

**ATTENTION IS DRAWN
TO THE PROHIBITION ORDER
AT PARAGRAPH 39**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 38
5633804

BETWEEN	QWI Applicant
AND	THE GREAT GATSBY LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Graeme Ogilvie, Advocate for Applicant Rosi Buttula and Michael Morris, on behalf of Respondent
Investigation Meeting:	10 April and 28 April 2017 at Wellington
Submissions Received:	At the investigation meeting
Determination:	19 May 2017

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, QWI, claims she was unjustifiably dismissed by the respondent, The Great Gatsby Limited (Gatsby), on or about 11 March 2016.

[2] Gatsby accepts it dismissed QWI but says the decision was justified.

Background

[3] Gatsby operates a restaurant in Raumati. It employed QWI as a sous chef in May 2015 but she was quickly promoted to head chef.

[4] The chain of events which gave rise to the claim commenced on 1 March 2016. At the time Ms Rosi Buttula, a director of the Gatsby, was in Fiji. She received a text message from a friend and regular customer at the Gatsby.

[5] The message contained the following:

I just had a troubling conversation with [SJB] – he related to me “in confidence” that there is some difficulty with your head chef, who he claims is causing problems and had offered to sell him “P”. I would appreciate if you could protect my confidentiality with [SJB] but you might want to have your people look at this. [SJB] stated that “everyone” (including Hanae) was aware of it.

[and a little later]

[SJB] fears that this individual will damage the Gatsby reputation. I cannot say whether [SJB] is accurate or not but I owe it to you to pass on his comments

[6] Ms Buttula concluded she could do nothing until she returned to Wellington which she did on 8 March. She went to the Gatsby that day and told QWI of the allegation she was offering drugs at work. She says the reply was *I can look you in the eye and deny that.*

[7] About the discussion QWI says Ms Buttula *spoke to me briefly and said she had been told I had tried to sell the drug P to another employee* and then accused me of being rude to staff. She goes on to say *I assured Rosi these things were not true.*

[8] Ms Buttula denies raising concerns about QWI being rude to other staff and says this had been discussed previously.

[9] Ms Buttula says she spoke with SJB, an employee, the next day (9 March) and he confirmed QWI had come into the kitchen and offered him methamphetamine. She also asked four other staff whether or not similar offers had been made to them. One said yes.

[10] With respect to SJB the particular allegations are that during a single conversation QWI first asked if he wished to *come and partake* before making an offer to sell. The second employee also referred to a single conversation in which she says QWI suggested she stop at QWI’s home some time for *a smoke, beer or crack.*

[11] QWI says she arrived at work to commence her shift at 4.00pm on 10 March. She says Ms Buttula again raised allegations of drug supply and rudeness to staff before adding a third accusation; namely that things had gone missing while

Ms Buttula had been overseas. QWI says she asked if she would need a lawyer and if charges were to be laid. She says Ms Buttula responded she wouldn't need *anything like that* and they would meet to discuss the issues the following day.

[12] QWI says she felt so upset she was incapable of working and advised Ms Buttula accordingly. She says she was told, before leaving, there would be a meeting of all staff at 10.00am the next morning to sort things out.

[13] Again Ms Buttula has a different view of events. She says she became aware stock was missing the previous day. Upon enquiry another employee told her QWI was using the stock for her own purposes and encouraging that employee to do the same. She goes on to say that as a result she placed notes on stock advising it could not be used for private purposes before adding:

Although these allegations had been made, we had not looked into them further and the signs were not directed at [QWI]. They were for the purpose of making the company policy clear to all employees going forward that the personal use of company stock was not acceptable.

[14] Ms Buttula says when QWI arrived she ripped the notices off. She then approached Ms Buttula saying the accusation of theft meant she was not going to work and left.

[15] On 11 March QWI arrived for her rostered commencement at 10.00am. She says Ms Buttula was standing in the bar and simply told her to leave. QWI says a brief discussion followed during which Ms Buttula advised it was because the kitchen staff didn't want her there. She says she asked if they were still having the meeting and was told *no, leave now*.

[16] About the discussion Ms Buttula says:

... [QWI] came in for her rostered shift. I told her that anyone who was offering drugs to my staff would not be tolerated in my kitchen. I told her she was being dismissed immediately for this reason.¹

[17] In oral evidence Ms Buttula confirmed QWI's recollection of events on 11 March was essentially correct. Dismissal was advised almost immediately and QWI as not given a chance to respond.

¹ Brief of evidence at [20]

[18] The dismissal was confirmed by letter dated 22 March.

[19] QWI also made a wage arrears claim regarding payment for her notice period but it was based on an incorrect assumption regarding the content of her employment agreement. That claim is no longer being pursued.

Determination

[20] Gatsby accepts it dismissed QWI. In doing so it accepts it is required to justify the dismissal.

[21] Section 103A of the Act states the question of whether a dismissal is 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 could have done in all the circumstances at the time the dismissal ... occurred.

[22] Section 103A requires the Authority consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[23] While there are a number of factual disagreements outlined above none need to be resolved in order to reach a conclusion about the dismissal. That is because it is very clear from both Ms Buttula's brief and her answers during the investigation the requirements of s 103A were not complied with. QWI arrived and was immediately told she had been dismissed. There was no discussion. While QWI had been able to deny the broad accusation regarding drugs during the earlier discussions the detail of the accusations was never put. No considered response was offered and it follows no explanation could have been considered.

[24] These are significant deficiencies that would normally render a dismissal unjustified. The only thing that may provide solace for the Gatsby is a lack of resources but I conclude that is not an excuse available to it. I do so for two reasons. First Gatsby had access to two sources of professional advice. There was an accountant, who according to Ms Buttula handled the majority of staff related matters, and Gatsby had access to the services of an industry association from which it could access support and advice. Indeed it was using the association's services less than a

fortnight before the first investigation meeting. Second I must be cognizant of the Court's conclusions in *The Salad Bowl Ltd v Howe-Thornley*.² At paragraphs [94] and [95] the Court noted such all-encompassing failures were neither excusable nor minor which deprives Gatsby of a potential benefit via s 103A(5).

[25] Given the evidence this dismissal must be found to be unjustified.

[26] That conclusion raises the question of remedies. QWI seeks three months wages, \$10,000 as compensation pursuant to s 123(1)(i) of the Act and costs.

[27] Here-in lies a further issue which relates to whether or not QWI did, as alleged, offer drugs to two of the Gatsby's staff and here I note the following comments from the Employment Court:

[216] We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with "equity and good conscience". The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.³

[28] If there is misconduct by an applicant employee that is outrageous, particularly egregious or disgraceful I should consider whether it is appropriate to award any remedies. In doing so I note that if QWI did offer drugs as alleged I would have no qualms in concluding she acted in a way that would have provided a substantive justification for dismissal. It would constitute conduct so egregious it would deprive her of any right to remedies.

[29] Also to be noted is that a conclusion about whether or not QWI did as alleged need only be established on the balance of probability and not to the criminal

² [2013] NZEmpC 152

³ *Xtreme Dining Limited v Dewar* [2016] NZEmpC 136

standard. Here I note the Courts comments in *Ritchies Transport Holdings Limited v Merrinage*:⁴

[98] Ms White submitted that a higher standard of proof is required on the part of an employer in undertaking an investigation and decision-making where serious and criminal misconduct is alleged. Support for this submission is found in various judgments of this Court, including *Alatipi v Chief Executive of the Department of Corrections*;⁵ *Edwards v Board of Trustees*⁶ and *Lawless v Comvita New Zealand*.⁷ The proposition appears to have its genesis in the Court of Appeal's judgment in *Honda New Zealand Ltd v New Zealand Boilermakers Union*, where it was held that:⁸
 ... where a serious charge is the basis of the justification for the dismissal then the evidence in support of it must be as convincing in its nature as the charge is grave.

[99] I doubt that the observations in *Honda* can be extrapolated to the proposition contended for. The first point is that *Honda* related to the way in which a grievance committee (not the employer) should approach its task of decision-making. The second point is that the Court of Appeal has since clarified that an employer is not required to apply a standard of proof in determining allegations against an employee.⁹ Further, the concept of a flexible application of the civil standard of proof has been subject to criticism - as being unhelpful and erroneous - and (in any event) the Supreme Court has made it clear that flexibility in terms of the notion of requiring stronger evidence in relation to serious allegations should not be regarded as a legal proposition.¹⁰

[30] Having heard the evidence and notwithstanding QWI's denials, I conclude on the balance of probability she did as alleged. I have no doubt that had Ms Buttula conducted a reasonable inquiry she would have concluded QWI did, as alleged, offer drugs to her employees and would then have dismissed QWI.

[31] Here I note the evidence of both SJB and the other employee who made a similar accusation. While challenged their recital of what occurred remained undisturbed.

⁴ [2015] NZEmpC 198 at [98] and [99]

⁵ [2015] NZEmpC 7 at [81], [121]

⁶ [2015] NZEmpC 6 at [8]-[11]

⁷ [2005] ERNZ 861 at [14]

⁸ *Honda New Zealand Ltd v New Zealand Boilermakers Union* [1991] 1 NZLR 392, (1990) 4 PRNZ 330 (CA) at 333

⁹ *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [19]

¹⁰ *Z v Dental Complaints Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [105] per Blanchard J

[32] While there is a suggestion both might have been motivated by malice the supporting evidence is limited to SJB's acknowledgment he did not like QWI. There is also evidence the parent of another employee harboured some very negative views about QWI but there is no evidence of a conspiracy against her.

[33] I also note neither SJB nor the other employee approached the employer with their allegation. Instead the allegation came to light as a result of SJB's discussion with a third party. That the discussion occurred is not a surprise. I heard enough to conclude SJB would have been very concerned about an offer of drugs and the person to whom he raised his concerns was someone he looked to as a sort of confidant. That person gave uncontested evidence SJB looked disturbed and as a result it was he who approached SJB to ask what the problem was. Given the way this allegation was aired, and the lack of any evidence of an ulterior motive, I find it difficult to reach any conclusion other than the allegation was motivated by a belief the conversation between QWI and SJB had occurred as stated.

[34] Finally I note the existence of facebook personal messages passed between SJB and the parent of another employee on 10 March. Again the recipient is someone to whom SJB looks up – indeed he described this person as a sort of father figure. The existence of these messages was not known to Ms Buttula until after the grievance was raised but their content may still be considered when discussing remedies.¹¹ The texts contain a contemporaneous report the offer of drugs had been made.

Conclusion and Costs

[35] For the above reasons I conclude that while QWI has established she has a personal grievance, in that she was unjustifiably dismissed, this is a situation where remedies should not result.

[36] Costs are reserved.

Name suppression

[37] It will be noted the identities of both the applicant (QWI) and SJB have been anonymised. In QWI's case this is because my findings will be seen as an affirmation she offered to sell drugs in the workplace. While that is correct it must be

¹¹ *Salt v Fell* [2008] ERNZ 155 (CA)

remembered the level of proof required is less than the criminal standard. I therefore consider it inappropriate she be stigmatised by an accusation of criminal wrongdoing when the allegation has not been proved to that level.

[38] The reason for anonymising SJB's identity is obvious. He is an innocent party.

[39] For these reasons I order there be no publication of information which might identify either QWI or SJB.

M B Loftus
Member of the Employment Relations Authority