

the one week's notice it considered it felt at the time was payable, and the two weeks' notice provided in the agreement.

Factual discussion

[4] Because it is a small business operating out of the Black's home and there are always duties to be attended to, confidentiality and reliability were factors that were important to Eyeline when it employed Ms Owen in March 2009. Ms Owen acknowledged these issues were raised with her.

[5] Unfortunately, Ms Owen was subject to a lot of illness during her 28 months' employment with Eyeline. Eyeline was very considerate towards Ms Owen and paid her sick leave before she had worked there for six months and therefore entitled to it. It was subsequently agreed, when she later ran out of sick leave, that she could substitute annual leave for sick leave. In all, over the two year period of Ms Owen's employment she took an extremely significant amount of leave. Very few, if any, of these days were genuine annual leave days.

[6] This high degree of sick leave, along with Ms Owen's regular lateness, became of concern to Eyeline. I determine from Eyeline's own timesheet history records that the sum total of sick and annual leave taken by Ms Owen was 50.5 days, and that in addition Eyeline did not deduct sick or annual leave from the first six days of sick leave that Ms Owen took, even though she was not entitled to paid sick leave. I note that an employer who for magnanimous reasons gives an employee paid leave before their sick leave is due, can not later claim the pay back. I also note that when calculating Ms Owen's final pay Eyeline deducted six days sick leave on the basis it was sick leave taken in advance, which was contrary to the parties' arrangement at that time, i.e. that Ms Owen could take sick days as annual leave days. It therefore follows that Ms Owen was paid for 44.5 days sick or annual leave, yet was entitled to 56.5 days, given her length of service.

[7] As noted above, not only was Ms Owen often sick, but she was also regularly late for work. Ms Owen lived in Wainuiomata, while Eyeline Optical is based in Hataitai. Ms Owen set aside between an hour and an hour and ten minutes to drive to work each day, but if the traffic was bad she would not get to work on time. This generally occurred between one and two days a week. After a while the Blacks felt,

for good reason, that this was unacceptable. Ms Owen was regularly counselled about the unacceptability of her lateness and the importance of timeliness to the business.

[8] In November 2009 Ms Owen was reminded that lateness to work would no longer be acceptable and that despite her otherwise good work record, if she couldn't improve her reliability then a replacement for her would have to be found. Unfortunately, matters did not improve and Mr Black felt obliged in July 2011 to issue a final warning to Ms Owen. She was provided with a letter to this effect at the end of the working day and asked to read it. It informed her of her continued habitual lateness, and her failure to personally contact the Blacks if late. She was told that:

You have now exceeded your annual leave and sick leave entitlements and any further sickness would be without pay. Doctor's certificates will be required – no excuses.

The letter concluded by stating:

You have one last opportunity to turn this situation around but if there are any further infringements you will be given a week's notice terminating your employment.

I note that the parties' employment agreement provides for two weeks' notice.

[9] After having a chance to read the letter, Ms Owen was again informed of the seriousness of the issues over punctuality and reliability. Ms Owen then discussed her health problems and the cost to travel from Wainuiomata to Hataitai, as well as other expenses she regularly had to meet. Ms Owen concluded by responding that she had *best resign*. Mr Black agreed with her and then said she could *stay on for a little while until she found another job*.

[10] Ms Owen did start looking for another job straight away. Indeed she informed the Blacks by text message the Sunday prior that she had a job interview on Tuesday, 26 July. Mr Black responded, effectively giving her permission to take the necessary time off.

[11] However, on her way to work on Monday, 25 July Ms Owen's car broke down on the motorway. For over an hour Mr Black did not know where she was. However at 10.39am he received a text message from Ms Owen stating:

Hey Brian, I won't be in today my car has stuffed out. I'm really sorry. I understand if I have blown my chances.

Mr Black's immediate reply was short and to the point:

You have blown your job. Last pay tomorrow.

Ms Owen, who at that point was dealing with repairs to her car, replied back:

Okay thank you for everything.

[12] It is clear that Ms Owen could have phoned or texted earlier, as required, even although she was waiting for a call back from a tow truck driver. A call to the Blacks would not have taken very long.

[13] The Blacks then neglected to pay Ms Owen her last week's pay, nor the two weeks' notice provided for in the employment agreement. I note that Ms Owen was paid the equivalent of \$106.80 gross per day, excluding her entitlement to holiday pay.

[14] Mr Black sent out a letter about the cessation of Ms Owen's employment that day. It states amongst other things:

Your text message stating that you were going for a job interview at 11am on Tuesday and that you will not be returning to the job until after the interview is not acceptable. As detailed in my letter to you dated 12 July 2011, I can no longer put up with the uncertainty of your attendance which now ends our association. I am sorry that it has come to this but you are in charge of your life and such decisions have consequences.

[15] I note that there was no direct reference to Ms Owen's non-attendance that day, but rather only to the job interview the next day.

[16] On 28 July Mr Ogilvie wrote on Ms Owen's behalf raising a personal grievance and seeking remedies for unjustified disadvantage over the final warning and unjustified dismissal, together with wages and holiday pay. The Blacks hired legal counsel, who responded on Eyeline Optical's behalf. That letter refers to the termination of Ms Owen's employment as a dismissal in paragraph 3.

[17] The claim for unjustified disadvantage over the warning has not been pursued. Despite mediation the parties were unable to resolve matters and it therefore falls to the Authority to make a determination on the remaining claims.

The Law

[18] This case is to be decided under the new s103A. In *Angus and McKean v Ports of Auckland* [2011] NZEMPC 160 the Full Court dealt with the issue of the application of this section in practice it held at 57 ff:

57. *The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employer's dismissal or disadvantage of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.*

58. *Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3),(4) and (5) must be applied to this exercise.*

59. *Finally, in determining justification under the new s103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or Authority must do so objectively, that is ensuring that they do not substitute their own decisions for those of a fair and reasonable employer in all the circumstances.*

[19] Those subsections (3), (4) and (5) referred to above state as follows:

3. *In applying the test in subsection 2 the Authority or the Court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated*

the allegations against the employee before dismissing or taking action against the employee; and

- (b) whether the employer raised the concerns that the employee had with the employer before dismissing or taking action against the employee; and*
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

(4) In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it thinks appropriate.

(5) The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –

- (a) minor; and*
- b. did not result in the employee being treated unfairly.*

[20] As the Court of Appeal held in *Coca-Cola Amatil (NZ) Ltd v Kaczorowski* [1998] 1 ERNZ 264, at 280:

A notice is an intimation by one of the parties to an agreement that it is to terminate at a specified time. If the employer in this case was dissatisfied with the length of notice it had its own rights and remedies to seek an earlier termination...

[21] An employer is not entitled to retrospectively deduct sick leave from workers to whom it has been granted in advance of their entitlement, and certainly not without written authority, which was absent in this case (see for example *Inspector of Awards & Agreements v. Eliassen (t/a) Mt Erin Chrysanthemums* [1987] NZILR 126).

Determination

[22] This case clearly involved, as initially accepted by the employer in correspondence from its lawyer, a dismissal of Ms Owen by Eyeline Optical. Ms Owen had given notice of an intention to resign, but that was not to take effect until such time as she had found another job, or at least had had a reasonable period to look for one. This notice of intention was agreed to by Mr Black, who accepted that he never gave any timeframe within which Ms Owen would be allowed to continue her job search without having to leave Eyeline's employ.

[23] It is clear from the evidence that Mr Black was concerned about two matters when he summarily dismissed Ms Owen on 25 March. The first was her failure to attend work on that day, and the second was, as set out in his letter written the same day, her intended absence the next day as well, in the context of the final warning issued less than two weeks before. Mr Black had clearly had enough and terminated her employment with immediate effect. However, in doing so he failed to act as a fair and reasonable employer, even given the small size of Eyeline. First, even had Ms Owen given a date for her resignation, that date had clearly not been reached before Mr Black peremptorily dismissed Ms Owen without any semblance of a fair procedure. There was no investigation whatsoever into the issues of whether Ms Owen had good cause to be late, or had good cause not to contact Mr Black straight away. Similarly, there was no investigation into whether or not she could take time off for a job interview, a matter which Mr Black had authorised only days before. Second, it is also clear, as a result, that Eyeline Optical had not raised its specific concerns with her before dismissal. Third, there was no opportunity for Ms Owen to respond and thus no genuine consideration of such an explanation, because there was no opportunity for Ms Owen to make one. These are all the relevant factors in determining whether or not Eyeline's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time.

[24] What Mr Black needed to do instead was to draw breath and have some form of investigation into what had occurred, as would be incumbent on any fair and reasonable employer. Ms Owen had had a breakdown in a very inconvenient place on the motorway and had to wait for a tow truck driver. While naïve, her explanation that she could not use her phone to contact the Blacks because she did not want to miss the tow truck driver needed to be considered. Similarly, she had been authorised to take the next day off on leave. Therefore even though she should not have taken the whole day off on the Monday, she did have explanations for her actions and the defects in the process followed by Eyeline Optical could not have been more substantial. They were thus major and did result in Ms Owen being treated unfairly. Even at the investigation meeting it was not entirely clear why Ms Owen had been dismissed, except that Mr Black had had enough of her absences. Therefore it follows that Ms Owen was unjustifiably dismissed.

[25] Eyeline has also failed to pay Ms Owen her last week's pay, two weeks' notice, or holiday pay. The sum it offered her much later, expressed to be as a full and final settlement, was clearly inadequate.

Remedies

[26] It took Ms Owen eight weeks to find another job. I accept that she did make efforts to find other work, and indeed mitigated her loss by finding a job in a relatively short period of time given the current difficult economic circumstances. She is entitled to eight weeks remuneration, of which two weeks would have been notice. It is, however, ironic that had Mr Black not acted so peremptorily Ms Owen would probably have found a job much earlier, given that she would not have had the stain of a dismissal on her record.

[27] Ms Owen seeks \$10,000 compensation for humiliation, loss of dignity and injury to feelings. However she has given little evidence of the impact of the dismissal on her, other than to say she was surprised and shocked to receive her dismissal letter and hurt by the way her dismissal occurred. She also referred to difficulties in finding a new job as a result of her dismissal. No evidence was provided by any supporting witnesses about the impacts on Ms Owen. In all the circumstances of this case an award of \$3,000 is appropriate.

[28] Any remedies awarded to Ms Owen must be reduced by the extent to which her actions contributed towards the situation that gave rise to the personal grievance. Ms Owen made no contribution whatsoever to the way in which she was dismissed, which was a knee jerk reaction by Mr Black to her regular absences. However, it is those absences that are blameworthy and without which the dismissal would never have occurred. Ms Owen had an extremely blasé attitude towards her obligations to Eyeline Optical to be at work on time each day. Despite being told the opposite she seemed to believe that it was not her responsibility to be on time if there were delays in traffic, in that it was just *one of those things*, which were *completely out of my control*. Despite the acknowledged difficulties in transport in the greater Wellington region (which no doubt are no better or worse than other cities of similar size around the world) it remained Ms Owen's responsibility to get to work on time throughout her employment. A lateness rate of 1-2 days per week is simply unacceptable and was not completely outside of Ms Owen's control, despite what she may think. It is clear that rather than arriving at work early on the majority of days, she simply left the

minimum time allowable to get to work, despite the regular difficulties with the traffic in the Hutt Valley, the motorway and central Wellington. This was a very unreasonable approach to adopt. Furthermore, Ms Owen could have been in no doubt, at least in the last few months of her employment, that this situation was impinging negatively on the business and was unacceptable to Eyeline Optical. In all the circumstances of this case, I consider that her contribution is one-third and reduce her compensatory remedies accordingly.

Costs

[29] Mr Ogilvie sought a contribution to Ms Owen's costs in the sum of \$3,000, plus \$71.56 for the filing fee. Mr Williamson, on behalf of Eyeline, claims that costs should lie where they fall.

[30] This was in many ways a standard case, in which the tariff should apply, based on the matter concluding by 1pm. In all the circumstances of this case I consider it appropriate that a contribution by Eyeline Optical to Ms Owen's costs (as she was the successful party) is \$2,000.

Summary of Orders

[31] I order the respondent, Eyeline Optical Limited, to pay to the applicant, Ms Renee Owen, the following sums:

- \$2,969.44 gross for twelve days unpaid annual leave, her last week's pay and two weeks' pay in lieu of notice;
- \$2,000 in compensation under s123(1)(c)(i);
- \$2,136 gross for lost remuneration (two-thirds of six weeks' pay); and
- \$2,000 in costs.

G J Wood
Member of the Employment Relations Authority