

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 301
5389801

BETWEEN

LOUISE REID
Applicant

A N D

HARRISON
ENTERPRISES LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: J McBride, Counsel for Applicant
D Harrison, Advocate for Respondent

Investigation Meeting: 12 March 2013 at Auckland

Submissions Received: 26 March and 22 April 2013 from Applicant
15 April 2013 from Respondent

Date of Determination: 15 July 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Ms Louise Reid, claims that she was unjustifiably dismissed on 8 July 2012. Ms Reid asks that the Authority find that she has a personal grievance and then award her the remedies of reimbursement of lost wages and compensation under s.123(1) of the Employment Relations Act 2000 (the Act).

[2] Conversely, the respondent, Harrison Enterprises Limited (HEL), denies that Ms Reid was dismissed at all and says that she left the workplace of her own volition on 8 July 2012; and by her actions, she was taken to have resigned.

Background

[3] Ms Reid is a horticulturalist. From August 2010 to 8 July 2012 she was employed by HEL at an Auckland garden centre trading as Palmers Garden World Remuera (the Garden Centre).

[4] The employment was on a permanent part time basis as a salesperson, working three or four days each week and as further required during busy trading periods. There was no employment agreement in existence and it appears that Ms Reid carried out private horticultural work on the days that she was not required at the Garden Centre. The extent of Ms Reid's private work may not have been entirely within the knowledge of her employer; but there is no evidence before the Authority of any apparent discussion or understanding about Ms Reid's private consulting or whether or not a conflict of interest could arise.

A problem arises

[5] Sometime in late June 2012¹, a customer, Mrs A², came to the Garden Centre and advised Ms Reid that she required two pots and suitable plants for her home. Ms Reid assisted Mrs A to select the pots and the plants to go in them. Mrs A then asked Ms Reid to visit her home to check the suitability of the site and the associated conditions where the planted pots would be placed; prior to delivery in the first week of July 2012. Ms Reid subsequently visited the home of the customer and confirmed that the selection made by her would be imminently suitable for the site.

[6] The evidence of Ms Reid is that while she was at the home of Mrs A, she was asked to look at the lawn as it was not in good condition. Upon making an assessment of the faults in the lawn and also identifying that there was a drainage problem, Ms Reid recommended that Mrs A contact a Mr B,³ who operates his own gardening business and is in competition with HEL; albeit it appears that he may have carried out contracts for them on occasions.

¹ The actual date has not been established.

² Because this person is not involved in the proceedings and for privacy reasons, it is not appropriate to publish her name.

³ He is not involved in the proceedings. It is the understanding of the Authority that he worked for HEL before going into business on his own account.

[7] The following day, Mrs A returned to the garden centre and confirmed her purchase of the two pots and the associated plants. These were delivered to Mrs A on or about 6 or 7 July 2012.

The departure of Ms Reid

[8] On Sunday, 8 July 2012 at approximately 10:00a.m, Ms Reid was requested to meet with Ms Harrison in her office. The evidence of Ms Reid and Ms Harrison is reasonably consistent in that Ms Harrison presented Ms Reid with the sales/delivery docket pertaining to the purchase made by the customer, Mrs A. The docket has the first name of Mr B written across it and it is crossed out. It has not been established who wrote the name on the docket or who crossed it out. But it is common evidence that Ms Harrison alleged that Ms Reid had recommended that Mrs A should use a competitor in the gardening/landscaping industry (Mr B) and this was unacceptable. However, there is considerable conflict in the evidence from this point on.

The evidence of Ms Reid

[9] Ms Reid says that she explained to Ms Harrison the requirements of Mrs A and recounted the visit to Mrs A's property and the inspection of the lawn. Ms Reid acknowledged that she had recommended the services of Mr B because he was good at turf work and Palmers Landscaping⁴ did not have anyone who could do the work required for Mrs A's lawn. Ms Reid attests that she said that Palmers Landscaping kept asking her to look at turf issues and teach them.

[10] The evidence of Ms Reid is that Ms Harrison was not interested in the explanation and said:

Well you won't be doing that. You are fired so fuck off and you have stolen from your work mates.

[11] Ms Reid attests that she then took off the radio (that sales staff are issued with) from around her neck and threw it down and told Ms Harrison that she would drop off her work shirts the next day. Ms Reid says that she then left Ms Harrison's office and was walking back through the shop area for about 20 metres, when Ms Harrison "yelled" at her: "... and you didn't get the job at Albany", an apparent reference to a

⁴ A business operated by Harrison Enterprises Limited.

job available at Palmers Albany. Ms Reid attests that she never applied for a job there and therefore responded to Ms Harrison: *“I never applied for it”*.

[12] The further evidence of Ms Reid is that she went outside the shop to a point about 20 feet from the information counter and was saying goodbye to some of her work colleagues, telling them she had been fired. Ms Reid says that as she walked back towards the information counter, she called back to her colleagues: *“I will see you guys later when I come into the shop”* and Ms Harrison, being at the information counter, “yelled out”: *“... you are fired so fuck off and you stole from us and you won’t be back. I’m taking out a trespass order against you”*. Ms Reid says that she assumed that the use of the words “stole from us” was a reference to recommending Mr B, rather than Palmers Landscaping, for the turf repair for Mrs A.

[13] Ms Reid went to empty her locker and then took some reference books that she owned from behind the information counter. Ms Reid says that Ms Harrison queried her taking the books but Ms Reid confirmed that they were hers. Ms Reid left the workplace and went to visit her friend (and assistant manager of the Garden Centre), Mrs Heather Wilkinson. She gave evidence to the Authority having been summoned by the applicant. I will return to the evidence of Mrs Wilkinson in due course.

The evidence of Ms Harrison

[14] As referred to earlier, the evidence of Ms Harrison is consistent with that of Ms Reid up to the point of discussing the referral of the turf job to a competitor. Ms Harrison says that she asked Ms Reid why she would refer work to a competitor and the response was: *“your landscaping is crap”* [or words to that effect]. Ms Harrison told the Authority that Ms Reid: *“... ripped her radio from around her neck and threw it across the orchid box [at Ms Harrison] simultaneously saying ‘I don’t want to be here anyway’”*. Ms Harrison attests that Ms Reid then left the office and created a “scene” in the shop, *“... yelling I’ve been fired”*. Ms Harrison says that Ms Reid went to empty her locker and then: *“... proceeded to run and cuddle all the staff on duty yelling, ‘I’ve been fired’*.

[15] Ms Harrison attests that she believed that Ms Reid had resigned without notice and she was astonished by the “outburst and performance” of Ms Reid. It appeared to Ms Harrison that Ms Reid did not like being “caught out”. Ms Harrison says that she

was shocked at the response of Ms Reid because the discussion was just an investigation meeting. Nonetheless, Ms Harrison says that she informed Ms Reid that she would no longer be welcome at the garden centre and the response from Ms Reid was that she would return and shop there whenever she liked.

The primary issue

[16] Given the substantial conflict in the evidence, the primary issue for determination by the Authority is: Was Ms Reid dismissed or did she resign?

[17] To arrive at a reasoned answer to this question, a close examination of all the available evidence is required. As is an assessment of the credibility of all the witnesses who gave evidence to the Authority.

The evidence for HEL

[18] Firstly, it has to be accepted that the employer was entitled to raise with Ms Reid the fact that the requirements of an existing client of the business had been referred to a competitor. Ms Reid appears to have some difficulty in accepting that her action was not consistent with her duty of good faith to her employer. But that is not something that I have to determine; it is simply enough to note that Ms Harrison was fully entitled to raise this matter with Ms Reid as she did.

[19] The focus of the investigation of the Authority is what was said during the discussion about the referral matter and what happened from there.

[20] In regard to the discussion that took place between the two women, Ms Harrison points to various issues that cast doubt on the credibility of Ms Reid's version of events; and also reflects on Ms Reid's demeanour or attitude on the day in question. Firstly, Ms Harrison refers to an issue regarding the paid hours of work for Ms Reid. Ms Harrison says that on Saturday, 7 July 2012, Ms Reid worked and entered into her signed timesheet that she had started work at 9:40a.m. Ms Harrison subsequently discovered (from the manager on duty) that Ms Reid had started work at 10:00a.m. and so she changed the timesheet to record that start time rather than the earlier one entered by Ms Reid. Ms Harrison also entered a 10:00a.m. start time for Sunday, 8 July 2012.

[21] Ms Harrison says that on Sunday, 8 July, upon becoming aware of the timesheet alterations that had been made, Ms Reid became angry about this. This is also confirmed by Mr Jonathan Harrison. In summary, it is the view of Ms Harrison that on the day of her departure from her employment, Ms Reid was in a confrontational frame of mind and this influenced her actions in regard to her alleged response to Ms Harrison, when questioned about the referral of work to a competitor.

[22] Ms Harrison also alludes to some purported inconsistency in regard to what Ms Reid had said about taking the radio off from around her neck and throwing it down and the presence of an orchid box. But I conclude that not much can be read into any of that except to say that it appears that Ms Reid removed the radio from around her neck with some aggression.

[23] Ms Harrison also says that before meeting with Ms Reid she had discussed with her business partner (and son) Mr Jonathan Harrison, the matter of the referral that was to be discussed and how it should be handled. It is her evidence (corroborated by Mr Harrison) that the meeting with Ms Reid was intended to be of an investigatory nature and if disciplinary action was necessary, then this would have been discussed by both of the business partners before any decision and/or action was taken.

[24] It is also argued for HEL that Ms Reid knew that she had “crossed the line” in regard to her referring work to a competitor and because she is a person who would not be prepared to suffer the indignity of any disciplinary action, such as a warning or dismissal, Ms Reid took the moral high ground and resigned; hence preserving her dignity before her employer could impose any sanction.

[25] It is argued that the evidence of Ms Reid, pertaining to what happened after she left Ms Harrison’s office, referring to Ms Harrison being at the information desk and allegedly yelling out to Ms Reid; is not supported by any evidence from any other person present. Mr Chris Curtain, employed in a customer service role at the Garden Centre, was present at the information desk on the day of Ms Reid’s departure. He told the Authority that he heard Ms Reid yelling several times that she had been fired. However, Mr Curtain says that Ms Harrison was just standing watching Ms Reid, waiting for her to leave the Garden Centre. In response to a question from the Authority, Mr Curtain stated that he did not hear anything from Ms Harrison.

The evidence for Ms Reid

[26] In addition to the evidence for Ms Reid, as set out earlier in this determination, she also attests to visiting her friend, Mrs Heather Wilkinson. Mrs Wilkinson was and is an employee at the Garden Centre and was a reluctant witness, having been summoned to appear at the investigation meeting. While Mrs Wilkinson's discomfort about giving evidence to the Authority in this matter was very obvious, I found her evidence to be generally reliable and it was given in an honest and objective manner, albeit she was obviously unhappy about being placed into a situation that potentially compromised her loyalty to her employer.

[27] Mrs Wilkinson attested to Ms Reid arriving at her home at about 10:00-10:15a.m. on Sunday, 8 July 2012. Notwithstanding that I have noted that Mrs Wilkinson was a generally reliable witness, she is clearly mistaken about this time as the meeting between Ms Reid and Ms Harrison was at approximately 10:00a.m. However, Mrs Wilkinson went on to attest that when Ms Reid arrived at her home on the morning in question, she was initially calm but then became upset and tearful and informed that she had been "fired". Mrs Wilkinson responded that she knew that Ms Reid might lose her job but could not say anything to her. Mrs Wilkinson then told the Authority that she had experienced "a very uneasy night" on Saturday as that day; Ms Harrison had called her into her office and started to tell her "all sorts of things". Mrs Wilkinson says that it was quite obvious that Ms Harrison was particularly upset about Ms Reid doing consulting and also taking liberties with her timekeeping.

[28] In response to a question from Mr McBride, Mrs Wilkinson said that when she came out of Ms Harrison's office on Saturday, 7 July 2012, she knew that Ms Reid was going to be dismissed. Mrs Wilkinson also attested to Ms Reid having to console her on Sunday, 8 July as she was terribly upset and feeling guilty that she knew what was going to happen to Ms Reid but she had hoped that it might "blow over" on the Saturday night.

[29] In response to questioning from Ms Harrison, Mrs Wilkinson acknowledged that on Saturday, 7 July 2012, Ms Harrison had shown her the sales docket relating to the referral made by Ms Reid and she acknowledged that her reaction was: "...*oh no what is she [Ms Reid] doing*". Mrs Wilkinson also confirmed that she asked

Ms Harrison what was going to happen to Ms Reid and was told that: "...*she is going to have to go*".

Was Ms Reid dismissed or did she resign?

[30] If it was only the evidence of Ms Reid and Ms Harrison about this issue, then the matter, most likely, would have been problematic. However, in addition to the evidence of Mrs Wilkinson, there is an email that Ms Harrison sent to the operator of another Palmers Garden World: Mr G.⁵ This email was sent at 10:31a.m. on Sunday, 8 July 2012: very soon after the departure of Ms Reid from her employment. The email informs:

Hello Garry,

*A confidential word of advise [sic]. Louise Rees [sic] may apply or already has applied for a position at your new store. She is an **absolute untrustworthy individual** and I have just terminated her employment.*

[The bold emphasis is original.]

See you soon,

Delma

Palmers Garden World Remuera

[31] Ms Harrison received a response from Mr G the following day. She also sent another email informing that she had spelt Ms Reid's surname incorrectly in the earlier email to him.

[32] While an attempt has been made by the employer to explain away the damaging content of this email, by suggesting that mistaken terminology has been used by Ms Harrison, I conclude that the words used are unequivocal and reveal a very plain meaning which simply cannot be misinterpreted.

[33] It follows that I find that the weight of evidence leads to a conclusion that Ms Reid was dismissed from her employment on Sunday, 8 July 2012.

Was the dismissal of Ms Reid an action that a fair and reasonable employer could take in the circumstances?

[34] Applying the test set out in s.103A of the Act, I find the dismissal of Ms Reid was not an action that a fair and reasonable employer could take in the circumstances

⁵ He was not involved in the proceedings.

that prevailed. In applying this test, the Authority is required to give consideration to the criteria set out in s.103A(3):

- (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 employer had with the employee 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.

[35] Having regard to the resources available to her, I conclude that Ms Harrison largely met the requirements of (a) and (b) above. Regrettably, the other two criteria, (c) and (d), were not complied with. And of course, notwithstanding the view of Ms Harrison that she was only having an investigation meeting, and indeed that may well have been her initial intention, the fact of the matter is that Ms Reid was never given any notice of the meeting or why it was required. And she was not informed that her employment may be in jeopardy and that she should take the opportunity to obtain a support person or representative if she wished to.

[36] Taking all of this into account, I am left to conclude that the dismissal of Ms Reid was unjustifiable and she has a personal grievance.

Remedies

[37] Having found that Ms Reid has a personal grievance she is entitled to the consideration of remedies under s.123 and s.128 of the Act.

(a) ***Reimbursement of lost wages:***

[38] Section 128(2) of the Act provides that where the Authority determines that an employee has a personal grievance and has lost remuneration as a result of the grievance, then the Authority must order the employer to pay to the employee the lesser of a sum equal to the actual lost remuneration or to three months ordinary remuneration. Then at s.128(3), the Authority has discretion to award more than three

months loss of wages. Ms Reid asks to be awarded a loss of remuneration for six months.

[39] I am satisfied that Ms Reid has attempted to mitigate her losses by attempting to obtain alternative employment, but without success. The evidence of Ms Reid is that she then decided to extend her gardening consulting business and put it on a more commercial footing. But as at 21 February 2013, it was running at a loss. An advertisement for Ms Reid's gardening consulting business has been produced to the Authority and Ms Reid says she placed this advertising in mid-September 2012 and again in October and November 2012.

[40] While Ms Reid's business may have been running at a loss, it is significant that by mid-September 2012, she had chosen not to pursue new employment and decided instead to concentrate on building up her business. Therefore, I conclude that it is not appropriate to reimburse her loss of wages for more than three months.

[41] As evidenced from Ms Reid's pay slips for five weeks shortly before her dismissal, the average weekly taxable pay was \$526. Ms Reid also received benefits in the form of coffee and stock purchasing privileges amounting to a further (approximate) amount of \$70 each week, albeit it is unclear if that figure is a taxable benefit. The submissions for Ms Reid suggest that it is a gross amount as the overall claim is for a total loss of wages and benefits in the sum of \$596 per week. For three months (13 weeks), the gross sum to be awarded is \$7,748.

[42] In the event that the method of calculation as to the actual loss incurred is not correct, and agreement cannot be reached as to the correct calculation, the parties have leave to return to the Authority for a supplementary determination, based on appropriate evidence.

(b) ***Compensation***

[43] Pursuant to s.123(1)(c)(i) of the Act, Ms Reid seeks compensation for humiliation, loss of dignity and injury to feelings "at or above the high end of the normal range": the sum of \$10,000-\$15,000.

[44] Ms Reid has given some evidence personally in support of this claim including referring to being on medication and her concerns about her reputation in the gardening industry. The use of medication is confirmed by written advice from her

doctor. There is more graphic evidence from Ms Reid's daughters and her husband and this has not really been disputed or found wanting. And while it can be expected that family members will have a more subjective view than perhaps others might, I accept that Ms Reid was affected to quite some degree by the manner of her dismissal. In particular, the allegation that she "stole" from the business affected Ms Reid and this was compounded by the email to Mr G; and the Authority understands that he has an influential role in the Palmers Garden World business environment, and this was of some concern to Ms Reid.

[45] On the other hand, it is submitted for HEL that Ms Reid could not have been too upset about the actions of Ms Harrison as she shortly returned to the Garden Centre: quite often, to purchase plants and use the cafe. It is said that this is hardly the behaviour of a person who had been seriously hurt and humiliated by the termination of her employment there. I agree. In the round, I conclude that an award of compensation in the sum of \$7,000 is appropriate.

(c) ***Contribution***

[46] As required by s.124 of the Act, the Authority is obliged to consider if the actions of the employee contributed to the circumstances that gave rise to the personal grievance and if so, the remedies awarded may be reduced.

[47] I find that Ms Reid did contribute to the circumstances that gave rise to the personal grievance. This is because, firstly, it is established that she acted against the best interests of her employer by referring work to a competitor. The referral was done with the knowledge that some time earlier, HEL management had conveyed to staff that they should always be looking to other business opportunities when dealing with customers. And secondly, when this matter was broached with her at the meeting on 8 July 2012, she was aggressive and uncooperative and showed little contrition in regard to her actions and it is quite likely that her attitude prompted the dismissal.

[48] I conclude that the remedies awarded to Ms Reid should be reduced by 40%.

Determination

[49] For the reasons set out above, I find that Ms Reid was dismissed on 8 July 2012 and the dismissal was unjustifiable.

[50] Pursuant to s.123 and s.128 of the Act, Harrison Enterprises Limited is ordered to pay to Ms Reid:

- (a) Reimbursement of lost wages and benefits in the gross sum of \$7,748 less 40%, being the sum of \$4,649.00 (rounded); and
- (b) Compensation in the sum of \$7,000 less 40%, being the sum of \$4,200.00.

Costs

[51] Costs are reserved. The parties are invited to resolve this issue if they can, taking into account the daily tariff approach of the Authority. In the event that a resolution regarding costs cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the respondent having a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority