

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 288
5440237

BETWEEN JANE MARGARET O'CONNOR
Applicant

A N D DRY DOCK CO LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: N Belton, Counsel for the Applicant
R Nabney, Counsel for the Respondent

Investigation Meeting: 30 June 2014 at Tauranga

Submissions Received: 30 June 2014 from the Applicant
27 and 30 June 2014 from the Respondent

Date of Determination: 7 July 2014

DETERMINATION OF THE AUTHORITY

Orders:

- A. Jane Margaret O'Connor was unfairly disadvantaged by Dry Dock Co Limited's decision to suspend her.**
- B. Jane Margaret O'Connor was unjustifiably dismissed by Dry Dock Co Limited.**
- C. There is an order that Dry Dock Co Limited pay to Jane Margaret O'Connor compensation of \$500 including a reduction of 50% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of**

this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Jane Margaret O'Connor was employed as a café cook by the Dry Dock Co Limited café. She was suspended then dismissed following various incidents with a respondent director, Sandra Johnson, between 18 and 20 November 2013.

Facts leading to dismissal

[2] Jane Margaret O'Connor (Janie) returned to work for Dry Dock Co Limited (the company) in or about July/August 2013. She had previously been employed but had left and worked in other cafés around Tauranga.

[3] Sandra Johnson (Sandra) is the respondent company's sole director. At the time of Janie's employment the staff comprised Janie, Sandra, Billie Houghton and one other. Sandra's partner, Roger Norton, would also assist with opening and closing the café.

[4] In September/October 2013 the company installed a new oven in the café. Unfortunately the new oven overloaded the power circuits blowing the café fuses. During the week of 11 November 2013 the café suffered power cuts and was unable to serve customers. This resulted in lost income.

[5] On 18 November 2013 there were further power problems. Around 8am, Sandra spoke to the staff about using the new oven. There is a dispute about the instruction given. Sandra left and did not return until 11am.

[6] During this period Janie used the new oven to do baking. Janie switched off appliances before using the oven.

[7] When she returned, Sandra saw the new oven was being used. She told Janie to switch it off. Janie became upset, switched off the oven then left the room for 5 to 10 minutes to calm down. There is a dispute whether she swore prior to leaving. Another employee, Billy Houghton, was present. Sandra was concerned about Janie's behaviour and asked Roger Norton to speak to her.

[8] Towards the end of her shift, Roger asked if he could speak with Janie. She agreed and they went outside the café and sat at some tables. Sandra followed. The meeting ended a few minutes later when Janie left.

[9] At 2.04pm Janie sent a text to Sandra saying *“from now on I turn up, do my job and nothing more, respect is a 2 way street and I’ve only ever tried my best for you! And you know that!”*

[10] On 19 November 2013 Janie arrived for work at 6am. Sandra and Roger were already there. Sandra approached her about the text message. Janie became upset. There is a dispute about the incident that occurred thereafter.

[11] Sandra asked Janie to return the keys to the café, which she did. Roger told her to go home because she was upset. Janie was concerned she may lose her job and refused to leave. She worked the rest of her shift.

[12] On 20 November 2013 Janie arrived at work. She had made enquiries about mediation and spoke to Sandra about it. When Janie returned from her lunch break she saw Sandra, her bookkeeper (Sonja) and a customer Keith looking at an employment law website. Janie tried to take a photo of them as she believed they were discussing her employment situation.

[13] Shortly thereafter, Sandra approached Janie to tell her she would be giving her a “disciplinary” letter by the end of her shift. Sandra and Roger then left to consult the respondent’s lawyer.

[14] At the end of Janie’s shift, Sandra had not returned. She called Sandra to ask about the letter. Sandra told her to go home and it would be emailed. Janie refused. When Sandra and Roger returned to the café at around 2.30pm Janie was still there. A customer, Robert Yeoman, was also present in the café.

[15] There is a dispute about the incident that occurred thereafter. Janie was upset and refused to leave until she had received her letter. Sandra asked her to leave several times. Sandra then called the respondent’s lawyer. She told Janie to go to the lawyers offices to collect the letter. Janie left the café around 3 pm.

[16] A letter dated 20 November 2013 was delivered to Janie that evening at 8pm by the company’s lawyer. The letter set out concerns about Janie’s behaviour,

including her refusal to follow instructions, behaviour and attitude on 18, 19 and 20 November 2013. It invited her written reply by 25 November 2013. It also informed her she was immediately suspended on full pay until its investigations were completed.

[17] On 25 November 2013 Janie's solicitors sent a letter alleging procedural irregularities and seeking compensation.

[18] On 26 November 2013 the company's lawyer sent a letter advising Janie's employment had been summarily terminated for serious misconduct. The incidents of serious misconduct were a failure to follow reasonable instruction, providing back-chat when given instruction, general unacceptable behaviour and attitude and her behaviour on 19 and 20 November 2013.

[19] On 28 November 2013 Janie's solicitors wrote again raising a personal grievance of unjustifiable dismissal. They alleged the outcome was predetermined, no alternative remedies had been discussed and the tests for justification in s.103A(3) of the Employment Relations Act 2000 (the Act) had not been met. They sought lost earnings for three months, compensation of \$20,000 and legal fees of \$5,000.

[20] The matter was unable to be resolved at mediation. It has now come before me for determination.

Issues

[21] There are four issues for determination:

- (a) Was Janie unfairly disadvantaged by the company's decision to suspend her?
- (b) Was Janie's conduct misconduct that a fair and reasonable employer could have dismissed her for?
- (c) Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances?
- (d) What remedies (if any) should be awarded?

Was Janie unfairly disadvantaged by the company's decision to suspend her?

[22] The parties accept clause 26.3 in the individual employment agreement provides the power of suspension. They disagree whether the employer is required to discuss this with the employee prior to suspension occurring given the circumstances on 19 and 20 November 2013.

[23] The fact Janie's employment was terminated is accepted. The onus falls upon the company to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)). In applying this test, the Authority must consider the matters set out in s.103A.

[24] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.¹

[25] Sandra Johnson was the decision maker. She sought and obtained legal advice prior to the decision to suspend.

[26] Clause 26.3 sets out the power of suspension:

26.3 In the event the Employer wishes to investigate any alleged misconduct, it may, after discussing the proposal of suspension with the Employee, and considering the Employee's views, suspend the Employee on pay whilst the investigation is carried out. [Emphasis added]

[27] The clause is clear on its face. The power to suspend may be exercised after discussing suspension and considering the employee's views. This did not occur here.

[28] A contractual right to consultation prior to suspension cannot be lightly dispensed with. It is an agreed matter of procedural fairness.

[29] Imminent danger to the employee or others is an example of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct. In many

¹ *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

cases that will call for advice and discussion before determining whether to suspend; in others, it may not.²

[30] The alleged evidence of imminent danger arises from the incidences on 19 and 20 November 2013. Janie accepted at hearing she was upset on these days. She had been through an upsetting medical procedure and was sensitive at the time. She had been told she would get a disciplinary letter at the end of her shift. She was concerned she may be dismissed and wished to know as soon as possible. She denied she was behaving in a threatening manner.

[31] Sandra perceived Janie's behaviour as threatening. On 19 November she alleges Janie was screaming and yelling. On 20 November she was yelling, swearing and at the end "*got right up close to my face*".³

[32] Sandra's evidence about Janie's behaviour on 20 November was corroborated by Robert Yeoman. I accept his evidence. He was a credible independent witness. He confirmed he saw Janie yelling and using offensive language towards Sandra and Roger. He saw Sandra asking Janie to leave several times. He heard Janie say she would "*take Sandra to the cleaners*" and she hadn't heard the last of this. He rated Janie's behaviour on a scale of 1 to 5 with 1 being friendly and 5 being threatening as 4 to 5.⁴

[33] Billie Houghton also gave corroborating evidence. On 20 November she saw Janie screaming and being extremely nasty to Sandra⁵, and saw Janie's behaviour to Sandra on 18 November. Although it did appear from text messages and at hearing they may have fallen out, some of Billie's evidence was supportive of and confirmed by Janie.

[34] Roger Norton corroborated Sandra's evidence about the events of 18 to 20 November. I place less weight on this given their relationship and his personal involvement in the employment matters.

[35] The above evidence supports the allegation of threatening behaviour on 19 and 20 November. I determine it is more probable than not that Janie was yelling and

² *Graham v. Airways Corporation of New Zealand Ltd* [2005] ERNZ 587 (EmpC) at [104]

³ Oral evidence J O'Connor and S Johnston at hearing 30/06/2014

⁴ Oral evidence R Yeoman at hearing 30/06/2014

⁵ Brief of evidence B Houghton paras 10 to 12

screaming on 19 November escalating to threatening behaviour towards Sandra on 20 November.

[36] However, when Janie left the café around 3 pm no decision about suspension had been communicated to her. She was not told about the suspension until 8 pm that evening. By then, matters had cooled considerably with time and distance. She had been text messaging Sandra earlier that evening seeking her disciplinary letter. Sandra offered to drop it off to her.⁶ It may be that the ‘imminent danger’ had passed.

[37] If the decision to suspend had been made immediately after the 20 November incident, I would have determined the suspension decision was reasonable, notwithstanding the breach of the agreement. No employer or employee should be expected to put up with threatening behaviour in the workplace. It is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

[38] However Sandra conceded in questioning by me, that the decision to suspend had been made when she attended her lawyer’s offices prior to the above incident on 20 November 2014. At that time when the suspension decision was made, there was no imminent danger. The proposed suspension could have been communicated to Janie at that time and comment sought either directly or through the respondent’s lawyer within a short timeframe. The delay in giving her the suspension decision was inexplicable and possibly contributed to the later incident.

[39] In these circumstances, a reasonable employer could have provided Janie with the concerns giving rise to the suspension, the opportunity to comment and consideration of her responses prior to suspension occurring. None of the mandatory requirements in s103A to justify this action were met.

[40] This defect was not minor and did result in unfairness to Janie having regard to her contractual right to be consulted.

[41] The Authority determines Jane O’Connor was unfairly disadvantaged by Dry Dock Co Limited’s decision to suspend her.

⁶ Text messages produced at hearing by S Johnston 30/06/14 between S Johnston and J O’Connor on 20/11/13

Was Janie's conduct misconduct that a fair and reasonable employer could have dismissed her for?

[42] The applicant submits that the conduct was not serious misconduct but misconduct warranting warnings. The company submits this was serious misconduct as defined in clauses 26.5(d) and (g) of the parties employment agreement dated 19 August 2013. Both parties accept this agreement governed their employment relationship.

[43] Sandra Johnson was the decision maker. She sought and obtained legal advice prior to the decision to dismiss. The dismissal letter dated 26 November 2013 set out the alleged serious misconduct she relied upon in making the decision to dismiss:

- *Failure to follow reasonable instruction on numerous occasions including a deliberate disregard of instruction not to use the new oven despite knowing the effect it was having on the café's power supply.*
- *Providing back-chat when given instructions.*
- *Unacceptable behaviour and attitude causing an inharmonious workplace.*
- *A 30 minute abusive verbal tirade at Sandra Johnson and her partner Roger on Tuesday 19 November 2013. A customer witnessed the later stages of this event.*
- *A further abusive verbal tirade at Sandra Johnson, including swearing and pulling the fingers at her, on Wednesday 20 November 2013. This was in the presence of a customer and two staff members.*

[44] Serious misconduct is defined in the employment agreement. Clauses 26.5(d) and (g) of the employment agreement are examples of serious misconduct:

26.5 The following is a non-exhaustive list of offences which constitute serious misconduct and which may give rise to summary dismissal.

...

(d) Refusal to undertake the duties of the employee's position, or to carry out any lawful and proper instruction given by the Employee's manager or any other person acting with the authority of the Employer;

...

(g) Acting in such a manner as to bring the Employer into disrepute.

[45] The agreement also sets out examples of acts or omissions which constitute misconduct and “*may, after the appropriate warnings in accordance with the warning procedure guide outlined in the Employee Handbook, lead to dismissal*” (Clause 26.6). This included:

(b) *The use of abusive, obscene, or threatening language to another person in the workplace;*

...

(d) *Disrupting the workplace by acts of undesirable behaviour or horseplay in disrupting any other Employee from carrying out that Employee’s duties;*

...

(j) *Any act or omission which, while not being serious misconduct, has a significant effect on the Employee’s ability to carry out the duties of the Employee’s position;*

[46] Acts or omissions that are serious misconduct “... *will generally involve deliberate action inimitable to the employer’s interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.*”⁷ It is conduct which “*deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*”⁸

[47] Serious misconduct under clause 26.5(d) requires a refusal to carry out a lawful and proper instruction. The alleged instruction was not to use the new oven because of its effect on the café power supply.

[48] An instruction not to use the oven in these circumstances would have been lawful, proper and reasonable. Janie’s evidence was that there was no clear instruction about not using the new oven. It had been used up to the café opening on 18 November. She accepted there had been power problems because of the new oven in the morning. She believed she had been instructed by Sandra to do further baking. In her mind, the best way to get the baking done was to use the new oven. When Sandra returned, Janie was told to turn off the new oven. She accepts she was upset, stared at Sandra and then had to leave the room for 5 to 10 minutes to calm down.

[49] Sandra gave evidence she told all staff after the morning power problems that “*we cannot use the new oven during the café busy time/opening hours*”. She says

⁷ *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

⁸ *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

Janie enquired about doing baking, Sandra told her “*pretend the new oven is not there*”, meaning to do baking using the old oven. When she returned she saw Janie using the new oven and turned it off. She alleges Janie swore then left for at least 30 minutes.

[50] The instruction to staff not to use the new oven was corroborated by another employee who was present at the time, Billie Houghton. Billie states in her brief “*we were aware that we were only to use the old oven*” (at para.5). When she went into the kitchen, she saw Janie had turned both ovens on. She told Janie they weren’t allowed to do that. She says Janie told her “*too bad, I have no choice*”. She saw Sandra return to the kitchen and tell Janie “*look I’ve just told you that you’re not allowed to do this*” (at para.6). Billie saw Janie look rudely at Sandra, point to the oven, switch it off and storm out of the kitchen. Janie confirmed she was upset, did stare at Sandra, turned off the oven, then left to calm herself down. I accept Billie and Janie’s evidence that she did not swear at Sandra.

[51] There may be some dispute about who turned off the new oven, but this does not affect the evidence about the instruction and subsequent incident that occurred. It appears more probable than not Sandra did give an instruction staff were not to use the new oven.

[52] Janie’s evidence about her use of the new oven was inexplicable in the circumstances. She knew the use of the new oven had caused power cuts that morning. She turned off other appliances to prevent blowing a fuse. She wanted to use the new oven during the busiest period for the café, when the largest power consuming appliances (coffee machine, cabinets and old oven) were in constant use. There was a high risk the power problems experienced that morning would re-occur. The baking did not seem to be a priority in these circumstances.

[53] It is highly unlikely Sandra would have instructed Janie to do the baking using the new oven in those circumstances. It is more probable Janie made the decision to use the new oven irrespective. Even if a blown fuse could have been easily fixed, this does not allow an employee to ignore a lawful and reasonable instruction.

[54] What is unclear is how the company then determined Janie’s actions were serious misconduct as opposed to misconduct warranting a warning. It would appear the refusal to follow the instruction about the oven on 18 November and the following

series of incidences on 19 to 20 November, escalated this matter to serious misconduct. Sandra told me at hearing, “*I had had enough of Janie’s behaviour*” and she had to “*take back control*”. Sandra found Janie’s behaviour alarming.

[55] Threatening behaviour is conduct which may deeply impair or destroy the employment relationship. This was not a one off event. This behaviour had been reoccurring over a three day period. It may not be the exact type of serious misconduct set out in the agreement but clause 26.5 states it was a non-exhaustive list.

[56] Given my above findings about Janie’s behaviour on 18 to 20 November 2013, I determine there was conduct that was serious misconduct a fair and reasonable employer could have dismissed her for.

[57] The company further submits Janie’s conduct on 19 and 20 November occurred in public and potentially brought her employer into disrepute.

[58] There was evidence the company was self-publishing the employment problems with Janie. Sandra accepted she had discussed Janie’s “disciplinary” letter with (at least) two café customers. Sandra and Roger also attempted to discuss employment matters with Janie in the public areas of the café. The company cannot complain about any damage to its reputation as a result. In the circumstances, Janie’s conduct did not bring the employer into disrepute given the manner these employment matters were being dealt with by the employer at the time.

Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances?

[59] The applicant submits she was not afforded a reasonable opportunity to comment on the allegations prior to dismissal and the outcome of the investigation was predetermined. The company submits it complied with s.103A of the Act and any defects in the process were minor and did not result in unfairness to the applicant.

[60] No issue about the investigation has been raised. This was a small café with limited resources. Sandra spoke to Robert Yeoman whom witnessed the incident on 20 November 2013 and her partner, Roger Norton. She was directly involved in the incident giving rise to the dismissal concerns. The behaviour was set out in the correspondence. There appeared to be little need for further investigation in the circumstances.

[61] No issue about the concerns was raised. The company's letters dated 20 and 26 November 2013 set out the concerns about the instruction and outlined Janie's behaviour on 18 to 20 November. Both omit to highlight that the behaviour was threatening to Sandra. Although the company could have been more forthright about the threatening nature of her behaviour, Janie was aware of this. She just did not believe her behaviour was threatening. If there was a defect by the company being less explicit about the threatening nature of her behaviour in its correspondence, it was minor and did not create unfairness for Janie in these circumstances.

[62] Janie raised concerns about her opportunity to respond. The letter raising the employers concerns was given to her on 20 November 2014 at 8 pm. It invited her to provide a reply by 2 pm Monday 25 November 2013. This gave 2.5 working days for her to take legal advice and provide a reply. Sandra's evidence was the company café was a small business with minimal staff and it urgently needed to know if Janie was to be replaced or not.

[63] Janie did respond through her lawyer's letter dated 25 November 2013. The letter stated the company "*has not followed the procedures for disciplinary action outlined in Ms O'Connor's employment Agreement nor has [the company] acted in a fair and reasonable manner.*" It noted Janie had suffered humiliation, stress and upset and this gave rise to "*a significant expectation of compensation.*" It then stated disciplinary issues should be addressed in accordance with the Act.

[64] Janie's letter does not challenge the substantive basis for suspension or dismissal. It only takes issue with the disciplinary procedure followed by the company. It does not identify what the procedural defects may be. It does not seek any further opportunity to respond or detail any difficulties obtaining legal advice.

[65] Janie's letter, while inadequate, did raise procedural defects that should have been considered prior to the dismissal decision. A fair and reasonable employer could have made further enquiries about these defects, given the serious consequences for Janie. Failure to do so evidenced a lack of genuine consideration of her responses. These defects were not minor and resulted in unfairness to Janie.

[66] The issues surrounding the suspension decision do not necessarily indicate the subsequent dismissal decision was pre-determined. There was a suggestion another employee was brought in to replace Janie. Billie Houghton gave evidence she took

over Janie's job until the matter was resolved. Interviews for additional staff were already taking place because of extended trading hours on Sunday's. At the time of the dismissal decision, the respondent café employed the same staff with the exception of Janie. There was no evidence of pre-determination.

[67] The Authority determines the process leading to dismissal was not what a fair and reasonable employer could have done in all the circumstances. Jane Margaret O'Connor was unjustifiably dismissed by Dry Dock Co Limited.

What remedies (if any) should be awarded?

[68] Given the finding she has a personal grievance, Janie seeks lost wages totalling \$6,688.50 being three months wages \$10,296 less earnings of \$3,607.50 during this period. She seeks an award of compensation but will leave the figure to me to determine. She accepts there should be some deduction for contribution but at the lower end of the scale.

[69] Janie had an obligation to mitigate loss by seeking alternative paid employment.⁹ An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.¹⁰ In practice this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.¹¹

[70] The evidence of mitigation is sparse. Her brief refers to "actively seeking work through WINZ" and contacting an employment agency. She was offered a job at the Waihi Beach Hotel but declined to accept it because of the travel and living costs and her wish to find a job closer to home. An email produced by the company suggests she simply did not turn up possibly due to a sick pet.¹² She eventually found a job in January 2014.

[71] There is no evidence of her financial circumstances at the time. There is evidence she refused to accept a job. There is no detailed account of her efforts to

⁹ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

¹⁰ *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

¹¹ *Allen v Transpacific Industries Group Ltd (t/a "Mediasmart Ltd")* (2009) 6 NZELR 530, para 78

¹² Email 19 June 2014 Waihi Beach Hotel to Sandra Johnston Respondent exhibit 1 produced 30/06/14

obtain any employment. Given the period and amount of lost remuneration sought, there is insufficient evidence to support this claim. The Authority declines to award any remedy under s123(b) because there is insufficient proof to the required standard she has lost remuneration.

[72] The amount of compensation for injury to feelings or other distress must be referable only to the harm done by the employer's behaviour.¹³ There was no medical evidence filed supporting the damages claim for stress. At best the applicant refers to her embarrassment arising from her dismissal. An award of \$1,000 would have been appropriate in these circumstances.

[73] I am required to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if those actions require a reduction in remedies accordingly (s.124).

[74] I indicated to the parties at the end of the hearing there may be issues of contributory conduct. Given my findings in relations to the events on 18 to 20 November above, a reduction of 50% is appropriate. The applicant's threatening behaviour was blameworthy. It was also causative of the personal grievance. I would have made a greater reduction but determined Janie was not wholly at fault. The company's behaviour also contributed to this personal grievance.

[75] There is an order that Dry Dock Co Limited pay to Jane Margaret O'Connor compensation of \$500 including a reduction of 50% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

¹³ *New Zealand Institute of Fashion Technologies v. Aitken* [2004] 2 ERNZ 340 at 344 [64]

[76] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority