

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 85/10
5272789

BETWEEN DELMA ISOBELLA SANDS
 Applicant

A N D WAVERLY SERVICES LTD
 T/A CHALLENGE
 GLENGARY
 Respondent

Member of Authority: Paul Montgomery

Representatives: Miriam Sinclair, Counsel for Applicant
 Stephen Thomas, Advocate for Respondent

Investigation Meeting: 27 January 2010 at Invercargill

Submissions Received: 10 February 2010 for Applicant
 9 February 2010 for Respondent

Determination: 8 April 2010

DETERMINATION OF THE AUTHORITY

[1] Mrs Sands claims she was unjustifiably dismissed from her position as office administrator at the respondent's service station and workshop. The applicant says her dismissal was substantively unjustified and the process adopted by her employer deficient. She seeks the remedies of lost remuneration, compensation for hurt and humiliation in the sum of \$10,000 and legal costs.

[2] For the respondent, Mr Thomas says the dismissal was not unjustified but resulted from the applicant's inability to come to grips with the software package used in the business. The problems Mrs Sands experienced led to the respondent spending considerable time after hours tracing errors in entries and rectifying them in order to reconcile entries with originating documentation. He says that despite providing considerable assistance from the previous administrator, the difficulties continued and could not be overcome leading to him terminating Mrs Sands' employment on notice. Mr Thomas says the respondent acted fairly to Mrs Sands at all times.

Essential facts

[3] Mrs Sands began with the respondent on 17 November 2008 working 8am until 4pm Monday to Friday. She says she was not offered nor given a written agreement nor was she given a uniform. Mrs Sparks, the outgoing administrator, remained employed to familiarise Mrs Sands with the office, shop and forecourt duties, while at the same time assisting another new employee by the name of Craig.

[4] At the end of November, Mrs Sparks returned to assist and train the applicant in the end of month procedures. Mrs Sands says Mrs Sparks was *in a hurry* at this time and *she did not train me adequately to take over the job*. The applicant raised this with Mr Thomas who told her that when she had a difficulty he would show her anything she needed to know.

[5] In respect of the employment agreement, Mr Thomas accepted at the investigation meeting that he had in fact prepared an agreement for Mrs Sands and also one for Craig. He told the Authority he gave Craig his agreement and later, after Mrs Sands' departure, discovered hers in a pile of papers in the office. While this is clearly an oversight on the part of Mr Thomas, it nonetheless caused some anxiety to the applicant.

[6] In respect of the uniform, Mr Thomas advised the Authority that the uniforms used by Challenge service stations throughout the country had been changed but that he was dissatisfied with this and was searching for alternatives at the time of Mrs Sands' employment with the company.

[7] Initially, Mrs Sands was not required to undertake GST returns which were done by Mr Thomas himself but it was clear that the applicant had considerable problems balancing each day, a task, which Mr Thomas says, generally would take approximately one hour.

[8] Matters came to a head in early March when Mr Thomas was undertaking a regular stocktake on tobacco and discovered significant errors in the processing of invoices. As a result of this, he met Mrs Sands in the office the following morning and questioned her as to how the errors had occurred. Following a discussion between the pair, Mr Thomas advised the applicant that he was terminating her employment with two weeks' notice.

The issues

[9] To resolve this matter the Authority needs to findings on the following issues:

- Was the procedure appropriate in all the circumstances; and
- Was the dismissal justified; and
- If not, to what remedies is the applicant entitled; and
- Did the applicant contribute to the circumstances giving rise to the dismissal?

The test

[10] The test for justification is set out in s.103A of the Act which requires the Authority to determine the question of whether a dismissal was justifiable, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

The investigation meeting

[11] The Authority heard from Mrs Sands in person and for the respondent Mr Thomas gave evidence. Mrs Sparks also gave evidence although no written statement of evidence was provided.

[12] I found all three to be open and honest in spite of their differing view of the situation and I want to thank them for their assistance. I would also like to record my thanks to Ms Sinclair and to Mr Thomas for their submissions which I have considered in coming to this determination.

Analysis and discussion

[13] The business in question is a privately owned suburban service station. Mr Thomas is a working shareholder involved in the day-to-day operations of all aspects of the business and is responsible for workshop repairs. The company uses a software suite called Synergy, but which is significantly different from more commonly used systems. It is clear from the evidence Mrs Sands was a thoroughly

competent office administrator in her prior employment situations which used more conventional software systems.

[14] Neither party anticipated the difficulties Mrs Sands experienced in using the Synergy system. Mr Thomas and Mrs Sparks said they had been trained in its use, in fact Mrs Sparks said this was the only system she was trained in using.

[15] At the heart of this case is the failure of the applicant to master the company's business systems to an adequate degree. The main problem appears to have been in relation to stock and invoicing and the time being taken to do daily balances. In spite of the efforts of all three working on the difficulties, the problems remained.

[16] Mr Thomas said he had to call a halt to bringing Mrs Sparks in, as the cost of doing so was of concern. He told Mrs Sands to come to him if she was having problems and he would take her through the necessary steps. He said he brought errors to her attention as they occurred and which she had corrected after hours, but at no stage did he make it clear the applicant's tenure of the position was at risk if the errors continued.

[17] Mr Thomas says the final straw came when doing a tobacco stock take on Sunday, 8 March in order to place an order with the distributor the following day. He said *Synergy Autoshop System sometimes has a problem with fast selling items. The stock count can be out a small amount in quantity.* He also said *I became very concerned about the ability of our business to continue given the level of mistakes and excessive time taken by Delma to balance each days takings.*

[18] Quite correctly, Ms Sinclair draws my attention to the legal precedents *Trotter v. Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, and *Ramankutty v. Vice-Chancellor of the University of Auckland*, 25/10/01 Goddard CJ, as being relevant in the context of this case.

[19] The Courts have consistently reinforced the importance, not the predominance, of a fair process needing to be undertaken before an employer can dismiss an employee. The process is not to be subjected to *pedantic scrutiny* but needs to pass the test of what did the employer do and how did the employer act at the time and in the circumstances.

[20] In this matter, there simply was no process so little scrutiny is required, pedantic or otherwise. Undoubtedly, as a small business owner, Mr Thomas became concerned at the recurring errors, the costs and time associated with rectifying them, drew them to Mrs Sands' attention yet never took the crucial step of instigating a formal process to provide a period during which her performance needed to improve, the standard to be achieved, with the clear message that should the required standard not be met within the time specified or sufficient improvement made, her employment could be terminated.

[21] For Mr Thomas to simply advise Mrs Sands of her errors, even in light of his concerns about her ability to prepare accurate end of year information, falls well short of what a fair and reasonable employer would have done. That said, I am firmly of the view that even had a substantially correct procedure been put in place, and fairly conducted, the likelihood of the employment relationship continuing was highly improbable. I say this because, as I read the evidence, both parties had become frustrated with the situation and with each other. Undoubtedly, that frustration was coloured by disappointment on the part of each of them.

Determination

[22] Returning to the issues set out above in this determination I find:

- The procedure was seriously deficient in a performance setting;
- The applicant was unjustifiably dismissed due to the respondent's failure to follow an appropriate procedure;
- The relationship was unlikely to continue for more than a month longer than the expiry of the notice period given the high probability of serious difficulties with the end of year accounts;
- The applicant did not contribute to the circumstances which gave rise to her dismissal as I am thoroughly satisfied her failure to master the Synergy system was not due to a lack of application to the tasks nor to any disinterest in them.

[23] Having found Mrs Sands has a personal grievance the issue of remedies arises.

Remedies

Lost remuneration

[24] In her evidence to the Authority, Mrs Sands accepted that her employment with the respondent ceased on 20 March 2009. Her evidence was, and this was unchallenged, that she had been out of work until Monday, 25 January 2010. She sought lost wages for this period.

[25] As I have found the employment relationship was highly unlikely to continue for more than a month following the expiry of the notice period, the Authority is restricted to awarding her four weeks' wages net of taxation. The respondent is to pay this sum to the applicant under s 123 (1) (b) of the Employment Relations Act 2000 .

[26] At the investigation meeting, Mrs Sands spoke of the difficulty she had had after losing her position. She presented no corroborative evidence of this. However, I do accept that her confidence was knocked and that that loss of confidence may have impacted on her presentation at the interviews she was able to secure. I also accept her estimate that she applied for between 20 and 30 positions but without success until securing the position she now fills.

[27] I find the applicant has suffered detriment and specifically a fall in her self confidence resulting from the dismissal from the respondent's employment.

[28] Weighing this up, in all the circumstances I order the respondent to pay Mrs Sands the compensatory sum of \$2,500 under s.123(1)(c)(i) of the Act. As the respondent is a small business, I require Ms Sinclair and Mr Thomas to discuss and agree a time payment schedule in respect of the compensation, should that be required.

Costs

[29] In the normal course of events I would call for submissions on costs. However, in this case, which took no longer than 90 minutes and required counsel to provide a statement of problem and a moderately short statement of evidence for the applicant together with some correspondence between the parties, I think it sensible to fix costs at this time.

[30] Taking into account the work performed by counsel for the applicant, including her appearance at the investigation meeting, I order the respondent to pay the applicant the sum of \$750 as a contribution to the applicant's costs.

Paul Montgomery
Member of the Employment Relations Authority