mill LiquorSave Limited.

[3] The Mill LiquorSave Limited does not accept that the final written warning was unjustified and say that the employment relationship ended not by dismissal but

by mutual agreement. It does not accept that its actions were in breach of good faith. I shall refer to The Mill LiquorSave Limited as “The Mill”.

The issues

[4] The Authority is required to determine the following issues:

- Were the actions of The Mill in investigating the employee’s complaint that Ms Moodie had bullied and been disrespectful towards him and in issuing a final written warning to Ms Moodie was what a fair and reasonable employer would have done in all the circumstances at the time the warning was issued: s.103A Employment Relations Act 2000?
- How did this relationship come to an end? Was Ms Moodie dismissed or was the termination with her mutual agreement or by her resignation?
- If there was a dismissal then was it justifiable: s.103A Employment Relations Act 2000?
- If the dismissal was not justified then what remedies is Ms Moodie entitled to and is there issues of contribution or mitigation?
- Were there breaches of good faith for which a remedy should be provided?

Final written warning

[5] On 19 June 2009 Ms Moodie was given a final written warning for breaching a company rule that employees *treat colleagues and other persons with who you have contact with courtesy and respect*. The issuing of the warning followed two written complaints by an employee who I shall refer to as “L”. Ms Moodie supervised L.

[6] Disciplinary meetings were held over two days on 18 and 19 June 2009. Ms Moodie was represented by Ms Guthrie at the meetings and she understood that the matter was serious and outcomes could be disciplinary up to, and including, summary dismissal. She understood the nature of the allegations she was facing and was provided with the two written complaints from L prior to the meetings. Ms Moodie was able to give an explanation in terms of the written complaint.

[7] Business Development Manager for the Central Region, Nicholas O'Connor and Store Manager, Nathan Whelan, attended the meeting on behalf of The Mill. Mr O'Connor was the decision maker and Mr Whelan's role was to support him. Mr O'Connor had advice and support throughout the disciplinary process from the National Human Resource/Operations Manager, Bevan Stone.

[8] Ms Moodie gave explanations usually through Ms Guthrie to the matters in the written complaints. There was an adjournment during the process for further investigation of character references from other employees provided at the disciplinary meeting by Ms Moodie and further questioning of L in light of the explanations.

[9] Ms Moodie and Ms Guthrie were advised of a summary of the findings and given an opportunity to make comment on the proposed disciplinary outcome of a final written warning before it was issued.

[10] Ms Guthrie submits that the process set out at clause 19.2 in Ms Moodie's individual employment agreement was not adhered to. That clause provides:

Before entering into a formal disciplinary process, the Employee will be given a reasonable opportunity to improve. This may be in the form of an informal verbal reprimand. The intent is to encourage the Employee to behave in a manner that is appropriate to their employment. In some cases it may be more appropriate to move directly to the formal procedures.

[11] Mr Whelan, who had initial informal discussions with Ms Moodie about the complaints, gave evidence as to why there had been a decision to move directly to the formal procedures. He provided a written note about the nature of his discussion with her at that time. The contents of that note were not challenged by Ms Moodie.

[12] Mr Whelan records in his notes that Ms Moodie responded to the allegations initially before reading the complaints *Its L isn't it*. Ms Moodie also stated *do I have to sugar coat everything....why don't I just swap jobs with him then since he can obviously do it better*.

[13] Mr Whelan spoke to The Mill Human Resource Adviser, Ann Rogers, about the nature of the allegations and initial comments made about them by Ms Moodie. Mr Whelan was advised by Ms Rogers that there should be a formal process adopted.

[14] One of the circumstances in this case is that there had been previous complaints about Ms Moodie from other employees. The Mill has an obligation to provide a healthy and safe workplace for all employees. Objectively assessed it was not a breach of the disciplinary policy by The Mill to move directly to a formal process in all the circumstances. Ms Moodie's initial comments, although made, I accept, at a time when she was distressed and possibly in a manner that she saw as light hearted did not provide suitable reassurance to Mr Whelan that the matter should/could be dealt with informally.

[15] Ms Moodie was then given the formal invitation to a disciplinary meeting on 9 June 2008 and was suspended until the disciplinary process commenced. No issue was taken with the suspension or the time allocated for the disciplinary meeting which I understand was delayed at the request of Ms Moodie.

Would a fair and reasonable employer have concluded that the conduct complained of by L had occurred?

[16] L's written complaints in December 2008 and May 2009 touched on some specific exchanges that he had had with Ms Moodie and found upsetting or concerning. He also referred in more general terms to Ms Moodie giving him *evil looks*, not talking to him, difficulties with breaks that Ms Moodie complained about work not being done when he had done it and that she was constantly finding problems with anything he did. He described the conduct as bullying at times and disrespectful.

[17] There was a delay in investigating L's written complaint. After the written complaint was given in December 2008 to the Southern Business Development Manager, Raymond Willemsen, L indicated he did not want the complaint taken further at that time. The Mill agreed in circumstances where L was dealing with some personal issues to put the formal investigation on hold until they were resolved.

[18] In May 2009 L confirmed that he was in a better state of mind to deal with an investigation and Mr Willemsen asked him to write a summary of his concerns to see if they were the same or different to those he had written about in December. The second letter of complaint was then provided and the formal process commenced. Although not ideal to have a delay in investigating between the first and second complaint, I accept that The Mill was presented with supporting information at the

time of the first complaint that a fair and reasonable employer would accept as to why L may not have been in a position to pursue it.

[19] Several of the concerns in the second complaint were the same or similar to those in the first complaint and suggested that some of the concerns had continued.

[20] Ms Moodie put forward as to why the complaints may have been made that L was trying deflect attention away from him and also Ms Moodie said that she also felt that L wanted her job. I accept that a fair and reasonable employer would be alert in investigating these types of difficult allegations to the role of a manager in managing staff. There is the possibility that some employees can take issue with simply being instructed to undertake tasks and/or complain as a way of removing scrutiny in relation to their own performance or other issues. I am satisfied that Mr O'Connor, because of the way in which he undertook the investigation, was alert to the need for care.

[21] Ms Guthrie submitted that Mr O'Connor never really questioned L's credibility notwithstanding that he was charged with a dishonesty offence that arose at or about the same time as the investigation and may have had some medical issues.

[22] I find however that in conducting the investigation Mr O'Connors did not simply rely on L's version of events. He talked to other staff, considered previous complaints and what he considered partial admissions on Ms Moodie's part. It was not therefore simply L's word against Ms Moodie's. For completeness I accept The Mill was obliged to investigate L's complaints notwithstanding it had other unrelated issues with L.

[23] During the disciplinary meeting on 18 June Mr O'Connor asked Ms Moodie what she considered bullying to be. Ms Moodie responded that she considered it to be fighting or being very nasty to a person. During the process Mr O'Connor advised Ms Moodie that the behaviour could be more than that and referred to such things as hostile, verbal and non verbal communication, interfering action and withholding of resources.

[24] By way of explanation Ms Moodie did not accept that she had been bullying to L or that she treated him differently to other employees. She explained the specific situations and interactions that L complained of as other than inappropriate conduct.

[25] Ms Moodie accepted she removed L from driving duties after she heard him say a staff member undertaking deliveries was too slow. Mr O'Connor re-interviewed L about this matter during the disciplinary process and he confirmed that he was unaware of the reason for the removal of his driving duties except that Ms Moodie said that *she says what happens and how it happens*.

[26] There was nothing I could find in the full notes that were taken of the disciplinary meeting where Ms Moodie said to the contrary that she had made it clear to L why he had been removed from driving duty. Mr O'Connor, fairly concluded that the removal of L from the driving duties must have been for some time because he had mentioned the matter in the December letter and the May letter. Mr O'Connor concluded that Ms Moodie's response in not giving driving duties to L had been unusual.

[27] Ms Moodie took six letters of support from staff about her management to the disciplinary meeting. Mr O'Connor took an opportunity during the adjournment to talk to some of the employees who had written letters of support. I find that this was an appropriate step where allegations of bullying were made. Mr Whelan made some brief notes on the bottom of the letters of support. These were difficult to read but he went through them at the Authority's investigation meeting. For reasons I shall elaborate on, I am not satisfied that these notes were a full record of what was said.

[28] The notes provided that one person said that initially Ms Moodie had given him a *hard time* and he had had a *gutsful of it*. One of the reasons that I find Mr Whelan's notes incomplete was that Mr O'Connor expanded on that brief note during the disciplinary meeting and said to Ms Moodie in some detail that that staff member now considered he had resolved issues with her. That was not apparent from the brief record Mr Whelan wrote. Another employee is recorded as using the words *picked on L* and *differently*. I accept that the other handwriting on that staff members letter that said *treated him differently-just ignored him* was added after the disciplinary process. Another note by Mr Whelan reflects another employee saying *-L frosty and age related difficulties*.

[29] I am satisfied that when Mr O'Connor returned to the meeting he did put to Ms Moodie and Ms Guthrie the nature of his discussions with other staff although they were not shown the notes. I find, however, when the meeting notes are considered,

that Mr O'Connor overstated that all staff talked to said that they felt Ms Moodie was treating L differently from the rest of them.

[30] A fair and reasonable employer would conclude from the discussions that took place that two employees observed that Ms Moodie either treated L differently or had a frosty relationship with him. The later, unless Ms Moodie was like that with all employees would support a difference in treatment. A third employee had had initial difficulties with Ms Moodie that had been resolved.

[31] The other matter relied on by The Mill was that there had been previous concerns raised about Ms Moodie's conduct by other employees and that there was some similarity in terms of the complaints raised. Mr O'Connor relied on these as supporting a pattern of behaviour.

[32] In 2006 an employee, J, complained to the Regional Manager about Ms Moodie's behaviour and attitude towards him. He did not wish to raise a formal complaint. The Mill say that Ms Moodie was informally talked to about taking care in her treatment of J. Ms Moodie has no recollection of that. J then complained once again that whilst Ms Moodie's behaviour had changed for a very short period, it had reverted back to the point where he felt he was bullied. He did not wish to raise a formal complaint and resigned bringing a personal grievance alleging a failure on the part of The Mill to protect him from bullying in the workplace.

[33] The second complaint was from another employee in November 2006 and there was informal discussion with Ms Moodie about that complaint. The third complaint was in December 2007 from an employee, K. K was happy to raise a formal complaint and in her complaint she referred amongst other matters to Ms Moodie treating her differently to other staff and she put forward that this was, she felt, because she was younger. At the end of a disciplinary process Ms Moodie was issued with a first written warning for a breach of the company rules requiring that employees treat each other with courtesy and respect. The first written warning was expressed to be for a period of twelve months. Ms Moodie did not challenge the warning but through Ms Guthrie's responses it seems clear that she did not consider she had done anything wrong in terms of her conduct towards K.

[34] I find that a fair and reasonable employer would conclude that there were similarities about the conduct complained of by K in particular, and that complained

of by L. K complained as did L about difference in treatment and also that Ms Moodie did not talk to her when they were working together. K also felt as L did that Ms Moodie was disrespectful. Mr O'Connor placed reliance I find fairly, in concluding a likelihood that the conduct L had complained of had occurred, on L not being aware of the substance of these earlier complaints.

[35] Although the first warning had expired by the time L's complaints were investigated a fair and reasonable employer would consider these earlier matters about Ms Moodie's conduct and her awareness about her conduct. Mr O'Connor said in response to a question from the Authority about these earlier matters – *not a major part of the outcome showed a pattern of behaviour.*

[36] Mr O'Connor also relied on Ms Moodie's own partial admissions about certain conduct including removing driving duties. Ms Moodie accepted that she talked less to L than she did to other staff although maintained that she did talk to him. L, when re-interviewed during the disciplinary process, said that he would work with Ms Moodie for entire shifts and she would not say anything to him. He said that when he tried to engage in a discussion with her she would mumble and walk away. Mr O'Connor found a discrepancy between Ms Moodie's denials that L had breaks and her subsequent explanations about her suggesting L go home early as a result of not having had a break on two occasions.

[37] I find that a fair and reasonable employer would have placed reliance on Ms Moodie's acceptance that some matters complained of did occur even though Ms Moodie did not see her conduct in relation to them as bullying.

[38] It was necessary for Mr O'Connor to conclude whether the behaviour was such that it could amount to bullying/serious misconduct. Mr O'Connor considered from the investigation that the behaviour was more than two people who did not get along. He accepted L's description of the conduct as constant rather than intermittent and that this reduced L's level of enjoyment in the role. L also indicated that he felt stressed by the conduct.

[39] I find that the investigation by Mr O'Connor into whether there was behaviour by Ms Moodie that was unacceptable towards L was one that a fair and reasonable employer would have done in all the circumstances. The only matter that has caused me to pause is in relation to the reporting back of what other staff said regarding the

difference in treatment of L. That was overstated. The staff comments though were verbally reported back to Ms Moodie and Ms Guthrie during the process. I am not satisfied that when considered as a whole that failure can be seen as one that would render an otherwise fair process unjustified.

[40] Objectively assessed I find that a fair and reasonable employer would conclude that the conduct complained by L had occurred and had reduced L's enjoyment of his role. The difference in treatment of L had been observed by other employees and a careful consideration of other complaints supported a pattern of behaviour by Ms Moodie toward some employees that they found unacceptable. The Mill could fairly conclude that it was not conduct involving a single incident or of an intermittent nature but was of an ongoing nature. It could fairly be concluded that it went beyond simply personality difficulties or was a fair and reasonable response to L's behaviour as a staff member. Driving duties had been removed for an extended period without explanation in unusual circumstances, communication with L by Ms Moodie was very limited or non-existent and L felt in terms of this and a variety of matters that he was treated differently.

Would a fair and reasonable employer have given Ms Moodie a final written warning?

[41] Mr O'Connor said that in making the decision to issue Ms Moodie with a final written warning, he felt that the misconduct by her was serious and that L had been treated differently by her to other staff. He said he took into account that this was not the first complaint about Ms Moodie's conduct and that she had previously been spoken to and a warning issued. The Mill had organised for Ms Moodie after her first warning to attend at a course called *Moving into Management* in April 2008 that included, amongst other matters, education about effective communication and managing conflict. Ms Moodie had found that course helpful. Mr O'Connor said that when he considered other actions taken following complaints from employees they had not been successful. Ms Guthrie submitted that Ms Moodie felt unsupported by Mr Whelan in terms of her dealings with young staff. I am not satisfied that The Mill failed to take appropriate steps to improve Ms Moodie management skills in that regard.

[42] Ms Guthrie submitted that The Mill was not justified in moving directly to a final written warning that is the second step in the three step disciplinary process

starting with a written warning and ending with a dismissal. It is however also stated in the employment agreement that where misconduct is considered serious enough a final written warning may be issued without a written warning preceding it.

[43] Mr O'Connor said that rather than consideration being given to a first warning or a final written warning, his deliberations were more about whether to issue Ms Moodie with a final warning or terminate her employment. He said that what persuaded him was that Ms Moodie was capable of showing improvement and he decided to issue a final written warning.

[44] In this case Ms Moodie was advised of the proposed disciplinary action and given an opportunity to comment on it. There was no alternative action proposed except to the extent that Ms Guthrie indicated that Ms Moodie did not feel the final written warning was justified.

[45] A final written warning was issued for a period of 12 months from 19 June 2009 and set out the rule that was considered to have been breached in relation to treatment of colleagues. The warning included a statement that any further instances of unacceptable behaviour could (after a full investigation has taken place) result in further disciplinary action, which may include summary dismissal.

[46] After the final written warning was issued Mr Whelan spoke to L and Ms Moodie separately to advise that the matter was closed. L was not informed of the outcome. Ms Moodie was advised that if she had any problems with L she was to inform Mr Whelan immediately.

[47] I find that The Mill undertook a full and fair investigation of the complaint by L about Ms Moodie's conduct towards him. Ms Moodie had an opportunity to give an explanation about the conduct complained of and it was considered. She did not accept the conduct that she displayed towards L was inappropriate but I find that a fair and reasonable employer was entitled to conclude that Ms Moodie's conduct towards L was not appropriate and that there had been some evidence of a pattern of behaviour prior to his complaint. There was also some evidence from other staff that Ms Moodie treated L differently or picked on him. To the extent that this was overstated, I have not found such overstatement fatal to an otherwise fair investigation. Other attempts to deal with the conduct had not been considered to have had the required degree of success.

[48] I find that a fair and reasonable employer would have given Ms Moodie a final written warning in all the circumstances of this matter.

Was Ms Moodie dismissed?

[49] The Mill has a policy that all staff must obtain suitable identification from all customers who are under the age of 25 years. Failure to do so is considered misconduct. Ms Moodie was aware of that policy.

[50] On 14 July 2009 Ms Moodie was written to by Ms Rogers, about a failure by Ms Moodie to ask a person under 25 for identification on Friday, 5 June 2009. Ms Moodie was asked to attend a disciplinary meeting to discuss that matter. She was advised in the letter that the matter was serious and there could be disciplinary action up to and including summary dismissal.

[51] Prior to this letter there had been an informal meeting with Ms Moodie and Mr Whelan. Ms Moodie advised Mr Whelan that she could not recall the sale and there was a possibility that the sale had been made by the next operator. She also mentioned that her mother had been unwell and this may have been in the forefront of her mind.

[52] Ms Moodie attended a disciplinary meeting to discuss the allegation on 23 July 2009. She attended with another employee, Sharon Thomson, and Ms Rogers attended at the meeting with Alanna Lumsden who was appointed as Acting Business Development Manager to cover for Mr Willemsen who was unable to work for health reasons. Full notes were taken of this disciplinary meeting.

[53] Ms Moodie did not deny that she had served the customer and had not asked him for identification. She confirmed that she had been trained and had trained others in the policy and made the comment *I realise how serious this is, I missed the person and I'm kicking myself*. There was some delay in having the survey returned to the store and that accounts for the passage of time between the attendance of the mystery shopper at the store and the matter coming to the attention of The Mill.

[54] Given that Ms Moodie did not deny she had served the customer, I do not accept Ms Guthrie's submission that there was no real evidence of the policy being breached and no opportunity therefore for an explanation. It was accepted that the video surveillance was no longer available, but a reading of the site report confirms

the mystery shopper records the person who served was a female who's name was Kaye. He describes her hair, apparent height and apparent age. Ms Moodie who had that site report never challenged that she was other than the person identified and described in that document.

[55] Had she done so, then I would accept that it is for The Mill to satisfy itself on a reasonable basis, and if called upon to satisfy the Authority, that it was Ms Moodie who served the mystery shopper. The way, however, the explanation was provided by Ms Moodie did not require that in this case.

[56] At the end of the meeting it was agreed that those in attendance would meet the following day on 24 July 2009. On that day Ms Moodie was advised of the conclusion that the company had reached in light of the meeting the previous day. Ms Rogers, in a letter dated 24 July 2009, concluded that Ms Moodie had received training to fulfil that part of the job. She also placed some reliance on the fact that Ms Moodie was an Assistant Manger of the Dunedin store and referred to Ms Moodie being in receipt of a final written warning for serious misconduct issued in June 2009. Ms Rogers said that she felt there was no alternative but to propose termination of employment. At that point she suggested that that proposal be considered and then the meeting reconvene to discuss any comments on the proposed disciplinary action.

[57] Ms Moodie and Ms Thomson suggested demotion as an alternative from Ms Moodie's current role to a Duty Manager position. Ms Rogers and Ms Lumsden then adjourned to consider this proposal. During the adjournment Ms Thomson advised that Ms Moodie did not want demotion as an alternative and she then advised that Ms Moodie's brother was coming to collect Ms Moodie from the workplace.

[58] Later that day Ms Moodie's brother telephoned Ms Rogers to advise that Ms Moodie would not be returning to work and to ask whether her notice could be paid to her. Ms Rogers agreed to pay two weeks notice to Ms Moodie and a letter followed confirming the nature of the discussion at the end of employment dated 29 July 2009. The letter provided, amongst other matters, the following:

Later that same day your brother phoned me to confirm that you were not going to return to work and that you had agreed to Terminate the working relationship also.

Given that at the time of this misconduct you were on a full and final warning for bullying in the workplace, we consider that the appropriate remedy is termination of your employment. The trust and

confidence the company must have in you to work at The Mill LiquorSave has been seriously undermined.

Your employment is therefore terminated with immediate effect. ...

[59] Ms Sargeson submits that the relationship was brought to an end by the agreement of both parties to an employment relationship, known as a mutual agreement to terminate employment.

[60] I am not satisfied from the evidence that Ms Moodie agreed to terminate her employment. There was a degree of inevitability that if Ms Moodie no longer wanted to pursue demotion then her employment would end which it did. There is no dispute that failure to obtain identification from a customer under the age of 25 is misconduct, but is not classified as serious misconduct. In those circumstances where The Mill placed reliance on a final written warning in a staged disciplinary process, a fair and reasonable employer would have dismissed on notice.

[61] I find in conclusion that there was no mutual agreement to terminate this relationship and that Ms Moodie simply accepted the inevitability that her employment with The Mill would end. Contact made by Ms Moodie's brother to The Mill was to confirm she would not be returning to work and to organise payment of notice. The initiative to end the relationship came from The Mill. I find it would be artificial to view the matter as other than a dismissal. Ms Moodie was dismissed from The Mill.

Was the dismissal unjustified?

[62] I accept Ms Guthrie's submissions that the allegation of failing to obtain identification was one of misconduct and not serious misconduct. Reliance, however, was placed by The Mill on the final written warning.

[63] The final written warning provided that *any further instances of unacceptable behaviour could after a full investigation has taken place, result in further disciplinary action, which may include summary dismissal.* The letter recording the final written warning did not limit the unacceptable behaviour to that for which the warning had been given.

[64] The employment agreement does not limit the three step disciplinary process to the same or similar offences. It is clear from the disciplinary procedures that

warnings are not limited to repetitions of the same or a similar offence but may be applied to offences of a different nature and the requirement in terms of any warning is as follows:

If the Employer decides to issue a warning, this will be formally and clearly issued and confirmed in writing. The Employee will be advised of any corrective action that is required and the consequence of continued or further instances of misconduct or substandard job performance.

[65] The words *or further instances* do not limit a further step in the process to misconduct of the same type.

[66] Although the conduct of failing to obtain identification from a customer under 25 years is classified as misconduct, I accept that it is important to The Mill for such identification to be obtained given the difficulties in ascertaining age and the legal ramifications that could be imposed for serving customers under 18 years of age. It is clear that Ms Moodie was likewise aware of the importance of this to The Mill in her job. She had in the past been very careful to ask for identification if she was unsure and this had never been a matter for which she had faced any disciplinary action.

[67] Ms Moodie was in receipt of a final written warning that did not limit any further breaches of the company's rules or policies to those for which the warning had been given.

[68] Ms Moodie did have an opportunity to comment on the proposed outcome and I find that in circumstances where there was a final written warning and an admitted further breach of a company policy, a fair and reasonable employer, after considering alternatives, would have dismissed Ms Moodie on notice. Such a dismissal occurred.

[69] I find that Ms Moodie was justifiably dismissed.

[70] I am not satisfied that there are any breaches by The Mill of its good faith obligations and there is nothing further I can do to assist Ms Moodie.

Costs

[71] I reserve the issue of costs. The Mill has until 10 March 2011 to lodge and serve submissions as to costs and Ms Moodie has until 31 March 2011 to reply

Helen Doyle
Member of the Employment Relations Authority