

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 136/08
5104364

BETWEEN ESTER SAMAELI
Applicant

AND OCS LIMITED
Respondents

Member of Authority: P R Stapp

Representatives: Peter Cranney and Camilla Belich for the Applicant
Paul McBride for the Respondent

Investigation Meeting: 29 July 2008, Wellington

Conference Call: 15 August 2008

Determination: 7 October 2008

DETERMINATION OF THE AUTHORITY

[1] On 17 October 2007 Ms Samaeli says her manager, Mr David Collins, verbally abused and humiliated her in front of employees at the Te Puni Mail Centre where she worked for OCS. Ms Samaeli reported the incident to the regional manager, Mr John Freer. He gave Ms Samaeli permission not to return to work at Te Puni. Later, she did not attend work at another site where she was scheduled that afternoon. Mr Freer telephoned Mr Collins to find out Mr Collins's version of the events.

[2] Ms Samaeli approached her union and a personal grievance letter was sent to the company whereupon a meeting was organised at the union office. Difficulties arose over investigating and settling the matter. The parties agreed to go to mediation, but the matter remained unresolved, and OCS's investigation stalled.

The Issues

[3] There is a factual difference between Mr Collins and Ms Samaeli on her role and the events. Ms Samaeli has claimed Mr Collins humiliated and shamed her. She claimed Mr

Collins abused her. He says that it was the applicant who was abusive, aggressive and obstructive.

[4] Arising from this there is an issue about what gave rise to any personal grievance: whether it is the events of 17 July 2007 or the procedure involving OCS and Ms Samaeli's complaint?

What was Ms Samaeli's Role?

[5] I hold Ms Samaeli was a cleaner employed by OCS. Documents were produced that establish she was employed by OCS Limited and in all probability was a cleaner. I am supported in this conclusion by the following documents: the application for employment as a cleaner dated 21.06.06, the existence of an individual employment agreement between OCS Limited and Ms Samaeli that was signed off by the parties on 21.06.06, and the employment details of the applicant.

What happened on 17 October at the Te Puni Mail Centre?

[6] On 17 October 2007 Ms Samaeli was working on a contract for OCS at the Te Puni Mail Centre. She was in the cafeteria/tearoom at about 11.30am when she was approached by Mr Collins. He had arrived at the workplace to have a meeting with one of the client's managers who was not immediately available so he decided to talk with Ms Samaeli about some work issues that he had not previously raised with her that concerned a vacuum cleaner, the storage of consumables and the amount of overtime hours Ms Samaeli had claimed she had worked.

[7] Ms Samaeli and Mr Collins have completely different versions of what happened next.

[8] I do not intend to outline those versions at this stage, except to note that it is common ground that Ms Samaeli got upset and decided to take the matter up first with Mr Freer and second with her union.

The events that followed the incident

[9] Ms Samaeli went to see Mr Freer at his Ngauranga office. Mr Freer says that Ms Samaeli informed him that she had been verbally abused by Mr Collins causing her to be humiliated. He decided that he needed to investigate what had happened and informed Ms Samaeli that he would need to get back to her, and gave her a commitment to do so in a short

period of time. Ms Samaeli says she was not told that he needed to investigate what had happened. She told me that she understood that Mr Freer would discuss the matter with Mr Collins. Mr Freer says that he gave no commitment except to contact her and he anticipated checking on how she was because she was upset.

[10] It was agreed between Ms Samaeli and Mr Freer that she did not need to go back to Te Puni that day to work. They, however, disagree on whether or not Mr Freer gave her permission not to go to work on another site elsewhere that she was scheduled to work that afternoon. He denied agreeing to any such arrangement on that. He denied that he gave his permission for Ms Samaeli to tell the contract manager at the separate site that he agreed that she did not have to work. He did not accept Ms Samaeli's evidence that she was permitted to make such a suggestion when she telephoned that manager and said she would not be attending work. I hold that Mr Freer's version is more reliable because there was no reason for him to make alternative arrangements for Ms Samaeli on another site where there was no problem and Ms Samaeli's evidence has involved no corroboration. If it was reliable I would have expected Mr Keil, Ms Samaeli's union organiser, to have covered off such an arrangement after he had become involved. He did not do so.

[11] There was a telephone discussion between Mr Freer and Mr Collins. During that discussion Mr Freer obtained Mr Collins's version of events. Mr Freer says he recorded Mr Collins's version and the details of the events in his notebook at the time. He has put what he says Mr Collins told him in his written statement of evidence. The details of their conversation were not provided to Ms Samaeli or Mr Keil prior to the Authority's investigation because Mr Freer to make an assessment of all the information at the time.

[12] Mr Freer says he made attempts to contact Ms Samaeli. He acknowledged Ms Samaeli gave him her mobile telephone number, but says he lost it. He says that he then tried to contact her using phone numbers from her employment details. I was able to determine from the material produced from Ms Samaeli's employment record that she did not keep up to date her telephone, mobile and emergency telephone numbers with OCS. It is more than probable that Mr Freer was not able to contact her because he lost her number and Ms Samaeli had not kept up to date her contact numbers on her employment record.

[13] In the meantime Ms Samaeli contacted her union, and Mr Keil prepared and sent a brief letter to OCS. That letter dated 18 October 2007 commented that *Ester Samaeli has a personal grievance arising from her employment* and the *Nature of the Grievance* was that she had been *abused and humiliated by an OCS site manager (SM), in front of other workers.*

There were brief facts outlined, including remedies sought that included: a written apology, the manager be given a final warning, the manager undergo a union approved health and safety course, financial compensation, lost wages and 2 weeks' extra leave.

[14] Mr Freer and Mr Keil agreed, first to meet, and second, to go to mediation.

[15] The parties met on 26 October at the union office with Mr Keil, Ms Samaeli and her husband. Mr Freer says he was astonished by Mr Keil's approach to the matter when Mr Keil insisted on the remedies without providing any further details about Ms Samaeli's complaint. Ms Samaeli agreed that Mr Keil spoke on her behalf and it is common ground that when Mr Keil was requested to provide more details he referred to his letter dated 18 October. The parties then agreed to attend mediation that occurred on 22 November 2007.

[16] The matter remained unresolved following mediation. OCS wrote to the union on 22 January 2008 requesting any written statements and details to further investigate, but in the meantime, the union filed a statement of problem in the Employment Relations Authority. The statement of problem was filed on 24 December 2007. The respondent's reply was filed in the Authority on 23 January 2008.

[17] I hold that Mr Freer's approach to the matter was not fatal because there is evidence that he endeavoured to try and resolve the problem where there was a meeting and that was followed by the parties attending mediation and a further opportunity was provided to the union to provide any witness statements and details for any further investigation by OCS.

[18] Also, Ms Samaeli initially provided Mr Freer with her information orally that she had been abused by her manager. The only detail of Ms Samaeli's account was from her union organiser's letter dated 18 October 2007. I accept that Mr Freer considered he needed more detail having regard to Mr Collins's different version of events. It was not in best practice that OCS did not disclose what information it had from Mr Collins, but at some point that information would have had to have been disclosed. The failure to disclose it was not fatal because the union then lodged the matter in the Authority and the company's investigation stalled because of that action.

[19] Mr Freer considered that Mr Keil's response only to refer to his letter was unreasonable because there was insufficient detail. Mr Keil told the Authority that he believed Ms Samaeli: thus focussing only on seeking the remedies. Mr Keil's approach was not helpful given he did not have the whole picture about what happened. However he can be excused because Mr Freer decided not to disclose Mr Collins's version of the events. Mr

Keil considered that Mr Freer had not properly got back to Ms Samaeli as he said he would. There was nothing fatal about Mr Freer not getting back to Ms Samaeli because she had raised the issue with her union, the parties organised to meet, and then they attended mediation.

[20] I hold that both parties have contributed to this situation and had a responsibility to try and resolve the matter and they did not do so in best practice, even where the matter remained unresolved after the meeting and mediation. The employer's investigation stalled and the employer could have been more proactive in trying to complete its enquiry.

[21] OCS says it was attempting to investigate the matter, and both parties agreed to try and make some progress on the matter in mediation. In hindsight that was laudable, but more could have been done to follow up OCS's position when the problem was not settled.

Was there a personal grievance?

[22] The different versions of the events of 17 October 2007 were never determined. It was not reasonable for the union to demand remedies where OCS needed to make some findings on what had happened. Mr Keil knew at least that OCS wanted more detail from Ms Samaeli. Mr Freer would have assisted if he had outlined his process better and provided Mr Collins's version to prompt Ms Samaeli to reply. It was reasonable for Mr Freer to expect Ms Samaeli to respond with more detail, especially since she had more to say in the Authority's investigation.

[23] I hold that the situation does not give rise to a personal grievance, despite some poor practice in what has happened. It was not fatal that Mr Freer did not release Mr Collins's version of events; that Mr Freer did not get back to Ms Samaeli; and that OCS's investigation stalled. It was not fatal because Ms Samaeli contacted her union, a meeting was arranged, the parties decided to attend mediation and the matter was lodged in the Authority by the union. Also it was open to the union to respond further to a letter sent by the OCS on 22 January 2008 to provide any further statements and details so that the matters could be further investigated. There was no disadvantage I hold.

[24] Ordinarily the matter should have followed a proper process involving how it was going to be investigated and for the employer to make some findings. I accept the employer's defence that it went to mediation in the hope the matter would be fixed and thereafter waited on details to be provided that were not forthcoming from the union until the matter was lodged in the Authority.

[25] Since I have had the benefit of the parties presenting their evidence it seems appropriate for me to draw some conclusions on the events. There is a matter of credibility. I hold that for the following reasons there was a verbal altercation, but Ms Samaeli has not been able to prove on the balance of probabilities that she was shamed and humiliated by Mr Collins's action alone. My reasons are:

- Ms Samaeli and Mr Keil were only prepared to consider remedies in the belief that she was right, and they ignored Mr Freer's reasonable request to provide more details of the incident.
- Mr Keil was in no position to provide any explanation as to why he believed Ms Samaeli's version of the events when he knew that OCS had requested more details from Ms Samaeli.
- There were other issues between Ms Samaeli and OCS in her employment.
- Ms Samaeli has exaggerated her role, when I found that she is a cleaner, and not a supervisor.
- Ms Samaeli and Mr Keil were silent about the meeting held on 26 October, until it was raised. Having regard to Mr Freer's account of that meeting it would have been reasonable to expect Ms Samaeli and Mr Keil to have raised that meeting in their outline of the facts.
- Witnesses at the mail centre on the day have commented that there was some altercation, but they were not conclusive about what they saw and what they heard and where the responsibility rested. They drew their own conclusions without explaining any basis for doing so.
- I have balanced Ms Samaeli's information with that of what Mr Freer and Mr Collins claim happened and what they say Ms Samaeli said at the time. Messrs Freer's and Collins's record of the events was not full and comprehensive to establish exactly what happened or who said what. It was not helpful that Mr Freer's notes were delayed and not provided in the statement in reply and that Mr Collins's version of the events was not alluded to until the Authority's investigation. Messrs Freer and Collins only learned for the first time what Ms Samaeli's details were from her written statement prepared for the Authority.

- Mr Freer's version of the arrangements after Ms Samaeli left the work place on 17 October 2008 was more reliable, as I found earlier in this determination.

[26] I conclude that Ms Samaeli has not been able to prove on balance that she was humiliated and shamed by an unjustifiable action by Mr Collins, although they were involved in a verbal altercation. Therefore, I hold that there was not an unjustified action and disadvantage personal grievance.

[27] Ms Samaeli's claims are dismissed.

[28] Costs are reserved.

Paul Stapp
Member of the Employment Relations Authority