

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 20
5429564

BETWEEN CARALENA SAUA
Applicant

A N D EQE LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Helen White, Counsel for Applicant
Joe Miller, Director of Respondent

Investigation meeting: 18 December 2013 at Auckland

Submissions Received: 19 December 2013 & 13 January 2014 from Applicant
22 December 2013 & 21 January 2014 from Respondent

Date of Determination: 22 January 2014

DETERMINATION OF THE AUTHORITY

- A. Ms Saua's dismissal by EQE Limited (EQE) was unjustified;**
- B. Taking contribution into account, EQE is ordered to pay \$7377.73 to Ms Saua for lost remuneration under s.128(2) of the Employment Relations Act 2000 (the Act);**
- C. Taking contribution into account, EQE is ordered to pay the sum of \$2500 compensation to Ms Saua under s.123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings suffered by her as a result of her unjustified dismissal;**
- D. Costs are reserved.**

Employment relationship problem

[1] The respondent company, EQE Limited (formerly known as Exquisite Food Products Limited) (EQE) owns and operates a business distributing and selling fresh and frozen seafood, chicken and petfood from premises in Copsey Place, Avondale. Mr John Jason Miller, known as Joe Miller, is the sole director of EQE.

[2] The applicant, Ms Caralena Saua, worked for EQE and its predecessor for 17 years, initially full time and more recently part time as a factory shop assistant in EQE's shop.

[3] Ms Saua was dismissed on 8 February 2013 for allegedly "stealing". Mr Miller says Ms Saua had been warned on a number of occasions about taking EQE's stock and not paying for it. Following an incident in February 2013, when Mr Miller says he witnessed Ms Saua loading a trolley with EQE's stock, without following the correct procedure, he asked her to resign. When Ms Saua did not resign Mr Miller dismissed her. Mr Miller believed Ms Saua was stealing stock. Ms Saua's last day of employment was on 11 February 2013.

[4] Ms Saua says she never stole stock or took it for her own personal use. Ms Saua accepts that on occasion she did not follow the correct procedures when obtaining stock from the factory to sell in the shop. This was usually when stock in the shop was running low and she wanted to ensure there were plenty of products for sale. On these occasions she would often get the stock from the factory for the shop and attend to the necessary paper work afterwards.

[5] Ms Saua says Mr Miller did not put allegations to her prior to issuing her with warnings on 3 and 29 November 2012 about taking products from the factory. Ms Saua says Mr Miller did not properly investigate allegations that she had taken stock without following correct procedures. Ms Saua says Mr Miller made up his mind she was stealing without giving her a proper opportunity to respond or explain. Ms Saua says Mr Miller put pressure on her to resign and when she refused to do so, he dismissed her. Ms Saua says the dismissal was unjustified and has caused her a great deal of embarrassment, humiliation and financial loss.

Issues

[6] The following issues arise:

- (a) Was Ms Saua's dismissal justified;
- (b) If so, what remedies should be paid to Ms Saua?
- (c) If remedies are payable, did Ms Saua contribute to her dismissal?

First Issue

Was Ms Saua's dismissal justified?

[7] At the time of her dismissal on 8 February 2013, Ms Saua had been employed by EQE and its predecessor companies for 17 years. Ms Saua was never provided with an employment agreement. Mr Miller initially told the Authority at the investigation meeting that this was because he "didn't get around to it." Subsequently in response to questioning Mr Miller said when new employment rules came in to force in New Zealand he ensured all staff were put on employment agreements. This was not correct. Mr Chetun Patel, supervisor, and Mr Pepa Kolomatangi, delivery driver, both gave evidence for EQE at the Authority's investigation meeting. Mr Patel has been employed by EQE for 10 years and does not have an employment agreement. Mr Kolomatangi was not sure if he had one. Ms Joanne Rere gave evidence for Ms Saua. Ms Rere is in customer services and has been employed by EQE for 8 years. Ms Rere does not have an employment agreement.

[8] Mr Miller was not a credible witness, his evidence was inconsistent and contradictory. Mr Miller's evidence regarding the provision of employment agreements to staff is one example of many inconsistencies in Mr Miller's evidence.

[9] EQE has premises at Nos 5 and 8 Copsey Place, Avondale where its factory and shop are located. It appears that for most of Ms Saua's 17 years of employment, EQE did not have a process or procedure for the ordering of stock from the factory. If Ms Saua required stock to sell in the shop, she would go to the factory and get it or ask for it to be delivered to her. There was no requirement for dockets or invoices. More recently, Mr Miller introduced a procedure whereby any stock taken from the factory was required to have an accompanying invoice signed by Ms Rere so that stock could be accounted for.

[10] From the evidence, staff did take stock for their own use from time to time and there was no policy in place regulating this practice. Mr Miller accepted staff took

stock and did not take issue with this if it was taken for their own personal use. However, taking large amounts of stock to resell, for example, was not acceptable to Mr Miller.

[11] Mr Miller told the Authority about one occasion when he found an employee hiding a significant number of chicken nibbles in her work boots. Mr Miller says he considered whether he should dismiss the employee on that occasion because the amount being taken was more than for her personal use, but decided not to because she was elderly and had been with EQE for some 25 years.

[12] Another employee was dismissed for taking stock but Mr Miller subsequently decided to give him another chance and the employee was reemployed. Mr Miller says he considers each case separately when discovering an employee has taken stock before deciding if dismissal is appropriate. It is my view that Mr Miller's approach to the taking of stock was vague and confusing for staff members. There were no guidelines for staff as to what amount of stock Mr Miller regarded as being for personal use or what amount of stock was too much and could jeopardise their employment.

[13] Until November 2012, there were no concerns with Ms Saua's performance at work and Mr Miller says she was a good employee.

[14] However for a number of reasons including the economic climate at the time, the death of one of EQE's directors, EQE's business had been suffering. Mr Miller took various steps to curtail losses. One of the areas Mr Miller looked at was product not being properly accounted for. A number of meetings were held with staff about the state of the business and the need for staff to stop taking stock without paying for it or obtaining an invoice.

[15] On 2 November 2012, Mr Miller was told by a member of staff that Ms Saua wanted 30kgs of skinless chicken thighs, that these had been packed and given to her but that no invoice had been provided.

[16] Mr Miller became suspicious because he believed the quantity of chicken thighs required by Ms Saua seemed very large and should have an invoice. Mr Miller spoke to Ms Rere who issued invoices for stock and was told by her that Ms Saua had not provided her with a docket for the chicken thighs. Mr Miller waited until the close of business to see if there was a record of sale of the chicken thighs. There was

no record and so Mr Miller spoke with one of the factory supervisors, Peri who informed him that Ms Saua had taken the chicken thighs from the factory and had not produced a docket or invoice for them. Mr Miller says Peri told him Ms Saua often took stock and did not produce a docket or invoice.

[17] Mr Miller believed Ms Saua had stolen the chicken thighs and immediately prepared a letter to her as follows:

... I have been told that you have ignored my instruction regarding taking products from the factory. During our last meeting with Joanne, Solo, Michelle, Carlota and Perry in Sept it was clearly spelt out to all that you are not to take any product from the factory without any documentation of invoice.

I am warning you again that this will be considered THEFT.

The following must be adhered to – no ifs and buts:

- 1) Place order on sale sheet every Monday.*
- 2) Joanne to pass to Jonathan on Tuesday to prepare order to deliver to Shop on Wednesday which Caralena must sign for.*
- 3) That's all that is allowed, you do not go near the freezer or chiller for any product.*
- 4) If it is advance order from customer, you require an invoice from Joanne to present to Solo or Michelle before you are allowed to take product.*
- 5) If for whatever reason, the above is not possible, then the customer is to be told we are out of stock.*
- 6) If you ignore this instruction again, you will be fired.*

[18] Mr Miller says on 3 November he asked Ms Saua to come to his office to explain why she had taken 30kgs of chicken without a docket. Mr Miller said all meetings with staff were held in his office. Subsequently, Mr Miller conceded that he did not always meet staff in his office and that he had meetings with Ms Saua in the shop from time to time. This is another area in which I find Mr Miller's evidence to be contradictory and inconsistent.

[19] Ms Saua says that she was working in the shop on 3 November when Mr Miller came in with a letter, which he told her was a "warning" that she needed to sign. Ms Saua says that Mr Miller was angry with her about taking stock to the shop without getting an invoice for it first. Ms Saua says there was no discussion about the warning and that she was sworn at and told "just sign it". Ms Saua did so thinking she had no choice. For reasons already given concerning Mr Miller's credibility, I prefer Ms Saua's evidence. I find that on 3 November, Mr Miller issued Ms Saua with a

warning letter in the shop without speaking to her about the issue first. Mr Miller did not have a meeting with Ms Saua in his office about the matter.

[20] Mr Miller accepts he prepared the warning letter on 2 November, before meeting with Ms Saua and says he could not remember whether he asked Ms Saua about the 30kgs of chicken thighs when he presented her with the warning on 3 November.

[21] The undisputed evidence is that Ms Saua was issued with a written warning by Mr Miller on 3 November without any prior discussion about the incident which had lead to it, namely Mr Miller's view that Ms Saua had taken 30 kgs of skinless chicken thighs without the required invoice.

[22] After issuing the warning, Mr Miller asked 10 other staff to also sign it which they did variously on 5 and 8 November. Ms Saua says she felt embarrassed and humiliated that other staff had seen the warning which stated "if you ignore this instruction again, you will be fired" and she felt other staff were talking about her. Ms Saua was extremely upset about being issued with a warning without prior discussion and humiliated and embarrassed by Mr Miller's subsequent requirement that staff sign the warning.

[23] A further incident occurred on 28 November. On this occasion, 15 boxes of chicken satay were packed and placed in the blast freezer in the factory. They were earmarked to be picked up prior to lunch for delivery. After lunch, Mr Patel went to collect the order and found only 13 boxes of chicken satay. He and another staff member went to see Mr Miller about this. Mr Miller says he went to investigate and found the two boxes in the shop. Mr Miller says he spoke with Ms Saua in the shop asking why she had taken the chicken satay without the docket. Mr Miller says Ms Saua's response was that she had been too busy in the shop to get a docket. Mr Miller was not satisfied with Ms Saua's response and so he decided to issue her with a further warning. Mr Miller says he thought about dismissing Ms Saua then, but because it was so close to the Christmas holidays he decided to issue her with another warning instead.

[24] Ms Saua's evidence, which I prefer, was that as she was coming out of the toilet Mr Miller called her into his office, swore at her saying she had "done it again". Mr Miller told Ms Saua he had been told by staff that she had taken 2 boxes of

chicken satay from the blast freezer. Mr Miller did not give her an opportunity to explain the situation and issued her with a warning which had already been signed by a “witness”, Carlotta, another EQE employee. The warning was as follows:

I was informed that you took chicken satay from blast freezer yesterday. WHY? Why did you keep on ignoring company procedure? On my last warning letter to you on 3 November, I clearly spelt out that you were not to take any more products from factory without invoice and yet you did it again yesterday. This is your second warning letter – what you did yesterday is a dismissable offence. I’m giving you the courtesy of not dismissing you before Xmas and in view of your long service – but there cannot be a next time. Are you clear? Do you understand?

[25] Mr Miller gave the warning to Ms Saua to sign which she did. Ms Saua says she was not responsible for taking the chicken satay from the blast freezer. Another employee had brought the chicken satay for his own use and put it in the shop. Ms Saua informed the employee that it could not remain in the shop without being invoiced. Ms Saua says Mr Miller did not afford her the opportunity to provide this explanation to him at the time.

[26] The next incident occurred on 25 January 2013 which was the Friday before the long Auckland Anniversary weekend. Ms Saua says she required stock which was running low in the shop before it closed for the day. Ms Saua says there was no pet food left for the Saturday and as this was the most popular product she needed to obtain it from the factory together with other stock.

[27] There was too much stock for her to take on the trolley and so she asked one of the drivers, Mr Kolomatangi, to assist her. While product was being loaded into the truck, Mr Miller drove up. A discussion ensued about where the documentation for the product was and Ms Saua accepts she had not obtained an invoice before taking product from the factory. Mr Miller told Mr Kolomatangi to take the product back to the freezer in the factory. Mr Miller told Ms Saua to close the shop for the day and that as he had decided not to open the shop the next day, which was the Saturday of the long weekend, she did not have to come into work. Ms Saua says she did not think anything more of it.

[28] The following week, an issue arose concerning a regular customer. The regular customer had forgotten his wallet and Ms Saua allowed him to take pet food and chicken home on the basis that he would return and pay for it.

[29] On 2 February 2013, Mr Miller asked Ms Saua to “*do the right thing and resign*”. Mr Miller requested that she go home and gave her a week in which to resign. Ms Saua was upset and felt she was being unfairly pressurised to resign. Ms Saua returned to work on Monday, 4 February as usual and was asked by a couple of other members of staff why she was there as they believed she had been dismissed.

[30] On Friday, 8 February, Ms Saua decided to speak with Mr Miller. Ms Saua informed Mr Miller that she was not going to resign and asked whether she still had a job. Mr Miller told her that she did not. Ms Saua asked for a letter confirming her dismissal and was told to pick it up the following Monday. Mr Miller did not provide a letter of termination to Ms Saua and when Ms Rere asked Mr Miller on behalf of Ms Saua for the letter he replied he had not done it but would do it “*when he got around to it*”.

[31] Ms Saua has attempted to secure work since her dismissal but has not been able to. Ms Saua earned on average \$338.18 gross per week and seeks reimbursement for losses suffered since the date of dismissal.

[32] Mr Miller issued Ms Saua with two written warnings, the first on 3 November and the second on 29 November. Mr Miller did not meet with Ms Saua to put allegations to her before issuing the warnings. Mr Miller did not undertake a proper investigation into the allegations before issuing Ms Saua with the written warnings. Mr Miller accepted that at no stage did he inform Ms Saua that she could have a representative prior to issuing her with a warning. Mr Miller did not tell Ms Saua of the specific matters for which she was being warned, did not give her an opportunity to explain or advise her of any corrective action required to remedy the situation. Mr Miller decided before meeting with Ms Saua on both occasions that a warning was appropriate.

[33] On 2 February 2013, Mr Miller asked Ms Saua to resign and when she did not do so, dismissed her on 8 February. Similarly, Mr Miller did not advise Ms Saua of her right to seek assistance or representation prior to dismissing her, he did not inform Ms Saua of the specific allegation for which she was being dismissed, the seriousness of the situation, nor did he provide her with the opportunity to refute allegations or explain the alleged misconduct. Mr Miller did not in fact tell Ms Saua what the alleged misconduct for which she was to be dismissed was.

[34] It is for EQE to establish that Ms Saua's dismissal was justifiable. The statutory test for justification is contained in s.103A of the Act. That section states:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is 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 or action occurred.*
- (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 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.*
- (4) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it considers 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.*

[35] The Full Court of the Employment Court in *Angus v. Ports of Auckland*¹, in analysing the section, emphasised that the role for the Court is not to substitute its view for that of the employer.

The test requires the Authority ... to determine whether on an objective basis dismissal was within the range of responses open to a fair and reasonable employer. If dismissal is within the range then it will be justified.

[36] In this case, Mr Miller failed to comply with basic principles of natural justice when issuing Ms Saua with warnings and then dismissing her and failed to comply with any of the procedures contained in s.103A(3) of the Act. Mr Miller did not sufficiently investigate the allegations that Ms Saua had taken products from the factory without proper documentation and that he considered such action to be theft. Mr Miller did not inform Ms Saua why he believed she should resign nor did he give her any reason for dismissal. Mr Miller did not give Ms Saua details of allegations against her before dismissing her and did not give her a reasonable opportunity to respond to any of his concerns before warning or dismissing her. The warnings and the dismissal were unjustified.

[37] On an objective basis, EQE's actions are not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Ms Saua accepted that she had not correctly followed procedure when taking stock from the factory but says she had good reason for not following the procedure. However, Mr Miller never gave her an opportunity to give him an explanation. When she was dismissed, Ms Saua was not told what she was being dismissed for.

Second Issue

If Ms Saua was unjustifiably dismissed what remedies should be paid to her?

[38] Ms Saua is currently living with her daughter, is on the unemployment benefit and has been attempting to obtain work. Ms Saua has made a number of job applications which have not been successful.

[39] Ms Saua's average gross wage when working for EQE was \$338.18 per week. For the period of 40 weeks and 2 days since her dismissal, Ms Saua's loss of wages totals \$13,662.47 gross.

¹ [2011] NZEmpC 160

[40] Ms Saua has, in my view, attempted to mitigate her losses as a result of her dismissal. I award Ms Saua lost remuneration as a result of her dismissal, pursuant to s.128(2) of the Act which sum is \$13,662.47 plus 8% accrued holiday pay of \$1,093, a total of \$14,755.47 gross.

[41] At the date of dismissal, Ms Saua had been employed by EQE and its predecessors for 17 years. Ms Saua was very upset and humiliated by her dismissal and the manner in which Mr Miller treated her.

[42] I order EQE to pay Ms Saua compensation in the sum of \$5,000 pursuant to s.123(1)(c)(i) of the Act for the hurt and humiliation she suffered.

Third Issue

If remedies are payable, did Ms Saua contribute to her dismissal?

[43] I am required under s.124 of the Act to consider whether Ms Saua's actions contributed towards the situation that gave rise to the personal grievance.

[44] I have made findings that the two warnings issued to Ms Saua were unfair in that she was not given an opportunity to address the circumstances for which the warnings were given prior to them being issued.

[45] Ms Saua accepts that she failed to follow correct procedure when taking stock from the factory. Ms Saua knew she had to obtain an invoice from Ms Rere before taking stock from the factory and that on occasion she failed to do so.

[46] The first warning issued to Ms Saua stated explicitly the procedure Ms Saua was to follow when taking products from the factory. The warning made it clear that if Ms Saua failed to follow the correct procedure, Mr Miller would consider such action to be theft and Ms Miller "fired". The second warning was also clear and stated that Mr Miller would not put up with another incident. Despite this, Ms Saua again failed to follow procedure.

[47] If circumstances arose, as Ms Saua said they did, when she felt she must obtain product from the factory in order to sufficiently stock the shop and without following the procedure spelt out by Mr Miller, Ms Saua should immediately inform Mr Miller. She did not. Ultimately, Ms Saua's failure to do so lead to the second warning and to her dismissal.

[48] It is my finding that Ms Saua's actions did contribute to the situation and the order for remedies will therefore be reduced. I consider a reduction of 50% appropriate in all the circumstances. The above remedies are accordingly reduced by 50%.

Costs

[49] Costs are reserved.

[50] Ms Saua has 14 days from the date of this determination in which to file and serve a memorandum as to costs. EQE has a further 14 days in which to file and serve a reply.

Anna Fitzgibbon
Member of the Employment Relations Authority