

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5092168
AA 27/08

BETWEEN CHRISTINA MORRISON
Applicant

AND COVA LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Nicholas Carter for Applicant
Brian Stephenson for Respondent

Investigation Meeting 14 November 2007 at Location

Submissions Received 23 November 2007 from Applicant
27 November 2007 from Respondent

Determination: 31 January 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Cova Limited (“Cova”) runs a café business. Ms Christina Morrison initially commenced employment with Cova on 22 February 2003. In August 2006 Ms Morrison left her employment to pursue another opportunity. After two weeks, on 28 August 2006, Ms Morrison returned to her employment at Cova and worked there until 6 September 2006.

[2] Following an altercation between Mr Mark Seton, the owner and manager of the café, and Ms Morrison’s partner, Mr Conrad Wolfgramm, Mr Seton advised Ms Morrison to leave the premises. Ms Morrison has never returned to work and says that on 6 September 2006 she was unjustifiably dismissed when Mr Seton told her to leave the work site.

[3] Cova says Ms Morrison was asked to leave the worksite and then was written to and asked to provide a written explanation as to her view of the events which lead to her partner physically assaulting Mr Seton. Ms Morrison never responded to the

request for an explanation and never returned to work. Mr Seton says by her actions, Ms Morrison abandoned her employment.

[4] The first issue for determination is whether Ms Morrison was dismissed or whether she abandoned her employment. If I find Ms Morrison was dismissed I am required to examine Cova's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

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 considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[5] The section requires me to scrutinise Cova's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

Background

[6] Ms Seton was one of three employees employed to work in the Café. The other two employees were a Tai couple called Apple and Joe.

[7] When Ms Morrison returned to the café in August 2006 Mr Seton advised her that two things would be different from her previous employment. One was that he would continue to bake muffins each morning as he had done since she had left which would mean that Ms Morrison would start at 6am instead of 5.15am consequently her hours of work would be 40 per week instead of 43.75.

[8] Mr Seton also explained to Ms Morrison that he did not want Mr Wolfgramm to expect cut price or free meals if he or their families came into the café.

5 September 2006

[9] On 5 September 2006, Mr Wolfgramm rang the café wanting to speak with Ms Morrison. Apple answered the phone. Ms Morrison said that Apple yelled at her from the back of the kitchen telling her that the phone was for her. Ms Morrison says that she was at the front serving a customer and as she did not want to be rude she continued serving that customer. She said that by the time she got to the phone Mr Wolfgramm had hung up.

[10] At 3.00pm Mr Wolfgramm arrived at the café to pick up Ms Morrison. While he was in the café Mr Wolfgramm uttered obscenities at Apple in relation to her answering the telephone. Apple was upset by the comments and reported the incident to Mrs Sheryl Seton who then advised Mr Seton.

[11] At approximately 4.00pm Mr Seton rang Ms Morrison's cell phone to discuss the 3.00pm incident. Ms Morrison was not available at the time and Mr Wolfgramm answered the phone. It was common ground that Mr Seton told Mr Wolfgramm to stay away from the café. Mr Seton says Mr Wolfgramm "...went ballistic" and was angry and shouting at him. Mr Seton says he didn't get the opportunity to say much until just before he hung up. He had listened to Mr Wolfgramm for a while and then told him he was "...a f****g loser..." and hung up.

[12] Following that telephone exchange Mrs Seton emailed the centre manager stating:

We have had a situation today of one of the staff's partners marching into the shop abusing the staff. Then further abusing another of our staff members on her way back from the bathroom.

We had previously told our staff member that her partner was to keep away from the premises. Mark called to talk to her after today's incident but he answered her phone and gave Mark a barrage of obscenities. Obviously, all our staff are upset by his behaviour and don't want him near them. What do we do to obtain a Trespass Notice against him?

[13] In response the centre manager advised Mr Seton to talk with Ms Morrison a second time and advise her that a Trespass Notice would be issued if Mr Wolfgramm returned to the premises. Unfortunately Mr Seton never had an opportunity to have the suggested conversation with Ms Morrison.

6 September

[14] On 6 September 2006, Mr Wolfgramm took Ms Morrison to work at her usual start time of 6.00am. Mr Wolfgramm left Ms Morrison at the car sorting out her gear for work and told her he was going in to talk to Mr Seton to see if he could resolve their differences from the previous day. Ms Morrison says after getting her bits and pieces together she then walked into the back entrance to the café.

[15] Ms Morrison says that as she arrived at the work place entry Mr Wolfgramm walked out with a blood nose and bruises on his face. I have been provided with a copy of the security video from that morning. What I viewed on the video does not corroborate Ms Morrison's evidence. The video shows Mr Wolfgramm exiting the workplace but his nose does not look to be bleeding.

[16] Mr Wolfgramm and Mr Seton had had a physical altercation which resulted in Mr Seton receiving medical treatment and Mr Wolfgramm being charged with assault for which he was discharged without conviction.

[17] In his written statement Mr Seton says he was shaking and felt dazed after Mr Wolfgramm left. At the investigation meeting when it was put to Mr Seton that he was angry after Mr Wolfgramm left, Mr Seton told me he was calm and collected. I do not accept that evidence. Mr Seton had been physically punched about the head. It is most unlikely he was calm and collected.

[18] As Mr Seton got a pack of frozen berries to stem the bruising on his face Ms Morrison walked in. It was common ground that Mr Seton told her to go away. Ms Morrison protested that she had done nothing wrong and that the problem was between Mr Seton and Mr Wolfgramm.

[19] It is at this point that Ms Morrison says Mr Seton made it quite clear to her that he did not want her back at the café.

[20] Ms Morrison told me that Mr Seton walked towards her pointing at his face and telling her to "...go away, go away I don't want you back here again." However, at the investigation meeting Ms Morrison conceded that when she came into the café Mr

Seton was behind the counter and she was on the other side of it some distance from him. Mr Seton denied telling Ms Morrison that he did not want her back.

[21] It was common ground that Mr Seton then rang the police.

[22] Later that day Ms Morrison received a telephone call from Mr Max Whitehead who had been instructed by Mr and Mrs Seton. Ms Morrison says Mr Whitehead, who she did not know, requested her address details to enable him to send her a letter. She said she was not willing to give her address over the phone to someone she did not know and gave Mr Wolfgramm's mothers address instead.

[23] A letter was hand delivered to Mrs Wolfgramm's address. At 6.30pm Mrs Wolfgramm rang Ms Morrison and told her about the letter briefly describing the contents to her over the phone. Ms Morrison did not see the contents of the letter until the following day.

[24] The letter states:

We act for Cova Café Limited in regards to the matters relating to your employment.

The purpose of this letter is to give you an opportunity to provide Cova Café Limited with an explanation regarding your behaviour associated with the following allegations:

- The person known as your partner named Conrad Wolfgramm telephoned the Café on the 5 September and verbally abused and swore at a staff member.
- At 3.00pm on the 5 September, your partner came into the Café to collect you and proceeded to verbally abuse, yell and swear at staff members. You took no corrective action.
- Later that afternoon when your manager Mark Seton telephoned you to find out what the problem was, Your partner took over the call and yelled, swore and abused your manager, again you took no corrective action.
- At approximately 6.15am on the 6 September you and your partner came into the Café where he physically attacked your manager and when your manager fell to the ground he repeatedly hit him about the face causing injury. You seemed to have supported this attack or you may even have provoked it.
- The shopping centre security staff arrived who call the police who are laying charges.

The above behaviours are justification for instant dismissal.

Due to your support and contribution to your partner's violent and aggressive behaviours you are until further notice not to enter the Café or approach any of the staff or managers.

From now on you are to communicate only with this office. Please note the contact details at the top of this letter.

Before Cova Café undertakes disciplinary action you are required to provide us with your full written explanation regarding the above allegations by 2.00pm Thursday 7 September 2006.

If you fail to respond to this letter or communicate with the writer by 9.00am Friday 8 September 2006, we will assume you have terminated your own employment and your final pay will be deposited into your bank account.

[25] When Ms Morrison read the letter she says she was absolutely stunned and amazed to see that she was being blamed for the whole incident despite the fact that it had nothing to do with her. Ms Morrison proceeded to ring around to try and get advice, but did not make any contact with Mr Whitehead. Ms Morrison told me she did not want to respond until she had received advice.

[26] Ms Morrison assumed the letter confirmed her employment had terminated. She said she did not get legal advice for some two weeks and the advice she eventually did receive was to not respond to the letter.

[27] On 13 September 2006 Ms Morrison received a second letter dated 12 September 2006. Attached to this letter was a copy of the 6 September 2006 letter. Ms Morrison was once again, invited to respond to the allegations against her by 15 September 2006 and to attend a disciplinary meeting. Ms Morrison said that she thought she had already been dismissed and had already been banned from the premises and blamed for the whole incident so she could see no point in having a meeting.

[28] At the investigation meeting Ms Morrison conceded that she never made any efforts to contact Mr Whitehead to let him know that she thought she had already been dismissed.

[29] At the investigation meeting Mrs Seton wasn't able to tell me with any certainty when Ms Morrison's employment was terminated. Having reviewed the documents provided by Ms Morrison I have concluded Ms Morrison's holiday pay was paid to her in two separate amounts, the first on 12 September and the second on 18 September 2006. I have concluded that by 18 September 2006 Ms Morrison's employment was terminated.

[30] By 28 September 2006 Ms Morrison had received legal advice. On that day Mr Rowland Ingram wrote to Mr Seton, on behalf of Ms Morrison, raising a personal grievance for unjustified dismissal.

[31] Cova, through its representative responded on 9 October setting out the its belief that Ms Morrison had abandoned her employment through her failure to make any contact with her employer or to attend work.

Was Ms Morrison dismissed on 6 September?

[32] I have concluded that at the time Ms Morrison made her entry into the café on 6 September 2006 Mr Seton was angry and suffering shock following a very physical altercation with Mr Wolfgramm during which Mr Seton sustained punches to the head. On the balance of probabilities it is more likely than not that Mr Seton told Ms Morrison to leave the café and to not come back.

[33] I find that at the point Mr Seton sent Ms Morrison away, he already believed Ms Morrison was either supporting or had contributed to Mr Wolfgramm's actions through provocation,. My conclusion on this point is supported by reference to these conclusions in the letter dated 6 September.

[34] A cooling off period was called for and I find this occurred. After seeking advice Mr Seton's representative spoke to and then wrote to Ms Morrison and advised her that her explanation to the incident was being sought. Ms Morrison was asked to make contact with Mr Whitehead before Friday 8 September or face having her employment terminated through her own actions. This should have been a warning to Ms Morrison to take some positive steps to either provide a written explanation as requested or to make contact with Mr Whitehead. Ms Morrison did neither of these things and chose instead to do nothing.

[35] This letter was followed by a second letter on 12 September once again requesting Ms Morrison to make contact with Mr Whitehead. This letter reiterated the warning that if she failed to make contact, Ms Morrison's employment would be deemed at an end. Again, Ms Morrison did nothing.

[36] The letter of 6 September provides a pretty frank statement of the respondent's already held views about Ms Morrison's responsibility for the incidents which occurred on the 5th and 6th of September. I find that quite remarkable given that Ms Morrison was not present when Mr Wolfgramm and Mr Seton had their telephone exchange on 5th September and neither was Ms Morrison in the building when Mr Wolfgramm and Mr Seton had their altercation on 6 September 2006. Having said that, I accept Mr Stephenson's submissions that the letters of 6 and 12 September also make it clear to Ms Morrison that the employer considered her employment to still be on foot.

[37] The request for Ms Morrison to make contact with Mr Whitehead was not an unreasonable request. Ms Morrison refused to make any contact on the basis that she assumed she had been dismissed and was seeking legal advice. It would have been not only courteous, but would have demonstrated good faith on her part, if Ms Morrison had made contact, even if it was just to explain that she was seeking legal advice and to seek an extension to the timeframe for providing her explanation. Instead Ms Morrison took the decision to do nothing.

[38] I find Ms Morrison was not dismissed on 6 September 2006, but that her employment was terminated on 18 September 2006 after Ms Morrison was requested on two occasions to make contact but failed to do so in the full knowledge that that failure would lead to a conclusion that she had abandoned her employment.

[39] In all the circumstances of this case, I find the actions of the respondent, following the events on 6 September, to be those of a fair and reasonable employer.

Suspension

[40] Pursuant to section 160(3) of the Employment Relations Act 2000 ("the Act") I am not bound treat a matter as being a matter of the type described by the parties and may concentrate on resolving the employment relationship problem, however, described. Further, I am not prevented from a finding that a personal grievance is of a type other than that alleged (s.122).

[41] Ms Morrison was advised on 6 September that she was not to enter the café or approach any of the staff or managers until further notice. This instruction was

tantamount to a suspension. It is well known that unless an employment agreement expressly provides for suspension to be without pay, suspension is to be on pay. Further, generally speaking, before making the decision to suspend an employee, the employee is entitled to be consulted about the possibility of suspension. There will, of course, be cases where it is inappropriate to delay suspension to give the employee the opportunity to be heard, I am not satisfied this is such a case. There was no evidence that either Mr Seton or any of his staff were in imminent danger from Ms Morrison. Further, the letter of 6 September followed a telephone discussion that same day between Mr Whitehead and Ms Morrison during which the fact of suspension could have been raised and discussed. I find it was not.

[42] By imposing the suspension in the manner it did, the respondent has completely disregarded its own values statement provided for in the employment agreement which states that the respondent will communicate openly by exchanging information and actively listening with and to its employees.

[43] I find the way in which the suspension was imposed on Ms Morrison to be an unjustified action by the respondent causing Ms Morrison disadvantage. Pursuant to the test in section 103A of the Act I am satisfied this was not the action of an employer acting fairly and reasonably.

Remedies

Lost wages

[44] I have found the termination of Ms Morrison's employment on 18 September to be justified but that her suspension from 6 to 18 September 2006 to be unjustified. Ms Morrison was not paid during her suspension and is entitled to reimbursement for that period.

Cova Limited is ordered to pay to Ms Morrison the sum of \$1,056 (being \$16.50 per hour for a 40 hour 5 day week which equates to \$132 per day x 8 days). Such payment is to be made within 28 days of the date of this determination.

Compensation

[45] Ms Morrison says that when she received the letter of 6 September she was shocked, stunned and amazed that she seemed to be getting blamed for Mr Wolfgramm's actions. I accept Ms Morrison felt humiliated by the manner in which

the suspension was imposed. Ms Morrison's distress was exacerbated by the fact that she also discovered, during her suspension that she was pregnant.

[46] In the particular circumstances of this case, and in light of the range of awards in similar cases, I consider an award of \$1,500 under s.123(1)(c)(i) is the appropriate level of compensation for the loss of dignity and injury to feelings of the Applicant arising from the Respondent's unjustified actions.

[47] No reduction to that remedy is required under s.124 of the Act as the evidence does not suggest that the Applicant's actions contributed to the situation giving rise to her grievance.

Cova Limited is ordered to pay Ms Morrison \$1,500 without deduction pursuant to section 123(1)(c) of the Employment Relations Act 2000, within 28 days of the date of this determination.

Costs

[48] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority