



[5] Ms Peleti commenced employment with KME in September 2008 in the position of Receptionist/Office Assistant. One of her duties as set out in the written employment agreement was “*arranging couriers,*” work in which she had some previous experience although not within a legal practice.

[6] Ms Peleti was dismissed because of the name and address details she gave to a courier firm retained to deliver documents KME had wanted sent to a person in London. The details of the intended recipient of the documents had been supplied by a client of KME when instructing Mr Kirkland to carry out legal work, which had included the preparation of those documents for execution by the client and the person in London.

[7] There is no dispute that on 25 March 2009, in the presence of the client, Mr Kirkland asked Ms Peleti to have the documents couriered to an address in London. They were picked up next day by the courier firm which was given by Ms Peleti the name and address of the person who was to receive them.

[8] By 9 April the client had become concerned that the documents had not been received and it began making inquiries of Ms Peleti and Mr Kirkland to find out why. Subsequently it was discovered that Ms Peleti had given the courier a name and address different from those of the person intended by Mr Kirkland and his client to receive the documents.

[9] The misdirected documents could not be traced and another copy had to be sent to enable the intended recipient to get them.

[10] The documents had been of the utmost importance and highest sensitivity to KME’s client and the intended recipient of them, who were parties to an arrangement they recorded. KME was reproached by its client for mishandling the delivery, as the successful execution and performance of a vital legal transaction had been jeopardised by what happened.

[11] A risk also arisen that action would be taken against the firm. As well as becoming exposed to civil and professional liability, KME considered its reputation and standing with its client may have been harmed by what happened, and the firm felt seriously embarrassed professionally.

[12] KME had regarded the particular work to be done for its client in drafting the documents and having them executed as being of high value to the firm. When instructing Ms Peleti to have them couriered Mr Kirkland had exhorted her to not “*muck it up.*”

[13] Before and after her dismissal Ms Peleti has maintained consistently that in arranging for the documents to be couriered she followed faithfully the instructions of Mr Kirkland. She claims that Mr Kirkland gave her the name and address of the person the documents were sent to.

[14] Ms Peleti claims that Mr Kirkland showed her a particular page of the documents to be couriered, on which was written the name and address of the person to whom she arranged them to be sent. As the Authority has seen for itself, a page of the documents does have on it that name and address. They are of a person who was a witness to a signature put on the documents but who was not the intended recipient.

[15] For his part Mr Kirkland has been equally adamant that he instructed Ms Peleti to send the documents to the person he and his client had intended to receive them in London. He claims he showed Ms Peleti a loose sheet of paper that was not part of the documents but which his client had given him with the name and address of the intended recipient typewritten on it. After Ms Peleti was dismissed that piece of paper was found in her work tray.

### **KME’s investigation**

[16] On 14 April 2009, after the misdirection of the documents had been discovered, Ms Peleti was given a letter from Mr Morrison asking her to meet the following day. She was told this was for the purpose of an investigation to be carried out with the stated view “*to a potential finding against you of serious misconduct.*” The letter made it clear that the outcome of the investigation could result in a written warning or termination of employment. Ms Peleti was advised of her entitlement to have a support person present and was given encouragement to seek that assistance. Her uncle, a solicitor who was known personally and professionally to Mr Morrison, was suggested by him as a person who might offer appropriate support.

[17] While Mr Morrison’s letter had drawn attention to a conflict between explanations given up to that point by Mr Kirkland and Ms Peleti, it did not expressly

raise dishonesty by anyone as a possible reason for the different accounts of what had happened.

[18] Ms Peleti with her uncle Mr David Lister attended the meeting on 15 April, at the end of which they were given a copy of minutes taken.

[19] A few days after the meeting Mr Morrison and Mr Enright met with Mr Lister to discuss Ms Peleti's conduct and her continued employment. As she was on annual leave and away from Auckland, Ms Peleti did not attend.

[20] During the meeting on 21 April between the three solicitors, which was held expressly on an 'off the record' and 'without prejudice' basis for most of it, Mr Morrison advised Mr Lister that KME had decided to dismiss Ms Peleti. Mr Morrison's evidence was that in giving this advice he had expected Mr Lister to pass it on to Ms Peleti.

[21] Mr Morrison himself did that the next day by emailing the following message to Ms Peleti:

*Shantelle,*

*We have now completed our investigation of the incidents raised.*

*We have determined that your actions amount to serious misconduct and accordingly your employment with KME Limited is hereby terminated, effective immediately.*

*You have taken 1 day of leave above your entitlement.*

*Please confirm whether you would like me to post this email to you as well.*

*Edwin (Morrison)*

[22] Particular aspects of the dismissal that Ms Peleti complains of as being unfair and unreasonable include KME's conveying the dismissal decision to her by email, KME's failure to express in the email any reasons for that decision, and also its failure to invite her to any further meeting after 15 April before any disciplinary action was finally decided upon.

[23] As to the last matter of complaint, the handwritten minutes of the 15 April meeting given to Ms Peleti referred at the end to having "A sit down together again next week when Shantelle returns from annual leave." In typewritten form and to

much the same effect this minute was reproduced as “*We will have another meeting next week to discuss.*”

[24] The only meeting Ms Peleti was invited to by KME was that held on 15 April. KME claims that as a result of Mr Lister having subsequently engaged with Mr Morrison and Mr Enright in the discussions on 21 April, there was no need to have the proposed second meeting. There was clearly little point in it, because KME had decided to dismiss Ms Peleti. KME claims that Mr Lister had acted as Ms Peleti’s agent or representative in taking part in the 21 April discussions and, when advised that his niece was going to be dismissed, had attempted to negotiate a financial settlement for her. There is no dispute that an agreement was not reached in that regard.

[25] The Authority finds that from the enquiry KME carried out it was left with reasonable grounds for believing, and did believe strongly, that Ms Peleti’s performance under investigation amounted to misconduct. In particular it had reasonable grounds for believing that Ms Peleti, without reasonable excuse, had not followed the clear instructions of Mr Kirkland to arrange to have the documents sent to the person whose name and address were given in writing by him to her.

[26] As well as Mr Kirkland’s explanation providing a basis for the employers reasonable belief Mr Morrison, who carried out the disciplinary enquiry, had information from a representative of KME’s client who had been present on 25 March. He said that during their meeting he had seen and heard Mr Kirkland give Ms Peleti instructions as to the name and address of the intended recipient of the documents.

[27] In addition to that direct evidence there were inferences reasonably able to be drawn by Mr Morrison from surrounding or circumstantial facts, such as the skill and experience of Mr Kirkland as a solicitor and the care and attention to detail he was likely to take, and was known to take, with transactions and associated work, such as having documents couriered to those immediately concerned with them.

[28] KME also held it against Ms Peleti that she had disobeyed instructions, which had been given when the problem was first detected and was being investigated, not to discuss the document’s misplacement with the firm’s client or any third party such as the courier firm that had been engaged.

[29] I find Mr Morrison had reasonable grounds for believing that those instructions had been given to Ms Peleti and that she had not complied with them. KME reasonably believed from its enquiry that Ms Peleti had discussed her role in arranging the documents to be couriered with KME's client and the courier firm, and at one stage had told the former that the problem was her fault. She said she had done this to protect Mr Kirkland from blame.

[30] As a result KME had reasonable grounds for considering that the reputation of the firm had been put at risk by her conduct.

### **Dishonesty the reason for dismissal**

[31] The evidence given by KME through Mr Morrison in particular, makes it clear that the decision to dismiss rather than take a different form of disciplinary action such as giving a final warning, was based primarily or substantially on a finding of dishonesty made against Ms Peleti with regard to the explanations she had given during the disciplinary enquiry.

[32] Mr Kirkland confirmed that the behaviour of Ms Peleti for which she was dismissed included telling lies, or as he put it "*bearing false witness*" against him. Untruths he said had been told to Mr Morrison, other staff, the client and customers, and he said her dishonesty had brought KME into disrepute as a consequence.

[33] Although in KME's letter of 14 April to Ms Peleti the possibility of dishonesty on her part was not expressly raised, the minutes from the meeting held next day on 15 April confirm that dishonesty became a "*key allegation*" made at that meeting. The issue was also referred to in the minutes as "*potential dishonesty due to the divergence between Marks account and Shantelles.*"

[34] The employer's stance has been that if Ms Peleti had acknowledged making a mistake through being careless or inattentive she would not have been dismissed. Although this view has been given after the dismissal, I accept that it was an expression by Mr Morrison's of his thinking at the time he decided to dismiss Ms Peleti. It is therefore relevant to the question of justification to be determined under s 103A of the Employment Relations Act 2000.

[35] Section 103A requires the Authority to determine, on an objective basis, 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 occurred.

[36] In looking at how the employer acted I find that there were imperfections in the way KME conducted its disciplinary enquiry. In particular the employer can be criticised for not holding the second meeting with Ms Peleti or her representative, as it had proposed to do at the 15 April meeting.

[37] Mr Lister's participation in the discussions of 21 April did not absolve KME as an employer from acting fairly and reasonably, or justifiably, in the way it acted towards Ms Peleti, including the way it reached the decision to dismiss her. Mr Lister as her representative or agent had not, I find, expressly or impliedly, waived the proposed second meeting, even upon being told by Mr Morrison that his niece was going to be dismissed.

[38] A second meeting would have provided an opportunity for her to be directly confronted with the finding of dishonesty that had been made by Mr Morrison. It would also have been an opportunity for her to respond to that and to any proposal that her punishment be dismissal, before that was confirmed to her.

[39] Forgoing the second meeting was also contrary to the representation made by KME in its letter of 14 April, that;

*.....no determination will be made as to whether there has been serious misconduct or the steps that will be taken by this firm until we have provided you with a full opportunity to provide an explanation.*

[40] In the circumstances I do not consider that Ms Peleti had a full opportunity to explain why she had not told the truth, as Mr Morrison had concluded, and why, as she obviously believed, dismissal was not an appropriate form of punishment.

[41] Nevertheless I consider that after conducting a substantially fair, although not perfect, investigation Mr Morrison had sufficient information available to him to reach a reasonable conclusion that Ms Peleti had been dishonest in giving her account of what had happened.

[42] In applying the test of justification in this case, I take the approach of the Employment Court in *Chief Executive of Unitec v Henderson* unreported, 19 March 2007, AC 12/07, a case referred to by Mr Edwards counsel for KME. At para [59] of the Court's judgment Colgan CJ observed that s 103A does not require an employer's

investigative process to be scrutinised minutely, pedantically and without sufficient regard to its overall fairness and reasonableness.

[43] The Court considered in the alternative what its view would have been if a close and fussy examination of the process had led to a finding that the process was unfair or unreasonable. The Court expressed itself satisfied that “*even if appropriate standards had been met by the employer*” it would nevertheless have dismissed the employee.

[44] Paraphrasing the Court at para [58] of its judgment, I find that KME’s failures to attain consistently the highest standards of fair procedure would not have affected the outcome for Ms Peleti of the employer’s investigation.

[45] She had known from the first meeting that KME suspected her of dishonesty, and she had known from KME’s letter of 14 April that termination of her employment was a possibility if misconduct by her was established. A second meeting was unlikely to have yielded any new information which might have swayed Mr Morrison to a different conclusion about Ms Peleti’s honesty or the appropriate punishment for her misconduct.

[46] The Authority takes the same view as the Court in this case towards the required standards of fair procedure; a second meeting is unlikely to have resulted in any different decision made by KME and Ms Peleti would still have been dismissed.

[47] Applying the test of justification at s 103A of the Employment Relations Act 2000, the Authority finds, from objective consideration, that what KME did and how it acted, was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[48] I must find therefore that the dismissal of Ms Peleti by KME was in the circumstances a justified dismissal.

### **Contribution**

[49] Had the dismissal been found unjustified the Authority is likely to have found that Ms Peleti contributed to the situation that gave rise to any grievance, and also that her contribution was great enough to preclude her from recovering any remedies.

[50] This too was an approach taken by the Court in the *Unitec* case (above) after finding, as the Authority has done, that a dismissal was justified. The Court held, at para [59], that the employee's conduct that gave rise to the circumstances in which she was dismissed was "*so significant and substantial*" that she would have been unlikely to have received any remedies.

[51] In view of the finding that the dismissal was justified the Authority does not need to determine Ms Peleti's contribution for the purposes of s 124 of the Act, but the evidence does allow me to make findings about whether there was blameworthy conduct on her part.

[52] The Authority directly investigated the actions of Ms Peleti that led to her dismissal. Evidence was given by several witnesses including Ms Peleti, Mr Kirkland and also the representative of KME's client, who was present at the meeting on 25 March and who said he had seen and heard Ms Peleti being instructed by Mr Kirkland to have the documents couriered.

[53] The version of events given by Ms Peleti and the other two witnesses are quite contradictory and cannot be reconciled except by finding that the evidence of either Ms Peleti or the other witnesses is plainly wrong. I accept the evidence of Mr Kirkland and the corroborative evidence of the client's representative, as to what Mr Kirkland said to Ms Peleti at the meeting. It follows that I am unable to accept Ms Peleti's account, steadfastly though she has maintained it.

[54] On that basis a finding can be made that Ms Peleti did not follow the clear instructions of Mr Kirkland. That in turn led to concerns being raised about the whereabouts of the package couriered to London, which in turn led to the client becoming involved and questioning the competence and professionalism of KME. Further in turn, that led to an investigation which then led to Ms Peleti giving an untrue account of what she had been asked to do by Mr Kirkland. That caused KME to regard Ms Peleti as dishonest, or as having acted dishonestly. That led KME to dismiss her. Her blameworthy conduct was causally connected to her dismissal and therefore was capable of being contributory fault for the purposes of s 124 of the Act.

[55] I find that the failure of Ms Peleti to explain truthfully what had happened was the predominant cause of her dismissal and led the employer down the path to dismissal at the end of it. Ms Peleti's conduct in this regard was so significant and

substantial as would have completely disentitled her to all or nearly all remedies, if her dismissal had been found to be unjustified.

### **Determination**

[56] For the reasons given above the dismissal of Ms Peleti by KME is found to be justified. No orders are required to be made against KME to resolve Ms Peleti's personal grievance.

[57] I consider that KME substantially observed the rules of procedural fairness applying to termination of employment, as it had expressly undertaken to do in clause 12.1 of the employment agreement. A penalty for breach is not therefore warranted.

[58] The claim for penalty for breach of s 4(1A) of the Act was not pursued.

### **Non-publication order**

[59] The evidence given by Mr Kirkland and other witnesses in relation to the circumstances that surrounded the instructions given to KME by its client to prepare the documents central to this case, and that were misdirected in being couriered, is not to be published by any person in any form. This order is made under clause 10 of Schedule 2 of the Act.

### **Costs**

[60] Costs are reserved. Mr O'Brien and Mr Edwards are to try and resolve any issue about costs between themselves, as counsel on behalf of the parties. If that cannot be done KME may file a memorandum in the Authority and serve a copy on Mr O'Brien, who will have 14 days in which to reply from the date of service.

A Dumbleton  
**Member of the Employment Relations Authority**