

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 430/08
5104447

BETWEEN JONG BOON KIM SUH
 Applicant

AND TOPSCO INTERNATIONAL
 LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Russell Harris for Applicant
 Damian Chesterman for Respondent

Investigation Meeting: 19 and 20 June 2008

Submissions received: 24 June 2008 from Applicant
 2 July 2008 from Respondent

Determination: 19 December 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant was employed by the respondent ('Staxs') in its Tauranga womenswear store from May 2006. She claims that from about July 2007 onwards she was bullied by the store manager and then, during September, was subjected to a baseless disciplinary process which resulted in an unjustified employment warning. Finally she says that she was unjustifiably dismissed in November 2007.

[2] The store manager agrees that the working relationship between her and the applicant was satisfactory until mid 2007 when she developed some concerns about the applicant's approach to her job. She discussed this with the Retail Operations Manager, Mrs Cooper, who suggested that the store manager conduct a formal assessment of the applicant's performance.

[3] This took place on 9 August 2008. The store manager identified that the applicant was too aggressive in her pursuit of sales and told the applicant that this was an area where improvement was needed. The applicant did not share this perception and was upset to get this feedback. However, overall the store manager graded the applicant as “good to very good” and both witnesses told me that the meeting ended on a positive note.

[4] The store manager habitually kept a diary in which she noted any matters of concern which arose during her working day. Over the next month she made two entries regarding the applicant’s work. She told me that this reflected her concern that the applicant was not showing the improvement she had hoped for. Once again she took her concerns to Mrs Cooper and this time Mrs Cooper decided to call the applicant to a disciplinary meeting. She notified the applicant of this by letter dated 14 September 2007.

[5] The applicant was deeply distressed and offended to get this letter. She told me that from the moment she received it she felt it would be impossible for her to work with the store manager again. She immediately went on sick leave. Meanwhile, on the same day, her representative wrote back, raising for the first time the allegation that she had been bullied by the store manager.

[6] Mrs Cooper says that she proceeded to investigate these allegations and found them to be without substance. She also investigated the applicant’s performance and was satisfied that a warning was justified. On October 3 Mrs Cooper wrote to the applicant advising the outcome of the investigation into the bullying allegations and also warning that the applicant’s employment was in jeopardy if her performance did not improve. The applicant considered both the warning and Mrs Cooper’s conclusions about the bullying to be unfair and unreasonable.

[7] Mrs Cooper told me that both before and after the warning letter she offered support to the applicant and the store manager in order to assist them to resolve any relationship difficulties they had. She believed that with her help they could have continued to work together in the Tauranga store. However, she said, the applicant declined this support and was not prepared to work with the store manager again

under any circumstances. Mrs Cooper also told me that at that time there were no opportunities available to transfer the applicant out of the Tauranga store.

[8] On 19 October, when the applicant's medical certificate had run out and discussions between the parties had failed to resolve their differences, Staxs wrote to her advising that her employment would be terminated if she did not return to work by 2 November. The applicant did not return. Staxs went ahead and paid out her final pay (including holiday pay) and on 16 November the applicant commenced work with another local retailer. From the respondent's point of view, the applicant abandoned her employment.

[9] The applicant claims that both the conduct the store manager displayed towards her and the warning gave rise to disadvantage grievances. She also says that the termination of her employment was unjustified in the circumstances. She says that the respondent failed to address her concerns and it was not reasonable for the respondent to expect her to return to work with her manager.

Issues

[10] There are three principal issues for determination in this case:

- i. Whether Mrs Cooper conducted a fair inquiry into the applicant's allegations about the store manager's conduct and whether the conclusion (that it did not amount to bullying) was open to her in the circumstances;
- ii. Whether Mrs Cooper conducted a fair and reasonable inquiry into the applicant's performance issues and whether the warning of 3 October was justified;
- iii. Whether the applicant was unjustifiably dismissed, and
- iv. Should any of these claims be made out, what if remedies are appropriate.

(i) Alleged bullying

[11] Although each has speculated as to why their working relationship deteriorated, neither the store manager nor the applicant was able to provide me with reliable evidence to back up their theories and it remains unclear why things went so badly awry between the two women after they had worked together for a year without any major problems.

[12] Upon receiving the applicant's allegations of bullying (set out in her representative's letter of 14 September) Mrs Cooper investigated them by interviewing the applicant, the store manager and the other two store workers. All those who were involved in Mrs Cooper's investigation gave evidence about it to the Authority. The interview notes were provided to me and confirmed as reliable by the individuals who were interviewed. I am satisfied that Mrs Cooper asked a suitable range of open-ended questions which provided an opportunity for staff to tell her about any concerns they had about how the store operated. She also asked some more specific questions which prompted staff to talk about the store manager's management style.

[13] After completing her investigation into the applicant's complaints Mrs Cooper summarised her response in the letter of 3 October, where she grouped the allegations into six categories. During my own meeting with the parties, the applicant confirmed that the six categories accurately summarised her concerns and for that reason, I have adopted them here.

[14] Mrs Cooper based her decision on the following information in relation to each of the six areas of concern to the applicant.

[15] The applicant's first concern was that the store manager had told staff not to contact head office about anything. The store manager had responded that she had done nothing more than let staff know that it was the respondent's policy for day to day operational matters to be handled in store and that on days when she was not present in the store staff should in the first instance call her with queries or problems rather than "*head office.*"

[16] The applicant's second concern was that the store manager had "*told staff off*" in front of customers and workmates. She elaborated by saying that the store manager had on occasion overridden her (in front of customers) to insist that Staxs' policies (such as the returns policy and the policy on taking goods "on approval") were strictly adhered to. The store manager agreed that she had done this (because she was obliged to) but denied ever "telling off" staff in front of workmates or customers.

[17] Next the applicant had said that the store manager sent staff members on breaks or home early so that she could get their sales, and made others log returns so that the sales manager's personal sales figures were not affected. Mrs Cooper noted that there would be no benefit to the store manager in taking extra sales or avoiding returns as unlike other staff, she received a bonus based on the figures for the whole shop, not her own individual sales. In addition she noted that it was part of the store manager's job to set breaks and working hours.

[18] The applicant's fourth area of concern was that the store manager took advantage of cultural differences and the fact that English was the applicant's second language. The applicant claimed that on at least one occasion she capitalised on this to make an insensitive joke at the applicant's expense. The store manager recalled making the joke alleged but said that no offence was intended.

[19] The applicant also claimed that the store manager declined to let her give Ms C further training on the computer. The store manager could not recall this but agreed that she would not have wanted staff to spend time going through the systems while the shop was open.

[20] Finally the applicant asserted that the store manager did not listen to staff concerns, which the store manager denied.

[21] Ms C and Mrs Cooper both agree that when she was interviewed, Ms C told Mrs Cooper that the store manager had once commented to her that "*you were just a cleaner when I hired you.*" Ms C also told Mrs Cooper that "*there is no discussion with [the store manager] – that [the store manager's] word is it*" and "*it is unfair [the store manager's] picking on [the applicant]...*"

[22] On the other hand the final interviewee, Ms G, told Mrs Cooper at the time that while she had no problems with the store manager she no longer wished to work with the applicant. At the time of my investigation meeting that remained her view.

[23] Mrs Cooper concluded (as set out in the letter of 3 October): “*I can see no evidence of any unprofessional conduct on [the store manager’s] behalf.*” In her evidence she explained that she considered there was insufficient evidence to support the allegations of bullying.

[24] The Authority heard evidence from a former staff member (Ms K) who was not interviewed by Mrs Cooper at the time of her investigation because she had left Staxs at the end of 2006, well before the bullying of the applicant was alleged to have commenced. Ms K told me that during her time in the Tauranga store the “*stress and personal attacks from the manager were unbearable.*” However she was able to give no specifics in her evidence and conceded that the only issue she had raised with Mrs Cooper before leaving Staxs was dissatisfaction with her hourly rate.

[25] Before the Authority Ms C, who has now left Staxs, also had much harsher things to say about the store manager than she had previously told Mrs Cooper. Although she gave no specifics she stated that she herself was subjected to “*verbal abuse in the form of criticism, manipulation and lies.*”

[26] Notwithstanding this evidence, Ms C also confirmed that shortly after the applicant received her warning, Ms C sought a further meeting with Mrs Cooper in which she retracted everything she had previously said about the store manager and asserted instead that she believed the applicant had been lying. When the applicant’s job as assistant manager was advertised, Ms C applied. Ms C told the Authority that she retracted what she had first said about the store manager to protect herself and her future at Staxs.

Determination

[27] I accept that Mrs Cooper conducted an adequate inquiry into the applicant’s concerns. She interviewed all relevant persons and her interview notes show that those interviews were thorough and covered the relevant issues. As Mrs Cooper had no way

of knowing that Ms K had experienced problems with the manager, and Ms K had left the respondent some time before, I do not accept that she should have taken steps to interview her.

[28] The respondent has argued in submissions that Ms C's evidence to the Authority cannot be relied upon. However, there is no dispute about what she told Mrs Cooper during her investigation and Mrs Cooper took it at face value at the time. The information she provided to Mrs Cooper at the time forms part of the relevant information on which Mrs Cooper's decision must be assessed.

[29] I turn now to consider whether Mrs Cooper's conclusion was fair and reasonable.

[30] Allegations (i), (iii) and (v) and the examples given in support of allegation (ii) were all within the reasonable and proper exercise of the store manager's role. The store manager was acting within her authority in: directing that staff should come to her, in the first instance, with problems or queries; in advising them when to take breaks; in instructing them that she did not wish them to conduct training on the computer when the store was open; and in insisting that they comply with company policies. These actions could not be said, in themselves, to be improper and certainly do not amount to bullying.

[31] This left the allegations that the store manager failed to listen to staff concerns, took advantage of cultural differences, and "*told staff off*" in front of others. Such behaviour is not appropriate in the workplace, especially from a manager, and these allegations were supported by Ms C's report to Mrs Cooper that the store manager "picked on" the applicant as well as the store manager's own acknowledgement that she made a joke at the applicant's expense.

[32] Mrs Cooper weighed this against what she heard in the interview with Ms G, (who had concerns about the applicant's conduct) and what the store manager had told her. Given that most of the specific allegations were not in fact allegations of bullying, and the fact that the staff were divided in their views, she did not consider the serious allegations of bullying had been made out.

[33] I accept that in the circumstances this was a fair and reasonable conclusion for Mrs Cooper to have reached. **It follows that the applicant has failed to make out a disadvantage grievance in relation to her allegations of bullying.**

[34] The information gathered by Mrs Cooper did however show that there were problems in the working relationships in the store, and indicated that not all the responsibility for this could be attributed to the applicant. Mrs Cooper should properly have taken this into consideration when she turned her mind to the next question: whether it was appropriate to take disciplinary action against the applicant. This leads me to the issue of the employment warning.

(ii) Employment warning

[35] Mrs Cooper confirmed in her evidence that the 9 August assessment was a performance management tool and was not disciplinary in nature. She also confirmed that (on the basis of what she saw in the record of the assessment) she was satisfied that the applicant's performance had not then fallen below the minimum acceptable standard. It is also acknowledged by the respondent that the applicant achieved a good volume of sales.

[36] The store manager's evidence is that during early September she experienced further problems with the applicant's "*behaviour and refusal to follow instructions*". She produced her diary which records a number of references to problems during the month of July. There were however just two after 9 August. On 1 September there is a diary entry recording that a customer told the store manager that she did not want to be served by the applicant as she was too pushy and on 8 September there is an observation that the applicant had been loud and pushy to a customer, and attempted to take a sale which the store manager felt rightfully should go to another staff member. On both occasions, the store manager refused to allow the applicant to ring up the sales in question. She also arranged to meet Mrs Cooper to obtain her advice on how to manage the situation.

[37] Although the store manager's diary records that on 11 September the applicant apologised to her for her behaviour on 8 September, the store manager went ahead and met with Mrs Cooper on 13 September at head office. Mrs Cooper responded by

drafting the letter of 14 September, which the store manager then presented to the applicant.

[38] What followed has already been set out above. Mrs Cooper did not conduct a separate investigation into the applicant's alleged performance failings and relied on the information she gathered in the same set of interviews conducted with the applicant, the store manager, and the other staff. She concluded that there were performance issues on the applicant's part which needed addressing.

[39] Mrs Cooper told me that she had not personally assessed the applicant's performance in coming to her conclusion. She told me that the warning was based primarily on the store manager's assessment, although she also took into consideration that Ms G had told her that the applicant was moody, pushy "tried to steal sales" and constantly sought to change the time of her breaks. As well, she noted that Ms C had confirmed the last comment and that the applicant could be moody.

[40] Overall, Mrs Cooper decided that this conduct was not what she wanted to see displayed towards customers or staff. She decided that the situation was serious enough to justify a warning.

[41] The warning identified four areas in which improvement was required:

- i. customer service (relating to her allegedly overbearing and pushy attempts to achieve individual sales);
- ii. conduct towards other staff (relating to her allegedly moody and erratic behaviour);
- iii. following the store manager's instructions on matters such as re-stocking and mark downs, and
- iv. following company "returns" policy.

[42] The applicant's position was that after the August discussions she had already taken heed of the instruction to "back off" when serving customers. She denied that

she was moody or ignored instructions and said that she had only once failed to follow the returns policy and that was when she had been confronted by very aggressive behaviour from a customer's husband.

Determination

[43] I am not satisfied that Mrs Cooper conducted an independent or sufficiently thorough inquiry into the issues with the applicant's performance, for the following reasons:

- i. Her reliance on the store manager's assessment was not fair and reasonable given the background of the conflict between the two women;
- ii. The applicant's performance had been found to be "good to very good" as at 9 August and has not been shown to have deteriorated in the period thereafter. Scrutiny of the diary showed that the number of recorded concerns dropped markedly after the 9 August assessment and that incidents which took place beforehand contributed to the decision to warn the applicant;
- iii. Mrs Cooper's evidence indicated that she framed the situation as being either that the store manager was bullying the applicant or that the applicant's behaviour warranted a warning. She did not appear to have considered the possibility that the two might share responsibility for the breakdown of their working relationship.

[44] **I am not satisfied that the warning of 3 October has been shown to be fair and reasonable in all circumstances. It has not been justified. The applicant has established a disadvantage grievance.**

(iii) Alleged unjustifiable dismissal.

[45] As we have seen, the applicant did not return to work after her medical certificate expired. The respondent says therefore that the employment ended by abandonment.

[46] Although I have found that Mrs Cooper erred in issuing the applicant with an employment warning, I accept her assertion that she wished to retain the applicant as an employee. I note also that she made attempts, in the period before the respondent dismissed the applicant, to resolve the situation in the store by setting up and facilitating a meeting between the two women. She was thwarted in this because from the moment the applicant received the 14 September letter (calling her to a disciplinary meeting) she refused point blank to attend any meeting at which the store manager was present.

[47] The applicant confirmed to me that well before she received the warning letter she had made up her mind that she would not deal with or work with the Tauranga store manager again. Unless she or the store manager were transferred, she said, she was not prepared to return to work for Staxs again. Given my conclusion that the applicant was not bullied and given Mrs Cooper's willingness to personally facilitate any return to work I can find no reasonable basis for this refusal to meet or work with the store manager.

[48] I am satisfied that the respondent was reasonable in concluding that the applicant had abandoned her employment. In the alternative, in all the circumstances including her failure to return to her duties, the respondent was justified in dismissing her.

Remedies

[49] The applicant has established one of her three claims. She has a disadvantage grievance associated with the unjustified warning.

[50] Identifying an appropriate level of remedy for this grievance had not been straightforward since it has required the separation of the hurt and humiliation arising from the warning from the distress the applicant felt at all the circumstances.

[51] After considering all the background I set the level of compensation for the distress arising out of the disadvantage grievance at \$3,000.00.

[52] The respondent is ordered to pay to the applicant the sum of \$3,000.00 pursuant to s. 123 of the Employment Contracts Act 2000.

Costs

[53] This issue is reserved. In the event that the parties are unable to agree costs, they have a period of 28 days from the date of this decision to request that the Authority determine the issue.

Yvonne Oldfield

Member of the Employment Relations Authority