

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 143/09
5143638**

BETWEEN KOLONA NICOL
 Applicant

AND BREWCRAFT LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Tim Oldfield for Applicant
 Clive Bennett for Respondent

Investigation Meeting: 21 April 2009

Submissions Received: 28 April 2009

Determination: 7 May 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mrs Kolona Nicol ("Mrs Nicol") claims she has personal grievances for unjustifiable disadvantage and unjustifiable dismissal. She asks the Authority to resolve the problem by making formal orders for reimbursement, compensation and reinstatement.

[2] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[3] Ms Kolona commenced employment with Brewcraft Limited ("Brewcraft") as a production assistant on 20 March 2006. The terms of the employment were recorded in a written individual employment agreement dated 16 March 2006. At the time of her dismissal Mrs Nicol worked as a packer.

[4] Mrs Nicol's mother suffered a stroke on 15 September 2008. She was admitted to Middlemore Hospital for care.

[5] At 3.00pm on 8 October 2008 Mrs Nicol's sister telephoned her to advise she could not look after Mrs Nicol's children on 9 and 10 October 2008 as previously arranged because she wished to be with their mother at Middlemore Hospital.

[6] Mrs Nicol completed a leave application form making application for annual leave on 9 and 10 October 2008. At the end of her break at 3.15 pm she placed the form on her supervisor Ms Adrienne Melville's ("Ms Melville") desk.

[7] Shortly before 4.00pm as Mrs Nicol was finishing for the day, Ms Melville approached Mrs Nicol annoyed by Mrs Nicol's application for leave the next two days. Mrs Nicol says Ms Melville said she should have given more notice and told her not to do it again. Ms Melville tells the Authority she said "Kolona you can't do this to me at such a late date, its going to be hard to replace you". She says Mrs Nicol simply turned her back on her and left without any response.

[8] Ms Melville confirms she did not expressly decline Mrs Nicol's application.

[9] Mrs Nicol did not attend work on 9 and 10 October 2008.

[10] Brewcraft did not contact Mrs Nicol to enquire as to her whereabouts or to direct her back to work.

[11] On Monday 13 October 2008 Mrs Nicol returned to work. I find there was no interaction between the parties in relation to Mrs Nicol's absence from work the previous two days.

[12] At about 10.00am on Tuesday 14 October 2008 Mrs Nicol was directed to see Brewcraft's General Manager Ms Victoria Lytton ("Ms Lytton"). Present with Ms Lytton was also Mr Hamish Dowell, a director of Brewcraft ("Mr Dowell"). Mr

Dowell told Mrs Nicol they were not happy that Mrs Nicol had taken two days leave. Mr Dowell advised Mrs Nicol if she needed representation they would delay the meeting with her but if she did not, the meeting would go ahead. Ms Lytton asked Mrs Nicol if she understood what Mr Dowell was saying. Mrs Nicol said she wanted her union to represent her. Ms Lytton and Mr Dowell agreed and said they would meet with Mrs Nicol on Thursday.

[13] When Mrs Nicol returned to work she was handed her payslip and learned that she had not been paid for 9 and 10 October 2008. She raised the matter with Ms Melville. I find that Ms Melville said she did not know why Mrs Nicol had not been paid and that she had submitted the leave application form to the HR personnel. Ms Melville says Mrs Nicol was angry that she was not paid and was aggressive and disparaging of Ms Melville. Ms Melville reported the situation to Mr Dowell.

[14] Brewcraft director Mr Hamish Dowell ("Mr Dowell") was informed of Mrs Nicol's dissatisfaction. He summoned her to meet with him. Mr Dowell told Mrs Nicol she was to go home and to come back on Thursday. When Mrs Nicol asked why he told her it was because she was angry. Mrs Nicol said she did not want to go home. Mr Dowell said he was suspending her. She asked for the decision in writing. Mr Dowell composed a letter dated 15 October 2008 which stated:-

I confirm having discussed with you my proposal that you be suspended on full pay until our meeting tomorrow with your representative at 10am. I have considered what you've had to say, and I have decided that you will be suspended on full pay until then.

[15] Ms Lytton wrote to Mrs Nicol by letter dated 15 October 2008. The letter confirmed a meeting was to be held with Mrs Nicol on 16 October 2008. It specified the conduct of concern as failure to give reasonable time to consider a request for annual leave, absence from work for two days and failure to give adequate notice to her supervisor regarding requests to alter start and finish times.

[16] Mrs Nicol attended the disciplinary meeting with her union organiser Mr No'ora Samuela ("Mr Samuela") on 16 October 2008. Present for Brewcraft were Mr

Dowell, Ms Lytton and its advocate in this investigation Mr Bennett. Mrs Nicol was asked to explain her absence on 9 & 10 October 2008. She said that her sister phoned her at 3.00pm on 8 October 2008 to say she could not look after Mrs Nicol's children the following day. Mrs Nicol disclosed that her mother had had a stroke. Mr Dowell asked why Mrs Nicol had not informed Ms Melville of that situation. Mrs Nicol said she did not do so because she knew Ms Melville was already "angry". Mr Dowell asked Mrs Nicol if she had yelled at Ms Melville. Mrs Nicol denied that she had. Mrs Nicol said that when Ms Melville confronted her on the afternoon of 8 October 2008, Ms Melville had said to her "not to do it again" and "you can't do this to me". She further said Ms Melville had not told her not to take the leave.

[17] Mr Bennett asked about occasions when Mrs Nicol had left work early. Mrs Nicol explained that she had already asked Ms Melville and Ms Melville had approved her leaving early.

[18] Mr Samuela referred to domestic leave and submitted that Mrs Nicol was entitled to it.

[19] I find that the meeting adjourned on the basis that Brewcraft would conduct further enquiries as to its own processes in relation to applications for annual leave and to consult Ms Melville.

[20] Mr Dowell sent a letter dated 22 October 2008 for Mrs Nicol to Mr Samuela. He concluded that the relationship of trust and confidence in the employment relationship had been destroyed. He advised that Mrs Nicol's employment was to be terminated immediately. Mr Samuela passed the letter to Mrs Nicol.

The merits

[21] The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. *Test of justification*

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.

[22] In relation to the contended personal grievance for unjustifiable disadvantage, there was no contractual right to suspend Mrs Nicol. While Brewcraft says Mrs Nicol was angry and disparaging towards her supervisor, I do not consider that situation justified removing her from the workplace. I am not persuaded that Mrs Nicol's behaviour was as severe as Mr Dowell contends. The situation called for effective management. Her removal from the workplace was not justifiable in my view. That said, I find that Mrs Nicol was permitted an opportunity for input before that decision was actually taken, but the right input was not sought. While Mr Dowell did tell Mrs Nicol she was angry, he did not explain to her why her immediate removal from the workplace was consequently necessary. **I find that Mrs Nicol has a personal grievance for unjustifiable disadvantage.**

[23] I find that Ms Melville did not actually decline Mrs Nicol's application for leave. I find that Ms Melville's own evidence implies the leave, while clearly causing inconvenience, was approved and there was no declaration of refusal.

[24] Ms Melville tells the Authority she remarked it would be hard to replace Mrs Nicol. That was an equivocal response. When Ms Melville was asked by Mrs Nicol why she had not been paid for 9 and 10 October 2008, Ms Melville did not respond that Mrs Nicol had not been authorised to take that leave. Instead, she told Mrs Nicol she did not know why Mrs Nicol had been paid and that she had submitted the leave application to the HR section. This evidence I regard as corroborative of my finding that Ms Melville did not refuse Mrs Nicol her requested annual leave.

[25] It was entirely Mrs Nicol's own decision not to inform Ms Melville the reason for her leave request. I find that she chose not to do so.

[26] Mr Dowell tells the Authority he did not believe that Mrs Nicol had taken leave arising out of her mother's stroke. He said he found it "beyond the pale" that Mrs

Nicol would not disclose the situation if it had in fact been true. Mr Dowell says that her "had trouble with her credibility" and that in relation to her mother's stroke, he said he really thought "she used that after the fact". I find Mr Dowell's conclusion is an allegation that Mrs Nicol had been dishonest to her employer. Mrs Nicol was never advised that Brewcraft did not believe her or of its reasons for so believing. She was denied the opportunity of addressing her employer to convince it to believe her. It was not fair to deny her that opportunity.

[27] I find, and it is not disputed, that Brewcraft did not make contact with Mrs Nicol on 9 or 10 October 2008 to direct her to return to work.

[28] It is not enough to simply assert that trust and confidence has been destroyed. Such an allegation must always be objectively sustainable. With respect to the allegation that Mrs Nicol had failed to give notice re her altered start/finish times, I find that Brewcraft acquiesced and permitted the situation to continue. But such conduct does not constitute serious misconduct. It was misconduct. The correct response was to deal with it as a matter of performance management.

[29] I have the same view of the allegation that Mrs Nicol had failed to give reasonable time for consideration of her request for leave. While clearly inconvenient, such conduct was not serious misconduct calling for summary dismissal. I tend to the view a fair and reasonable employer would quite properly have issued a warning to such an employee. Again this conduct ought to have been dealt with as a matter of performance management. But summary dismissal was not the proper response.

[30] The final allegation was that Mrs Nicol had been absent for two days without authorisation. While Ms Melville had told Brewcraft she did not approve Mrs Nicol's leave, Brewcraft's investigation of the situation was not sufficiently effective to disclose that neither had Ms Melville explicitly refused the leave. I find that in fact, the leave was not refused. I infer from Ms Melville's sworn evidence, that she in fact submitted documentation for Mrs Nicol to be paid for the two days leave in question. She would not have done so if the leave had actually been refused.

[31] I find that this is not a situation where Mrs Nicol was explicitly refused leave and then in defiance took that leave. If that had been the situation, Brewcraft would have been entitled to regard such conduct as serious misconduct. The particular circumstances are that Mrs Nicol applied very late for leave, was not expressly refused it and in fact was permitted it. Those circumstances do not amount to serious misconduct. A fair and reasonable employer would not have viewed the circumstances that way. The correct response was to communicate to Mrs Nicol in a formal way, expectations around applications for leave.

The determination

[32] Whether as instances on their own or considered collectively, I determine that Brewcraft was wrong to find serious misconduct and the conclusion that trust and confidence had been destroyed was not justifiable. In all the particular circumstances, and in relation to both the established grievances for unjustifiable disadvantage and unjustifiable dismissal, I find that Brewcraft's decision and its actions were not the actions of a fair and reasonable employer. **I find that Mrs Nicol was unjustifiably disadvantaged and unjustifiably dismissed and she has personal grievances. She is entitled to formal orders in settlement of the personal grievance.**

The resolution

[33] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Employment Relations Act 2000 to consider the extent to which Mrs Nicol's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[34] I find that Mrs Nicol did contribute to the situation that led to her personal grievances. She cannot be criticised for not making her application for leave earlier. The situation necessitating her absence arose only the day before she took leave. However, Mrs Nicol ought to have disclosed to Ms Melville that her mother had had a stroke and that she needed to care for her children. I accept that if she had done so,

Brewcraft would likely have been sympathetic as Mr Dowell gave evidence it would have. Mrs Nicol failed to be active and communicative with her employer and her failure in that regard in my assessment was blameworthy and directly causative of the situation leading to the personal grievances I have found. For these reasons, I consider a reduction in both the nature of the remedies to be provided is appropriate.

Reimbursement

[35] Mrs Nicol says she did not look for another job following her termination. She says she weaved baskets and sold them for \$400.00. I find that Mrs Nicol failed to mitigate her now claimed losses. I decline to award her reimbursement. If I had been persuaded that reimbursement was appropriate, I would have reduced that award for contribution.

Compensation

[36] I am satisfied that Mrs Nicol suffered hurt and humiliation, loss of dignity and injury to her feelings. I make a global award of compensation in respect of both personal grievances I have found. Having regard to her evidence, her length of service and the nature of the personal grievances found, I award her compensation in the amount of \$6,000.00 but reduced by 25% for her contribution. **I order Brewcraft Limited to pay to Kolona Nicol the sum of \$4,500.00 as compensation.**

Reinstatement

[37] Mrs Nicol asks to be reinstated to her former employment. Reinstatement is the primary remedy and I accept that wherever practicable it ought to be ordered. Brewcraft says that if Mrs Nicol is reinstated Ms Melville will "[lose] all control over her team". I am not persuaded that Mrs Nicol's reinstatement is impracticable so as to deprive her of the primary remedy. **I therefore order that Mrs Nicol be reinstated to her former employment at Brewcraft Limited, and that order is to take effect from 18 May 2009.**

Costs

[38] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Oldfield is to lodge and serve a

memorandum as to costs within 14 days of the date of this Determination. Mr Bennett is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application or submission outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority