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Mortimer v Sun Kissed Tan Limited [2022] NZERA 449 (9 September 2022)

Last Updated: 23 September 2022

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI ŌTAUTAHI ROHE

[\[2022\] NZERA 449](#)

3151882

BETWEEN	ROBYN MORTIMER Applicant
AND	SUN KISSED TAN LIMITED Respondent

Member of Authority: Antoinette Baker

Representatives: Robert Thompson, advocate for the applicant

Mathew Docherty, for the respondent Investigation Meeting: 7 July 2022

Submissions received: 7 July 2022

Determination: 9 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Mortimer worked as a nail technician for the respondent (SKT). She was suspended on pay from her employment pending investigation of a client complaint. A week later she was summarily dismissed for serious misconduct.

[2] Ms Mortimer says the suspension was an unjustified action that disadvantaged her in her employment. She says there was no consultation, and it was a disproportionate response in that SKT could have considered other options while it investigated.

[3] Ms Mortimer says the dismissal was unjustified because SKT did not tell her the investigation may result in dismissal; did not previously warn her about the issues she was dismissed for; did not give her an opportunity to be heard; predetermined the outcome; and did not sufficiently investigate the client complaint before making a decision.

[4] SKT says it was justified in both suspending and then summarily dismissing MsMortimer. SKT says it was justified to suspend because it decided Ms Mortimer's behaviour was erratic and there was a risk to its reputation if she was to continue in the workplace during its investigation of the client complaint; that it dismissed her for serious misconduct because it had lost its trust and confidence in Ms Mortimer to continue to perform her client facing role without making inappropriate comments in front of, or to clients. It says that she had not followed its

previous instructions about the way she spoke to clients and had admitted “most” of the conduct it was concerned about in its investigation. SKT considered its commercial reputation was at risk if it continued to employ Ms Mortimer.

[5] Ms Mortimer claims lost earnings, compensation, and costs. Her application for a penalty for breach of good faith was withdrawn at the investigation meeting. The personal grievance raised for disadvantage relating to the beginning of a redundancy process was not progressed.

The Authority’s investigation

[6] For the Authority’s investigation a statement of problem and a statement in reply were received, together with later lodged evidence from both parties. At the investigation meeting witnesses were questioned and the parties gave submissions.

[7] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act), this determination has stated findings of fact and law, expressed conclusions on the issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[8] SKT operates multiple beauty salons. Mr Docherty is the director of SKT. Ms Foreman is the area manager. Ms Mortimer worked part-time in one of the stores as a nail technician.

Phone call about client complaint and suspension

[9] On 27 April 2021 at 5.29 pm SKT received a client complaint email about Ms Mortimer from a client (client). Ms Foreman emailed the complaint to Mr Docherty. At approximately 7.40am on 28 April 2021 Mr Docherty spoke on the phone with Ms Mortimer. He told her about the client complaint but not the client’s name or date of the appointment. He put a series of things to Ms Mortimer from the emailed complaint and sought her responses. He told her she would be suspended on pay while the matter was investigated.

Suspension letter

[10] After the call on 28 April 2021 Mr Docherty emailed a pre-dated 27 April 2021 letter to Ms Mortimer (the suspension letter) which he had drafted before the phone call discussion. The suspension letter was headed ‘IMMEDIATE SUSPENSION’ and included that:

This letter confirms that you are suspended from work from today until further notice while an investigation is completed, we will be investigating a serious complaint laid in writing by one of your clients, where it is alleged you

- Attempted to discipline a client’s child
- Called a colleague a “bitch”
- You openly discussed the company’s restructuring plans despite the information being completely confidential
- Swore in front of a client and her children
- Failed to complete nail treatments to an acceptable standard
- Told a client that your colleague’s work was terrible and that she wasn’t good at her job.

Given the nature of the complaint we have deemed you unfit for work, and until we can ascertain the validity of the complaint having you in the store presents serious risk to the business and its reputation.

Your suspension does not mean that we have already decided that you have done or not done an action or behaviour that is misconduct or serious misconduct. We will not keep you suspended for longer than is necessary for us to carry out the investigation and decide on action to be taken, if appropriate. We can lift the suspension at any time. ...

[11] The remainder of the suspension letter said that Ms Mortimer was not to come to the workplace unless invited by Mr Docherty or Ms Foreman and that as her employment still continued, she must co-operate with the investigation and attend the “workplace for interviews or other meetings related to the suspension or matters under investigation.” The suspension letter ended by saying Ms Mortimer was not to have contact with any contractors, customers or staff of SKT without Mr Docherty or Ms Foreman’s authorisation.

First SKT phone call to the client complainant

[12] On 28 April 2021 after SKT's confirmation of the suspension to Ms Mortimer, Ms Foreman rang the client for the first time about her complaint. Ms Foreman summarised her record of that call in a bullet point email to Mr Docherty. More detail about the client's allegations regarding Ms Mortimer's interaction with her children was included. The summary included that Ms Mortimer had allegedly on a previous occasion criticised the colleague already referred to in the client's email complaint, and that a person from another beauty store came in during the client's appointment and Ms Mortimer said disparaging things about her haircut. Ms Foreman concluded in her summary with, "Once speaking to [client] I can confirm that everything is true, and we have proceeded to give her a refund and cancel any future appointments at SKT Nails." This summary was not given to Ms Mortimer before she left her employment.

First personal grievance raised

[13] On the 29 April 2021 Ms Mortimer through her lawyer raised a personal grievance in relation to the suspension and a redundancy proposal process that had commenced. That letter asked for further information about the client complaint including a full copy of the client's complaint email.

Mr Docherty's responses after the first grievance was raised

[14] On 29 April 2021, Mr Docherty responded to Ms Mortimer's then lawyer, by email, saying the suspension was immediate because SKT believed that Ms Mortimer was "an immediate risk to our brand and reputation if [she] returned to the workplace, we are also aware of her intention to disrupt other employees"; that Ms Mortimer was "invited to a non-disciplinary (investigative) meeting on 29 April 2021 to discuss the complaint". (Ms Mortimer through her lawyer had already declined this meeting as short notice.) The email further noted that Ms Mortimer in refusing to attend was breaching her employment agreement because "she is required to attend workplace meetings as instructed." This letter concluded with, "As per my previous emails we expect to see Robyn at our head office today at 1pm failure to attend may act against her during this process."

[15] Further email exchanges between Mr Docherty and Ms Mortimer's lawyer followed. Mr Docherty indicated during that correspondence that because the meeting was not a "disciplinary" meeting there was no need for Ms Mortimer's lawyer to attend but she was welcome to do so.

Meeting 3 May 2021 and first feedback from Ms Mortimer

[16] A meeting eventually occurred on 3 May 2021 (the meeting). Ms Mortimer, her then lawyer, Mr Docherty, and Ms Foreman were present.

[17] At the meeting Ms Mortimer had prepared and then read out her written feedback on the suspension, the restructuring and the client's email complaint (first feedback).

[18] Ms Foreman summarised the meeting after it concluded (meeting summary) from contemporaneous notes she says she took but now believes she has discarded. No other contemporaneous notes were produced. Ms Mortimer could not recall if anyone else took notes at the meeting. SKT did not provide the meeting summary to Ms Mortimer for her to agree to its accuracy of the meeting discussion. Ms Mortimer confirmed at the Authority investigation meeting that the meeting summary included things that were discussed. Ms Foreman in her evidence confirmed her notes and the meeting summary did not capture everything discussed.

[19] The meeting summary records Ms Mortimer "Admitted calling [colleague] a bitch and this is also in writing that Robyn wrote herself." The writing refers to Ms Mortimer's first feedback that she read out at the meeting:

[Client] accuses me of calling [colleague] 'a bitch'. Shamefully, I have to admit that statement is true. For that, I sincerely apologise to [client], as it was unprofessional of me to verbalise such an opinion in front of a client.

[Client] states that I wished [colleague] wouldn't return from ...leave. While this is true, I sincerely apologise for saying it in front of a customer.

[20] Ms Mortimer's first feedback explained that these comments were a result of her being unsettled after what she considered was an unexpected restructuring meeting earlier that day.

[21] The meeting summary ended with:

“No decisions have been made and there will be another meeting pending more investigations on the areas that we needed to have more detail in. Meeting ended at 1.48pm once both parties had been given all the information needed for this day.’

[22] After the meeting concluded at 1.48pm Ms Foreman made a further call to the client and summarised this phone call in an email to Mr Docherty at 2.21pm. This summary was not provided to Ms Mortimer before she left her employment. The summary included confirmation about the existing complaint and included a further allegation by the client that Ms Mortimer criticised the lack of control of children at a children’s princess party held at the salon. Ms Foreman includes in relation to this additional information that, “It is important to note that Robyn was rolling her eyes while these comments [about the princess party] were being said.” The summary then concludes by adding that:

In terms of her swearing in front of the client I can confirm Robyn did use the word Fucking and again quoted by [client] she said the following, “It’s so fucking good to say what I like about people now since I’m not under SKT.”

Post meeting phone call from Mr Docherty to Ms Mortimer

[23] Mr Docherty phoned Ms Mortimer after he received Ms Foreman’s email and verbally summarised Ms Foreman’s call to the client. Neither party is clear exactly what was said in this phone call.

[24] Ms Mortimer gave SKT further written feedback after Mr Docherty called her. In that feedback she recalled times she had asked the children not to disrupt their mother’s nail appointment. She said she did not think there was anything wrong with the way she managed the situation with the children. In this feedback, Ms Mortimer did not respond to issues about a princess party. It is not clear she had this additional complaint put to her.

Dismissal

[25] On the afternoon of 4 May 2022, SKT emailed Ms Mortimer to say she was immediately dismissed based on SKT’s finding of serious misconduct. The reasons given included the two admissions from Ms Mortimer and SKT’s view that it had “absolutely no reason to believe that [client] would fabricate” the things that Ms Mortimer denied and that “... we feel her written complaint and the two verbal discussions we have had with [client] over the phone to be legitimate.” The dismissal letter says that SKT had indicated Ms Mortimer’s actions could have been serious misconduct justifying summary dismissal and that the “incident follows a pattern of behaviour where topics of your discussions with clients have been deemed inappropriate.”

Second personal grievance raised

[26] On 9 May 2021 Ms Mortimer through her lawyer raised a personal grievance saying the dismissal was unjustified.

The issues

[27] The issues requiring determination are:

- (a) Was SKT justified to suspend Ms Mortimer and if so was she disadvantaged in her employment because of this?
- (b) Was SKT justified to summarily dismiss Ms Mortimer for serious misconduct?
- (c) If SKT was not justified in suspending and or dismissing Ms Mortimer, is she to be awarded:
 - a. compensation under [s123\(1\)\(c\)\(i\)](#) of the Act
 - b. reimbursement for lost earnings under [s 128](#) of the Act?
 - (d) If remedies are awarded, should they be reduced under [s124](#) of the Act for blameworthy conduct by Ms Mortimer that contributed to the situation giving rise to her grievance(s)?
 - (e) Should either party contribute to the other’s representation costs?

[28] [Section 103A](#) of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss or suspend was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or suspension occurred. This includes asking whether the employer’s substantive reasons were sufficient to justify the decision and whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[29] Under [s103A\(3\)](#) of the Act the following factors are considered to measure an objectively reasonable employer's fair process leading to a decision to dismiss or suspend:

- (a) whether subject to resources available, the allegations against an employee were sufficiently investigated
- (b) whether the allegations were raised with the employee
- (c) whether the employee was given a reasonable opportunity to respond to the allegations
- (d) whether the employer genuinely considered feedback.

Was SKT justified to suspend Ms Mortimer and if so was she disadvantaged in her employment because of this?

[30] Ms Mortimer submits that she was not given a proper opportunity to be heard on the issue of suspension before the decision was made and draws my attention to the rules of natural justice that almost always, circumstances dependant, require some consultation before

the decision to suspend is made.¹ Ms Mortimer further submits that, "to justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue."² I agree that these are principles that I should consider.

Consultation before deciding to suspend

[31] Mr Docherty says SKT consulted with Ms Mortimer in the phone call discussion he had with her on 28 April 2021. He relies on Ms Mortimer's employment agreement to support the justification of SKT's decision to suspend, the relevant wording in unnumbered clauses being:

'Suspension':

The employer may decide to suspend the employee on pay while investigating allegations against the employee, e.g. For serious misconduct.

'Ending employment: Serious misconduct': ...Serious misconduct includes ...

- repeated failure to follow a reasonable instruction
- actions that seriously damage the employer's reputation
- a serious breach of the employer's policies and procedures

[32] The employment agreement does not carry an express obligation to consult before suspension, as can sometimes be observed in agreements. However, SKT had a duty to act in good faith under [s 4](#) of the [Employment Relations Act 2000](#) ('the Act') as well as to follow principles of natural justice, a fundamental of which is to give a person a right to be heard before an adverse decision might be made against them for things they may have allegedly done.

[33] The Employment Court has found that an immediate suspension was justified in circumstances where, despite the employer providing limited details for the reason, it would have been obvious to the employee what the suspension related to because it happened on the

¹ *Hong v Auckland Transport* [2019] NZEmpC 54 at [50]. [65] to [67]

² *Singh v Sherildee Holdings Limited* [2005] EmpC Auckland AC53/05 at [93].

day of the suspension in an environment where the employee knew what had happened and what had been said.³

[34] I find that the issues raised by Mr Docherty in the telephone call on 28 April 2021 were a complete surprise to Ms Mortimer. He did not provide her with sufficient detail to know when or to whom they related. I do not find this was a situation where Ms Mortimer ought to have known what the complaint was about.

[35] I am further satisfied that the client complaint was delivered by Mr Docherty in a manner that likely had Ms Mortimer at a loss to respond. Mr Docherty says she responded with words like, "I do not know" or "cannot recall", and he regarded this as sufficient to have consulted with her about the decision to suspend. The call was heard in its entirety by Ms Mortimer's daughter, Ms Martin, who was sitting next to her mother with the phone on speakerphone. Ms Martin describes that Mr Docherty "barely gave Robyn a chance to respond to what he said before he levelled allegation after allegation against her". This is consistent with Ms Mortimer's evidence that the phone call "left me entirely shell shocked and totally ambushed".

[36] Ms Martin said she particularly recalled Mr Docherty telling Ms Mortimer that her services were not up to

standard and that she was the “sole reason for the decline” in the nail salon side of the business. She describes being shocked by this and the overall way the phone call went. Mr Docherty responded to the evidence that he made the “sole reason” comment with a question: “why I would say this when she was fully booked?” I found Mr Docherty’s answer equivocal and prefer the evidence of Ms Mortimer and Ms Martin.

[37] Based on the above, I find Mr Docherty’s approach on the phone call could not reasonably be regarded as consultation before deciding to suspend.

3 *Allison v Ceres NZ LLC* [2021] NZEmpC177 at [83].

Was SKT justified in not consulting before suspension?

[38] Having found there was no consultation about the suspension I will consider whether in the alternative this was a situation that an immediate suspension was justified.

[39] The Employment Court⁴ has confirmed that in deciding whether an immediate suspension is justified a “case by case”, “flexible and sensible” approach should be applied. “Imminent danger to the employee or others, and an inability to perform safety-sensitive work” are two examples that might support an employer suspending without consultation. Ultimately, it says the test in each case is the fairness and reasonableness of the employer’s conduct.

[40] SKT’s suspension letter justifies the immediate suspension based on the “nature of the complaint,” that it “deemed” Ms Mortimer “unfit for work,” and that there was a serious risk to SKT’s reputation if Ms Mortimer came back to the workplace before it had concluded the investigation. Mr Docherty further justified the suspension in a letter responding to Ms Mortimer’s lawyer as “an immediate risk to our brand and reputation if [she] returned to the workplace, we are also aware of her intention to disrupt other employees.” There is no evidence before me to support a serious risk to SKT’s reputation or that Ms Mortimer was intending to “disrupt” other employees other than Mr Docherty telling me this was so. He explained that he had decided Ms Mortimer’s behaviour had become “erratic” based on previous discussions he had with her about similar behaviour. I will return later to discuss these previous discussions. For now, I note that there is little evidence to support these were the sort of discussions that could reasonably support a finding of a “pattern” of behaviour.

[41] The suspension letter was prepared before Mr Docherty rang Ms Mortimer. While it contains words to say that no decision had been made, it also starts with SKT saying it had “deemed” Ms Mortimer “unfit” for work. I find that to have so quickly arrived at this view and decided she posed a “serious risk” warranting immediate suspension was at best a serious over reaction on the part of SKT and not what I find a reasonable employer could have done in the circumstances.

4 *Graham v Airways Corporation of New Zealand Ltd* [2005] NZEmpC 70; [2005] ERNZ 587

[42] Considering the above I am satisfied that the suspension was an unjustified action by SKT.

Was there a disadvantage to Ms Mortimer if suspended on full pay?

[43] The Employment Court has held that there can be an adverse effect on an employee suspended on pay where there was no consultation and where a letter had been written before the suspension was verbally communicated. It rejected an argument that there could be no disadvantage if the employee remained on full pay noting that the sudden expulsion from a workplace could on its own have an adverse effect on the employee.⁵

[44] Mr Docherty says the suspension was on pay and there was no disadvantage to Ms Mortimer. Ms Mortimer submits that by SKT not consulting with her about the suspension she lost the opportunity to suggest ways to continue with her appointments without risking further engagement with the client. I agree. I also accept that the suspension and the manner in which Mr Docherty delivered this message was a sudden and likely shocking expulsion from the workplace which I can understand would have had a considerable emotional effect on Ms Mortimer as an employee.

[45] Ms Mortimer provided messaging on her Facebook page from clients who wondered where she was after discovering from SKT that their appointments with her were all suddenly cancelled. Her responses show that she explained she was not able to say why she was not available. I accept she likely felt a sense of embarrassment and a concern about how people might second guess what had happened. This is supported by Ms Martin’s evidence. I am satisfied that the suddenness of the suspension, that she was “deemed unfit” for work and told she was the “sole reason” for the nail treatment side of SKT’s business failing had an adverse impact on Ms Mortimer’s wellbeing.

[46] Accordingly, I find SKT was unjustified in immediately suspending Ms Mortimer when it did, and that Ms Mortimer was disadvantaged in her employment because of this. I will return to the issue of a remedy below.

5 *Booth v Big Kahuna Holdings Limited* [2014] NZEmpC 134 at [60].

Was SKT justified to summarily dismiss Ms Mortimer for serious misconduct?

An indication that dismissal was a potential outcome

[47] Ms Mortimer says that she should have been told her employment was at risk rather than Mr Docherty's insistence that it was not a disciplinary process. I find it likely Ms Mortimer realised dismissal could be an outcome of the process. Her lawyer confirmed in an email to Mr Docherty that she was concerned that he thought that Ms Mortimer's behaviour was serious misconduct. That at least ought to have alerted Ms Mortimer to the seriousness.

[48] By the simplest interpretation SKT's process was clearly a disciplinary process. The language used in the suspension letter supports this as a reasonable interpretation. When a meeting date was being negotiated with Ms Mortimer's then lawyer, Mr Docherty's emails focused on him raising issues about the involvement of Ms Mortimer's lawyer and included that while welcome to attend the meeting, she need not attend because it was not disciplinary. While for an unrepresented employee this approach would appear to dent their right to a fair process, Ms Mortimer was represented and her lawyer attended the meeting with her. I find it likely in these circumstances that Ms Mortimer must have realised that the investigation was disciplinary and may result in dismissal.

[49] Based on the above I do not find that Ms Mortimer is successful in this part of her challenge.

Previous discussions or warnings about past similar conduct

[50] Mr Docherty in his oral evidence could only refer me to two discussions he had with Ms Mortimer about the behaviour that SKT calls a similar "pattern" in its dismissal letter. In his oral evidence he gave some details about one of these informal discussions and little on the other except to say that it was about family issues. There was no performance follow up after the discussions referred to. Nothing was recorded. The discussion Mr Docherty told me about involved his sister who had her nails treated by Ms Mortimer at the salon. Ms Mortimer did not know at the time that the client was Mr Docherty's sister. Mr Docherty then heard

from his sister that Ms Mortimer has made critical comments about the chair she was expected to use. Ms Mortimer's view of this was that Mr Docherty was overbearing when discussing this situation with her. She says she thought the matter was trivial. Weighing this with the evidence about how Mr Docherty likely spoke to Ms Mortimer on the phone telling her she was suspended I prefer Ms Mortimer's evidence about the manner in which Mr Docherty raised the issue with her. Even if I am wrong about the way Mr Docherty may have dealt with this, it was the only incident identified by Mr Docherty in any detail to justify SKT's finding of a "pattern" of similar behaviour.

[51] Based on the above I am not satisfied that SKT has shown that it was reasonable in the circumstances for it to have found a pattern of behaviour to support a finding so serious that it could not trust Ms Mortimer to continue in her employment.

Predetermination

[52] There is evidence that SKT predetermined the suspension decision. While this event was the subject of a separate grievance claim I find it relevant to consider the suspension as the commencement of the process towards dismissal, given that the suspension letter outlines issues to be investigated. The letter to suspend was drafted before the phone call and "deemed" Ms Mortimer as "unfit" for work. This language indicates a decision had already been made about Ms Mortimer's behaviour.

[53] The meeting summary indicated a further meeting and feedback would happen before a decision was made. Mr Docherty did not wait to do this and dismissed Ms Mortimer because he tells me that he decided Ms Mortimer had "admitted most of it." Ms Mortimer admitted two things and apologised for these. I do not find it reasonable for SKT to have formed a view that she "admitted most of it". This also supports a finding of predetermination.

[54] Ms Foreman's summaries to Mr Docherty of both calls to the client include her confirmation that said she accepted what the client said was true. While under cross examination Ms Foreman did not accept that she was also a decision maker for SKT, I find

some likelihood that her views were intertwined with Mr Docherty's decision to forge ahead with SKT's decision to dismiss when it did.

[55] The combination of the above satisfies me that there was predetermination of the decision to dismiss Ms Mortimer for serious misconduct.

Subject to resources did SKT sufficiently investigate the concerns it raised due to the customer complaint

[56] As submitted on behalf of Ms Mortimer, the Court of Appeal has stated that an employer could not justify the dismissal of an employee if he had closed his eyes to available evidence or not given the employee an opportunity to be heard⁶; that "minimum requirements" for procedural fairness are that an employer must properly investigate allegations against an employee and give an employee the opportunity to be heard and then consider what they say "with an open mind" before making a decision to dismiss.⁷

[57] The suspension letter refers to an investigation to follow, and the meeting summary refers to further investigation and a further meeting before a decision would be made. However, there was little, or no investigation carried out by SKT beyond Ms Foreman ringing the client complainant twice and getting her to largely reiterate her complaint.

[58] As submitted for Ms Mortimer, the Employment Court refers to the importance of checking the veracity of complaints about employees coming from outside the workplace.⁸ I find no reliable evidence from SKT that this occurred. While Mr Docherty said he talked to one employee and Ms Foreman the other, Ms Foreman does not recall this and nothing that other employees may have said happened one way or the other was ever put to Ms Mortimer for comment.

⁶ *Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd* [1990] 3 NZLR 549 at p 554.

⁷ *Man O'War Farm Ltd v Bree* [2003] CA169/02 at [30].

⁸ *New Zealand Tramways Union (Wellington Branch) v Wellington City Transport Ltd (t/a Stagecoach New Zealand)* [2002] EMC Wellington WC 36/02.

[59] Based on the above I find that SKT did not sufficiently investigate the complaint about Ms Mortimer.

Were the defects in procedure minor or if they were, did they result in unfairness to Ms Mortimer?

[60] Mr Docherty says that any failing in the procedure was minor and because Ms Mortimer "admitted to most of it" SKT was justified to summarily dismiss her. I have already noted that Ms Mortimer only admitted two things.

[61] Mr Docherty submitted that SKT has grown exponentially and that they are still learning. I took this to mean that I should consider that SKT should be forgiven for any failings in its process. However, Mr Docherty emailed Ms Mortimer's lawyer a response to the first personal grievance by saying that SKT had "solid HR processes". Overall, I do not find that this was a situation where SKT was not able to consider for itself or to obtain advice about carrying out a fair and sufficient process of investigation.

[62] Standing back and considering all of the above I find that while my findings relate to what could be described as procedural failings, I do not find these were minor. In particular the lack of sufficient investigation and predetermination meant that SKT found a more serious set of comments had been made beyond those Ms Mortimer admitted to.

[63] Accordingly, I find that SKT was not justified in summarily dismissing Ms Mortimer for serious misconduct.

If SKT was not justified in suspending and dismissing Ms Mortimer, is she to be awarded:

a. compensation under [s 123\(1\)\(c\)\(i\) of the Act](#)

[64] While I have been asked to consider two grievances, I find that a global compensatory sum is appropriate. This is because my finding of an unjustified dismissal reflects a series of events in a very short time frame starting with an unfair suspension. All of this had a cumulative effect on Ms Mortimer.

[65] I have already commented that there was a likely adverse effect on Ms Mortimer due to the suddenness and manner of the suspension. I heard from Ms Martin. I found her to be a straightforward witness. She gave evidence of her observations from close hand living with her mother. She described the number of clients who were concerned about where her mother was. She described the change in her mother's behaviour from someone who was always well groomed and finding things to do such as gardening to a person who could not seem to raise the energy to do anything. Medical evidence supports that symptoms consistent with this increased from around the time of the dismissal.

[66] Considering the above I find that the combination of the suspension and dismissal had a significant emotional affect on Ms Mortimer. This was the first time she had worked doing nail treatments for an employer having previously worked from home. I find it likely she felt embarrassment, loss of dignity and humiliation. I can understand how what happened over the course of the week likely affected Ms Mortimer's confidence to find further work and her need to seek benefit assistance.

[67] In these circumstances I find that subject to the issue of contribution that I consider below an award of \$16,000.00 is appropriate compensation for both grievances.

b. reimbursement of lost earnings under [s128 of the Act](#)

[68] Ms Mortimer submits that she should be reimbursed for three months lost wages under [s 128\(2\)](#) of the Act less the earnings she received from at home nail treatment appointments after she was dismissed. I agree that this is the approach to take. I accept Ms Mortimer had difficulty obtaining further employment due to the likely effect on her from the grievances.

[69] While there is a lack of documentary evidence to support Ms Mortimer's earnings after the dismissal, the estimate of \$90.00 per week earnings from home clients from six weeks after the dismissal is accepted. Any government benefit that Ms Mortimer received during this time cannot be taken into account.

[70] I accept that Ms Mortimer was earning on average 34 hours per week at \$21.20 per hour at SKT. Twelve weeks is \$8,649.60 gross. I award 8% onto this amount for holiday pay entitlement under [s 25](#) of the [Holidays Act 2003](#). Six weeks of \$90.00 per week is then to be deducted.

[71] In summary I find the following to be Ms Mortimer's likely lost earnings subject to the issue of contribution that I consider below:

12 x average weeks	34 hours x \$21.20 = \$720.80	\$8,649.60
8% holiday pay	8% x \$8,649.60	\$691.97
		\$9,341.57
Less 6 weeks earnings	6 x \$90.00	-\$540.00
	Total for lost earnings:	\$8,801.57

If compensation as a remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Ms Mortimer that contributed to the situation giving rise to her grievance(s)?

[72] Section 124 of the Act requires me to consider the extent to which the employee's actions contributed to the situation that gave rise to the personal grievance. If those actions require it, I must consider whether to reduce the remedies otherwise awarded.

[73] It is submitted that Ms Mortimer "participated to the best of her ability throughout the disciplinary meeting and over the course of her suspension given the lack of information from the respondent." My findings above have to an extent already reflected this.

[74] However while Ms Mortimer apologised for referring to her colleague in front of a client as a "bitch" and saying she hoped she would not return from leave, these were things

that could be reasonably considered unacceptable in the client facing role that Ms Mortimer had and likely contributed towards the situation that gave rise to the grievance.

[75] The Employment Court has summarised an approach when considering this issue⁹ and made observations about past awards for contribution reducing a 50% contribution award made by the Authority to no more than 20%. In that case the employee's contribution was described by the Court as blameworthy because he had incurred infringements in a departmental vehicle, failed to report them, lost his licence and continued to drive while on notice that his licence had been suspended. The contribution finding was focused on his non-communication with his employer about his situation. The Court noted however that he could not "be blamed for other deficiencies in the process which worked significantly against him." I consider Ms Mortimer's contribution less serious and find that her contribution should result in a small reduction of the compensatory remedy I have awarded.

[76] Considering these things and comparing the situation with other contribution reductions I find some blameworthy conduct to justify a reduction of 10 % from the remedies made.

Orders

[77] Sun Kissed Tan Limited is ordered to pay Robyn Mortimer within 28 days:

- a. **\$7,921.41 gross** being \$8,801.57 gross for lost earnings under s 128(2) of the Act less 10% for contribution under s 124 of the Act.
- b. **\$14,400.00** being \$16,000.00 compensation under s 123(1)(c) of the Act less 10% for contribution under s 124 of the Act.

⁹ *Maddigan v Director-General of Conservation* [2019] NZEmpC190 at [71] to [77].

Costs

[78] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[79] If they are not able to do so and an Authority determination on costs is needed Ms Mortimer may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum SKT would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[80] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁰



Member of the Employment Relations Authority

10 *PBO Ltd v Da Cruz* [\[2005\] NZEmpC 144](#); [\[2005\] 1 ERNZ 808](#), 819-820 and *Fagotti v Acme & Co Limited* [\[2015\] NZEmpC 135](#) at [106]-[108].

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