IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 370
5309303

	BETWEEN	NAOMI SMITH Applicant
	AND	CAPRIMA CUISINE LTD t/a GRILLERS RESTAURANT Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Alex Hope, Counsel for Applicant Nannette Bolstad, Advocate for Respondent
Investigation Meeting:	1 April and 5 July 2011 at Hamilton
Submissions received:	15 July 2011 from Applicant 15 July 2011 from Respondent
Determination:	24 August 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Naomi Smith, claims that the verbal and written warnings issued to her on or about 1 May 2010 and 8 June 2010 respectively, and the alleged unilateral variation of her Employment Agreement by the Respondent, Caprima Cuisine Limited ("Caprima"), were unjustifiable and disadvantaged her in her employment.

[2] Ms Smith also claims that that she was disadvantaged in her employment by Caprima's failure to protect her from bullying.

[3] Ms Smith further claims that she has a personal grievance under s103A of the Employment Relations Act 2000 ("the Act"), in that she was unjustifiably dismissed on 17 June 2010.

[4] Caprima claims that the verbal and written warnings were justifiable. Caprima denies that Ms Smith was subject to a unilateral variation in her Employment Agreement.

[5] Caprima further denies that it failed to protect Ms Smith from bullying in that the concerns raised by Ms Smith were investigated and were resolved, resulting in Ms Smith withdrawing the allegations.

[6] Caprima denies that it dismissed Ms Smith and claims that Ms Smith terminated her employment by abandonment.

Issues

[7] The issues for determination are:

i. Was Ms Smith unjustifiably disadvantaged in her employment with Caprima as a result of a verbal warning?

ii. Was Ms Smith unjustifiably disadvantaged in her employment with Caprima as a result of a written warning?

iii. Was Ms Smith unjustifiably disadvantaged in her employment with Caprima as a result of a unilateral variation in her Employment Agreement?

iv. Was Ms Smith unjustifiably disadvantaged in her employment with Caprima as a result of a failure by Caprima to protect her from bullying?

v. Was Ms Smith unjustifiably dismissed from her employment by Caprima or did she abandon her employment?

Background Facts

[8] Ms Smith commenced employment with Caprima, trading as Grillers restaurant ("Grillers"), as a casual chef in February 2010. The employment was on a casual basis as Caprima had a head chef, and Ms Smith was engaged to provide additional cooking support in the kitchen on busy nights.

[9] Ms Smith was offered a permanent position with Caprima on 2 February 2010, and shortly afterwards applied for the position of head chef when that position became vacant.

[10] Mr John Pennington, owner and director of Caprima, said that on 23 February 2010 he agreed to give Ms Smith a trial in the position of Senior Chef. Ms Smith stated however that her understanding was that she had been appointed to the position.

[11] Mr Pennington said that he had provided Ms Smith with an Employment Agreement at that time but that Ms Smith did not return it despite repeated requests to do so. Mr Pennington said on 28 May 2010 he provided Ms Smith with two further copies of the standard Caprima Employment Agreement and discussed the terms outlined in it with Ms Smith. Both copies were signed by both parties on that date.

[12] Ms Smith said that she had not been provided with an Employment Agreement at the time of her appointment in February 2010, and that she only received an Employment Agreement after she had made several requests to be provided with one.

[13] The Employment Agreement produced in evidence was signed by Ms Smith and Mr Pennington and is dated 28 May 2010. Ms Smith's position is described as 'Senior Chef'. Although the Employment Agreement refers at clause 5.2 to a job description being attached as Schedule A, there was no attachment to the copy of the Employment Agreement produced at the Investigation Meeting and Ms Smith said there never were any appendices or attachments, specifically Ms Smith said that she was never provided with a job description.

[14] Mr Pennington said that at the same time as he discussed the Employment Agreement with Ms Smith, he gave her a copy of the job description for her role, and provided her with a copy of the House Rules. Mr Pennington said that a copy of the House Rules was also displayed prominently on the staff notice board in the kitchen area. Ms Smith, despite a statement to the contrary in her written witness statement, agreed in evidence that she had been given a copy of the House Rules, but that she had not noticed a copy on the staff notice board until some time later.

[15] Relevant clauses of Ms Smith's Employment Agreement are:

- *5.1 All duties will be performed in accordance with the instructions of the Manager*

- *5.3 House Rules as outlined in Schedule C to this Employment Contract, apply to all staff.*

- *8.1 You will receive a paid meal break after 4 hours of service taken at a time as agreed by your manager. You will be entitled to a meal up to the value of $14.00 upon agreement from the kitchen staff on what is available.*

- *15.1 Step One: Verbal warning Issued in cases of substandard performance or misconduct. The warning will remain on your record for twelve months.*

- *51.1 Step two:Written Warning Issued in cases of poor performance or misconduct where you have previously received a verbal warning in the previous six months. This written warning will remain on your record for twelve months and will be the final warning.*

- *51.3 Step three: Dismissal may follow instances of poor performance or misconduct where you have received a final written warning in the previous twelve months.*

- *15.2 All warnings will be recorded on your file and you will sign the warning to indicate either that you agree with it or that you have received it. We will provide you with a copy of the warning.*

- *15.3 Before any warning or dismissal, we will meet with you to discuss the concerns or problem. You will be invited to bring a representative with you to this meeting.*

- *18.1 We will either give you two weeks notice or pay you in lieu of notice if we terminate your employment.*

- *21.1 Where you are absent from work for a continuous period of two days without our consent and without good cause, you shall be deemed to have terminated your employment.*

[16] Relevant clauses of the House Rules are:

> *10. The removal of food or drink from the premises without the express permission of the Employer is not permitted.*
>
> *13. Staff meals may be made available for staff on shifts in excess of five hours. Staff meals will be confirmed by the front of house manager in consultation with the Chef.*

[17] On 3 March 2010 Mr Pennington appointed Ms Cassie Evans, who had been working in the role of Team Leader Restaurant since the beginning of February 2010, as the Restaurant Manager and issued a written notice to all staff confirming this dated 3 March 2010. In the notice Mr Pennington wrote that:

> *…to start with Cass will have my authority to make day-to-day decisions in regard to the running of the restaurant as a WHOLE.*
>
> *These will include:*
>
> - *Responsibility for front of house and kitchen staffing and rosters to ensure consistency*
> - *Enforcement of 'house rules' and other operating procedures*
> - *Overall standards and business performance.*

[18] Ms Smith said that she regarded herself as 'Head Chef", although Mr Pennington preferred to call her 'Team Leader Kitchen'. Ms Smith said that she was in charge of the kitchen, being responsible for ordering food, preparing menus and supervising staff. On this basis Ms Smith said that her understanding was that she and Ms Evans shared the management of the restaurant, Ms Evans covering the front of house operation and Ms Smith covering the kitchen operation.

[19] Mr Pennington said that on 10 March 2010 he held a staff meeting at Grillers at which Ms Smith was present. Topics discussed at this meeting were the House Rules, systems, meals and drinks by staff, completing checklists, timeliness, and the Restaurant Manager role. Mr Pennington said he had emphasised compliance with the House Rules and reminded the staff that a copy of these was displayed on the kitchen notice board.

[20] Mr Pennington stated that he had had a meeting with Ms Smith on 25 March 2010 to raise concerns he had in regard to her maintaining consistent kitchen ordering, stocktaking, measures, and rosters. Mr Pennington said Ms Smith had been receptive at the meeting and had agreed to try to improve at stocktaking. Mr Pennington said that he had given Ms Smith on-the-job training on completing the standard stock take sheets.

[21] Ms Smith said that her relationship with Ms Evans, which had initially been good, began to deteriorate during April 2010. Ms Smith said that Ms Evans swore at her in front of staff and berated her in front of customers.

[22] Ms Smith attributed the deterioration in the relationship in part to the fact that she and Ms Evans had both been pregnant in April 2010; however Ms Smith had miscarried and lost her baby. Ms Smith said that prior to the pregnancies, she and Ms Evans had socialised during shared smoking break time together; however Ms Evans as a result of her pregnancy stopped smoking, which meant that she and Ms Smith did not spend as much time together as previously.

[23] On 22 April 2010 Mr Pennington held a supervisory meeting with Ms Evans and Ms Smith. The topics for discussion included the standard stock take sheets, and Mr Pennington said that he had reinforced the requirement to use the standard stock take sheets to ensure consistency.

[24] Ms Smith said that part of the discussion at this meeting on 22 April 2010 was concerned with resolving the problems in the relationship between herself and Ms Evans. Mr Pennington explained that he had discussed the need for Ms Smith and Ms Evans to liaise with each other and had emphasised the respective responsibilities they each held.

[25] Mr Pennington said that Ms Smith had told him that the relationship between her and Ms Evans had improved after this meeting so he had taken no further action in the matter.

[26] On 6 May 2010 Mr Pennington stated that he had visited Grillers prior to the lunch service and discovered Ms Smith trimming eye fillet steak. Mr Pennington said he had pointed out to Ms Smith that she had ordered pre-trimmed eye fillet steak, had received an invoice for pre-trimmed eye fillet steak, but had in fact accepted delivery of the untrimmed eye fillet steak, which should have been invoiced at a lower cost. Mr Pennington said he had pointed out to Ms Smith that it was part of her responsibilities to ensure that the supplies accepted for delivery correlated with the order which had been placed.

[27] On 10 May 2010 Ms Smith said that by the end of her rostered shift she had worked for 5 hours continuously, and decided to take a paid meal break in accordance with clause 8.1 of her Employment Agreement Ms Smith explained that rather than remain at work and eat the meal, which consisted solely of a dessert which had been made for a customer but was not of the correct standard, she had decided to take it home.

[28] Ms Smith said Ms Evans had seen her leaving with the meal and had accused her in front of the other staff of stealing the meal, and that Ms Evans had informed her that she would receive a warning. Ms Smith said she had responded by explaining that she was taking

the meal in accordance with the policy regarding staff meals, but that if Ms Evans required, she would leave the dessert.

[29] Mr Pennington stated that Ms Evans had contacted him that evening and informed him that another staff member had brought the incident involving Ms Smith to her attention. Ms Evans said that a staff member had told her that a spoiled dessert, which had been stored in the chiller, had disappeared during the evening prior to the staff members leaving for the night. Ms Evans had voiced her concern to Mr Pennington about allegations of dishonesty which were being made about Ms Smith.

[30] Mr Pennington said that the following day, 11 May 2010, he had spoken to the staff to determine the facts, and then he had spoken to Ms Smith and informed her that he wished to speak with her concerning a performance matter. Mr Pennington said he had explained to Ms Smith that it was a serious issue and had asked if she wanted to have a support person present. Ms Smith had confirmed that she was happy to proceed without a support person.

[31] Mr Pennington stated that he had told Ms Smith at the outset that Ms Evans had no authority to give her a warning.

[32] Mr Pennington said Ms Smith admitted that she had not spoken to Ms Evans about taking the dessert home and that she had had an argument with Ms Evans when confronted by her about the incident. Mr Pennington said that he had pointed out to Ms Smith House Rule number 10, which stated that food was not to be removed from the premises without the express permission of the employer. However in the notice to all staff dated 11 May 2010 Grillers had amended 'employer' to 'Restaurant Manager'. Mr Pennington said that he had then given Ms Smith a verbal warning for removing food from Grillers without permission, which she had accepted.

[33] Ms Smith agreed that Mr Pennington had produced the House Rules at the meeting held on 11 May 2010 but stated that she had not been shown these at the time when she was employed, nor had they been provided with her Employment Agreement. This is in clear contradiction to Ms Smith's evidence given at the Investigation Meeting when she confirmed she had been given a copy of the House Rules and that the House Rules had been discussed at the staff meeting on 10 March 2010.

[34] Ms Smith said that she had not been aware until some time after the meeting that she had been issued with a verbal warning.

[35] Mr Pennington said, and Ms Smith agreed, that he issued a notice to all the staff dated 11 May 2011 reiterating the House Rules as regards staff meals and reminding them of when and how they might be taken.

[36] On 25 May 2010 Mr Pennington said he had visited Grillers shortly after the lunch service had finished and had found that there were no floor mats down in the kitchen. Mr Pennington explained that it is a standard Health and Safety procedure to place a number of rubber mats down on top of the lino kitchen floor in order to provide a safe and secure walking surface.

[37] The mats would be lifted at the end of the dinner service to allow the floor and mats to be cleaned; they would then be placed back on the floor before the start of the next days shift and remain down for the remainder of the day. Mr Pennington said he had therefore reached the conclusion that the mats had not been down during service as they were still hanging over a rail at the rear of the restaurant and the kitchen floor had food remains and water on it consistent with no mats being down during service.

[38] Ms Smith explained that on 25 May 2010 she had no other staff to help her and that Mr Pennington had already reduced her working hours. This had resulted in her having only one hour to do the preparation work which included washing the floor and the mats, and to be ready for service. Ms Smith said that she remembered asking a staff member to bring the mats in and to place a large towel under her workbench.

[39] Ms Smith said that Mr Pennington had made no comment to her on 25 May 2010. Mr Pennington commented that Ms Smith was finishing the lunch service and although he had asked Ms Smith to see him, she had been busy and there were members of the public in Grillers. Ms Smith agreed that Mr Pennington had asked to see her after she finished her shift, but as he was having lunch with two people at that time, she had not wanted to intrude so she had decided to leave.

[40] Mr Pennington stated that on 26 May 2010 he had spoken to Ms Smith, and advised her that he wished to speak to her on a performance issue, and asked if she wished to have a support person present. Ms Smith confirmed that she was happy to proceed without a support person, so Mr Pennington proceeded to discuss the issue of the mats, asking Ms Smith for an explanation.

[41] Ms Smith stated that Mr Pennington had not provided her with an opportunity to provide an explanation, although she had attempted to give one. Mr Pennington said that Ms

Smith had explained that she had not had sufficient time to deal with the matter, to which his verbal response had been that placing the floor mats down to ensure a safe workplace was not optional.

[42] Ms Smith said, and Mr Pennington agreed, that he had then passed a written warning to her across the table at which they were sitting. Mr Pennington said he had asked Ms Smith if she wanted them both to sign the written warning but that she had not done so. The written warning, which was dated 26 May 2010, made reference to a verbal warning given on 11 May 2010 for breaching the house rules by removing food in an unauthorised manner and stated:

> *You are hereby given a written warning that your work performance was seriously sub standard.*
>
> *You are required to significantly lift your performance which includes completing duties efficiently, following house rules and procedures, and communicating to others in a professional manner.*
>
> *I look forward to seeing a significant improvement immediately.*

[43] Ms Smith stated that during May 2010 Mr Pennington had informed her that he was removing her Team Leader status and that this had occurred in front of other members of staff. Mr Pennington denied that Ms Smith had been stripped of any status and said that she retained her position as Senior Chef and responsibility for stock control and ordering.

[44] On 3 June 2010 Mr Pennington said he had been having lunch at Grillers and had ordered soup. When the soup arrived Mr Pennington said it was only lukewarm. As he had been having a meeting at the time Mr Pennington said he had raised the cold soup issue with Ms Smith once he had finished the meeting.

[45] On 7 June 2010, which was the Queen's Birthday statutory holiday, Mr Pennington, who was out of town, said he had received a call from Ms Smith on his mobile telephone. Ms Smith had explained that Grillers had run out of meat as she had forgotten that the meat suppliers would be closed on the Queen's Birthday as that day was a statutory holiday, and that she was therefore unable to place the meat order. Mr Pennington said that Ms Smith had suggested that hamburgers were served in Grillers that night, which he found to be an unpalatable suggestion, and he had telephoned his son who was in Hamilton and who had been able to obtain meat for Grillers from a supermarket.

[46] On 8 June 2010 Mr Pennington gave Ms Smith a written notice stating that he intended to take disciplinary action. The issues to be addressed at a meeting scheduled to take place prior to 11 June 2010 were:

- 29 – 30 May 2010: insufficient meat supplies ordered to cater for the weekend;

- 3 June 2010: lukewarm soup served to Mr Pennington;

- No entries made in the kitchen diary on a daily basis as required since 30 May 2010;

- 4 June 2010: instructing other kitchen staff to change both the type of fillet meat ordered and the supplier without authority and in breach of express instructions;

- 5-6 June 2010: failing to ensure adequate washed and clean linen supplies resulting in Grillers running out of adequate clean linen and purchasing new towels without permission from the Restaurant Manager or Mr Pennington; and

- 7 June 2010: failure to anticipate the meat suppliers being closed for the Queen's Birthday weekend and the restaurant thereby running out of meat supplies.

[47] In the notice Mr Pennington advised Ms Smith that these actions coming so soon after the written warning had: "*totally undermined my confidence in your ability to undertake your duties in even the most minimal manner.*", and that he was considering her suitability to remain employed at Grillers.

[48] Ms Smith said that she had spoken to Mr Pennington the following day, 9 June 2010, and asked for a mediator to resolve the issues. Ms Smith also asked if the meeting could be moved to the following week. Mr Pennington stated that he had explained that Ms Smith was entitled to have a support person rather than a mediator present at the meeting, and that he had agreed to move the meeting to 16 June 2010.

[49] Ms Smith explained that she had been working a split shift on 9 June 2010 and that prior to the commencement of the second half of her shift, she had decided she was too upset to attend work. Ms Smith said she had asked a friend, Ms Tania McDonnell, who worked as a Kitchen Hand at Grillers, to contact Grillers on her behalf and advise that she (Ms Smith) would not be attending Grillers to complete her shift.

[50] Mr Pennington stated he was telephoned by Ms Evans on 9 June 2010 at 4.49 p.m. and who informed him that Ms Smith had not turned up for her shift which had been due to commence at 4.30 p.m. Mr Pennington had suggested that Ms Evans contact another staff member to ascertain if they would cover the shift and asked Ms Evans to keep trying to contact Ms Smith by telephone. Telephone records provided at the Investigation Meeting established that several calls were made from Grillers to Ms Smith's telephone number.

[51] Mr Pennington explained that Ms Smith was the only kitchen staff member rostered for that evening who was able to prepare meals. Ms Evans had however been able to call in another employee to cover the shift.

[52] Ms McDonnell said that as she was concerned for her job, she had not contacted Grillers but had made a call to Mr Pennington's mobile telephone number and left a message for him. Mr Pennington stated that he had been in a meeting until approximately 7 p.m. and had left his mobile telephone in his car. Consequently although the message was sent at 5.41 p.m., Mr Pennington did not access it until he returned to his car at 7.00 p.m.

[53] A transcript of the message produced in evidence read:

> *Good evening again Mr Pennington. It's Luella McPhee here calling from Waihere Law. I do apologise for before. It appears that the phone was um terminated. However, um I do advise that Mr James Alex Hope does represent um Ms Naomi Smith in respect of her employment matter and we advise that she shan't be at work until we are able to discuss this matter further.*
>
> *Could you please call us on 078396237 or alternatively 02765226003. We look forward to hearing from you. Alternatively Mr Alex Hope will be in touch with you in due course.*

[54] Mr Pennington stated that the next day, 10 June 2010, he had called Mr Hope's office and left a message asking Mr Hope to contact him urgently to discuss the matter and to advise if Ms Smith intended to return to work. Mr Pennington received no response from Mr Hope's office following this message.

[55] On 11 June 2010 Mr Pennington appointed Ms Nanette Bolstad to act on his behalf and sent a fax to Mr Hope advising him of this. Mr Pennington stated that Ms Bolstad was able to contact Mr Hope on 14 June 2010 and confirm a meeting to be held on 16 June 2010.

[56] On 14 June 2010 Ms Smith failed to report for duty and did not provide Caprima with an explanation for not doing so.

[57] On 16 June 2010 a meeting took place between Ms Smith and her counsel, Ms Mania Hope, Mr Pennington and Ms Bolstad. The meeting was held at Grillers premises at 3.00 p.m., which was outside of the regular opening hours, at a table in the front of the restaurant area within full view of the footpath, and from which the kitchen area was clearly visible.

[58] Ms Hope said that although she had been uncomfortable at the setting for the meeting, she had not raised it as an issue with Mr Pennington.

[59] At the meeting Ms Hope said that she raised personal grievances on Ms Smith's behalf in respect of an unfair verbal warning, an unfair written warning, and her demotion. Ms Hope said she had responded on behalf of Ms Smith to each of the issues raised in the letter of 8 June 2010.

[60] Ms Hope said she had also raised the issue of disparity of treatment at the meeting in relation to the issues of clean linen and meat ordering over the Queen's Birthday weekend as set out in Mr Pennington's letter of 8 June 2010.

[61] Mr Pennington stated that Ms Smith had been asked for an explanation as to why she had failed to report for work on 9 June 2010 and on subsequent days. Ms Smith had responded in explanation that she had been "*too upset*". Mr Pennington said Ms Smith was also asked why she had removed her knives when she had left Grillers on 9 June 2010 when the usual practice was to leave them at Grillers, but that Ms Smith had offered no explanation for this.

[62] Ms Hope stated that Ms Bolstad had indicated that her client would consider abandonment of employment when considering Ms Smith's responses to the letter of 8 June 2010. Ms Hope said she had responded by saying that abandonment of employment could not be considered given that a disciplinary process was in progress, further that Ms Smith's intention of not attending her rostered shift on 10 June 2010 had been communicated by telephone message to the employer.

[63] Ms Hope had also pointed out that another person had been interviewed on 8 June 2010, the same date when Ms Smith had been given the disciplinary meeting letter, and stated that she (Ms Hope) had therefore been concerned when Ms Bolstad had asked Ms Smith to return her keys to Grillers so they could be used by "*replacement staff*".

[64] Mr Pennington explained that the request for Ms Smith to return the keys to Grillers had been made on the basis that as there were only a limited number available and as Ms Smith had made it clear that she would not be returning to work until the disciplinary process was completed, the keys would be required for use by other staff members who would be covering the shifts she should have been working.

[65] It was agreed to adjourn the meeting until the following day.

[66] A further meeting took place on 17 June 2010 with the purpose of presenting a decision to Ms Smith. Ms Smith attended this meeting with Mr Hope; Mr Pennington and Ms Bolstad were again present. At the commencement of the meeting Mr Hope had objected to the meeting taking place at the same table as on the previous occasion and the meeting was reconvened at a table to the rear of the restaurant area.

[67] The notes of the meeting on 17 June 2010 state:

> *Nannette then advised that Ross Pennington was invoking clause 21.0 Abandonment of Employment and provided a letter to Alex outlining this. Alex asked "does this mean that you are terminating her employment?" Nanette stated "no, it is our view that Naomi terminated the employment"…*
>
> *Alex was not prepared to respond to the preliminary findings as he stated that as we had invoked the Abandonment of Employment, the disciplinary process could not continue.*
>
> *Alex and Naomi then terminated the meeting at 11.08 a.m. and left the premises.*

[68] Mr Pennington confirmed that once Ms Bolstad confirmed that it was Caprima's view that Ms Smith had terminated the employment relationship through abandonment, Mr Hope had terminated the meeting and left the premises with Ms Smith.

Determination

The Law

[69] Section 103A of the Employment Relations Act 2000 ("the Act") provides the test to be applied to a dismissal, and as appropriate, to circumstances in which an unjustified disadvantage in employment arises. The question to be applied in the case of dismissal and/or disadvantage is the extent to which the action may be justifiable.

[70] In either cases s 103A sets out the test to be applied, namely whether the employer's actions, and how the employer acted, determined from an objective basis, were what a fair and reasonable employer would have done in all the circumstances at the time.

[71] There are two requirements which must be met to establish an unjustifiable disadvantage. The first is that there must be a 'disadvantage' and the second is that the disadvantage must be 'unjustifiable'.

[72] The test to be applied is that contained in s103A of the Employment Relations Act 2000 ("the Act"), which states:

> *For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, 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 or action occurred"*

[73] As was stated by the Employment Court in *Air New Zealand v V*[1]: "*...the Section requires the Court to determine the question of justification on an objective basis and in all the circumstances at the relevant time."*

[74] The requirement that such a determination be made on an objective basis is to be made by reference to "*a fair and reasonable employer"*. In *Fuiava v Air New Zealand Limited*[2] Judge Travis stated:[3]

> *The Court in Hudson found that the new s103A did not give the Employment Institutions the unbridled licence to substitute their views for that of the employer. Their role was instead to ask if the actions of the employer amounted to what a fair and reasonable employer would have done and to evaluate this objectively.*

[75] Additionally there is a requirement to assess the action taken by the employer by taking into consideration "*all the circumstances at the time the action occurred"*.

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[1] [2009] ERNZ 185 at para [29]
[2] [2006] ERNZ 806; (2006) 4 NZELR 103 (EMC)
[3] At para [50]

Was Ms Smith unjustifiably disadvantaged as a result of a verbal warning?

[76] Mr Pennington said that Ms Evans, when reporting the incident involving Ms Smith on 10 May 2010 to him, had been concerned that staff members were making allegations of dishonesty about Ms Smith, a senior employee at Grillers, and in a position of some authority in the kitchen area.

[77] I find that Ms Smith was aware of the House Rules. Ms Smith had agreed at the Investigation Meeting that she had been given a copy by Mr Pennington, and that there was a copy displayed on the staff notice board in the kitchen area. Although Ms Smith said that she had not noticed the House Rules displayed on the staff board in the kitchen area initially, I consider that she had ample opportunity to have read and familiarised herself with them, as would be expected as the senior person in the kitchen area with some degree of responsibility for ensuring that the House Rules were adhered to by the kitchen staff. Further, the House Rules were referred to in Mr Pennington's memorandum dated 3 March 2010 concerning the appointment of Ms Evans which was copied to Ms Smith, and were also among the subjects of discussion at the staff meeting on 10 March 2010 at which Ms Smith was present.

[78] The Employment Agreement which Ms Smith signed on 28 May 2010 stated at clause 5.2 that the House Rules applied to all staff. Although Ms Smith was provided with the Employment Agreement after the incident on 10 May 2010, there was no evidence that Ms Smith had queried the applicability of the House Rules in light of past practices at the staff meeting on 10 March 2010.

[79] I find that the taking of a meal by employees was subject to clauses 10 and 13 of the House Rules, and Ms Smith's actions were in breach of these requirements.

[80] Mr Pennington issued a notice on 11 May 2010 reminding all staff members of the House Rules in respect of the taking of meals, he also stated that on the same day he had issued Ms Smith with a verbal warning. Ms Smith agreed that such a notice had been issued.

[81] On consideration of these factors, I find it more likely than not that Ms Smith was issued with a verbal warning by Mr Pennington for removing food from Grillers without permission.

[82] Whilst there is no formal requirement for a verbal warning to be in writing, it is prudent for such a warning to be recorded in writing to avoid any subsequent disagreement between the parties. Moreover in this case Ms Smith's Employment Agreement specified at

clause 15.2 that *"All warnings will be recorded on your file and you will sign the warning"* for the precise reason that it would be possible to prove that the employee had either accepted it or received it. Clause 15.2 also stated that *"We will provide you with a copy of the warning"*.

[83] There is no evidence that the warning was recorded on Ms Smith's file, that she signed it, nor was she issued with a copy of the warning in accordance with clause 15.2 of the Employment Agreement.

[84] In these circumstances, although I accept Mr Pennington's evidence that he gave Ms Smith a verbal warning, I find a procedural flaw such that I determine that Ms Smith was unjustifiably disadvantaged in respect of the verbal warning.

Was Ms Smith unjustifiably disadvantaged as a result of a written warning?

[85] Mr Pennington's issue regarding the non-placement of the rubber mats on the kitchen floor had its basis in a health and safety concern. The mats were there to provide a safe walking surface.

[86] Ms Smith explained that due to the fact that there was one member of staff short in the kitchen area and that she was undertaking a major cleaning exercise in the kitchen area, there had been no time to dry the mats and place them back down on the floor before Mr Pennington arrived at Grillers.

[87] Ms Smith was in a position of authority in the kitchen area, able to organise her own staffing and responsible for safety standards in the kitchen. I find that on a day when a major cleaning exercise was to be undertaken in the kitchen, Ms Smith was able to organise the staff required to undertake the task. Had she been unable to do so, she could have contacted Mr Pennington and discussed the matter with him in order to find a way to resolve it.

[88] I note that Ms Smith had stated that she had asked a staff member to place a large towel under her workbench. I find that Ms Smith was aware that the rubber mats not being down presented a health and safety risk in a kitchen area which by its very nature was inherently more dangerous than other working environments.

[89] I find that Mr Pennington had substantive justification for his decision that Ms Smith's performance was seriously below required standards. However I find that the fact

that Mr Pennington had prepared the written warning in advance of the meeting to undermine the procedural requirements.

[90] I do not accept Mr Pennington's explanation that he had merely prepared the letter due to a lack of word processing facilities at Grillers and on the proviso that Ms Smith might not be able to tender a viable explanation.

[91] A fair and reasonable employer would have given careful consideration to Ms Smith's explanation before reaching a decision that the matter constituted serious misconduct. and issuing Ms Smith with a written warning.

[92] I determine that Ms Smith was unjustifiably disadvantaged in respect of the written warning.

Was Ms Smith unjustifiably disadvantaged as a result of a unilateral variation in her Employment Agreement?

[93] Ms Smith and Ms Evans appeared to be of equal status prior to Ms Evans appointment as Restaurant Manager. Mr Pennington said that the appointment of Ms Evans as Restaurant Manager did not affect Ms Smith's role as Team Leader Kitchen.

[94] Although Ms Smith says that she was stripped of her Team Leader status in front of other staff members, Mr Pennington denied that this happened, and Ms McDonnell did not refer to it having happened, as I would have expected had this occurred. Ms McDonnell did refer in her evidence to Ms Evans taking over the ordering of stock, but on 7 June 2010 it was apparent from the evidence that Ms Smith was still responsible for the stock ordering.

[95] The determining of this issue has not been assisted by the ambiguity of the Grillers' position descriptions. Ms Smith described herself as having been appointed as 'Head Chef", Mr Pennington said that Ms Smith had been appointed as "Senior Chef', which is the title used in the Employment Agreement. Both Ms Smith and Mr Pennington also used the title of 'Team Leader Kitchen".

[96] Ms Smith said that she had not been given a position description. A position description which was produced in evidence by Ms Smith was denoted as 'Kitchen Supervisor Position' and specified a reporting line to '*The Owner'*, "*And in the owners absence to the Restaurant manager'*. The position description specifies

> *<u>Responsible for:</u> Directly responsible for kitchen staff, but also the overall kitchen operation including the performance and delivery of the kitchen staff.*
>
> *<u>Primary Function:</u> The operation and organisation of the kitchen with maximum quality whilst containing labour costs. Ensure the efficient and effective operation of the kitchen and maintain the establishment's standards.*

[97] Ms Smith did not report to Ms Evans when she initially commenced employment, and despite Ms Evans appointment, I find that her duties and responsibilities did not significantly alter. There is no evidence that Ms Evans interfered in the kitchen operation and it appeared that Mr Pennington dealt directly with Ms Smith on such matters. The fact of Ms Evans promotion does not appear to have disadvantaged Ms Smith or to have acted as a unilateral variation in her Employment Agreement

[98] I do not find that Ms Smith to have been unjustifiably disadvantaged as a result of a unilateral variation in her Employment Agreement. I do however observe that the ambiguity referred to above (paragraph 95) impacted upon the events which later transpired.

Was Ms Smith unjustifiably disadvantaged as a result of a failure by Caprima to protect her from bullying?

[99] Ms Smith's Employment Agreement contains an express health and safety clause, and states at clause 26.1:

> *26.1 The parties in this agreement are committed to the observance of safe working practice and to the good health of all employees.*

[100] Moreover, the duty to take reasonable steps to maintain a safe workplace is an implied term of all Employment Agreements: *Attorney General v Gilbert*[4]. In particular the employer must:

> *take all reasonable care to avoid exposing the employee to unnecessary risk of injury or further injury to his or her physical or psychological health and in particular to provide and maintain a safe system of work;*

[101] Mr Pennington was aware that the initially good relationship between Ms Smith and Ms Evans had deteriorated and as a result had attempted to resolve the issues between them at the meeting on 22 April 2010.

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[4] [2002] 1 ERNZ 31, at para [75] (CA)

[102] Mr Pennington's evidence was that Ms Smith had told him that the relationship between her and Ms Evans had improved after this meeting and she did not raise the issue again.

[103] Mr Pennington was aware that the relationship between Ms Smith and Ms Evans was "*strained"* during May and the fact that Ms Evans had informed Ms Smith on 10 May 2010 that she was giving her a warning highlighted this fact.

[104] I accept that the relationship between the two women deteriorated during April 2010 and consider that the situation regarding the pregnancy of both women significantly contributed to this.

[105] However apart from the reference by Ms Evans to her giving Ms Smith a warning on 10 May 2010 which occurred during what was clearly a heated exchange, I am unable to conclude that Ms Evans behaviour towards Ms Smith constituted bullying, such as to pose a risk to her physical or psychological health. Nor do I find that Mr Pennington was aware that there was anything more than a personality issue between Ms Smith and Ms Evans, such that more interventionist action was required on his part after the meeting on 22 April 2010.

[106] I do not find that Ms Smith to have been unjustifiably disadvantaged as a result of a failure by Caprima to protect her from bullying

Was Ms Smith unjustifiably dismissed or did she abandon her employment?

[107] At clause 21.1 of Ms Smith's Employment Agreement it states that an employee is deemed to have terminated their employment if they are absent from work for a continuous period of two days without Caprima's consent or good cause.

[108] Ms Smith did not attend work for the second part of her rostered shift on Wednesday 9 June 2010. The shift was due to start at 4.30 p.m. Ms Smith had asked Ms McDonnell to telephone on her behalf and explain that she would not be attending work that evening. Ms McDonnell did not telephone Grillers, but left a message for Mr Pennington on his voice mail message service on his mobile telephone. This message was recorded as having been left at 5.41 p.m., more than 1 hour after Ms Smith's shift was due to start.

[109] The message left by Ms McDonnell using an assumed name advised that Mr Hope was representing Ms Smith. It also advised that Ms Smith would not be at work until Mr Hope was able to speak on her behalf.

[110] Ms Smith did not attend for her rostered shift the following day, Thursday 10 June 2010. Ms Smith was not rostered to work on the next two days, Friday 11 and Saturday 12 June 2010.

[111] Although Mr Pennington and Ms Bolstad had attempted to contact Mr Hope, no response was established until 14 June 2010, and a meeting was arranged to take place with Ms Smith on 16 June 2010. By 16 June 2010 Ms Smith had not attended work for three and a half days: 9,10, 14, and 15 June 2010.

[112] By 16 June 2010 Ms Smith was in breach of clause 21.1 of her Employment Agreement, abandonment, unless Caprima had consented to her absence or she had good cause.

[113] Ms McDonnell in the telephone message left for Mr Pennington on 9 June 2010 had indicated that Ms Smith would not be attending work until the matter was further discussed. Being involved in disciplinary action does not *per se* entitle an employee to absent themselves from their place of work. Ms Smith had not applied to take annual leave, nor had she provided evidence of illness as she was required to do in accordance with clause 11.6 of her Employment Agreement which required a medical certificate be produced after two days of absence.

[114] I do not find that Ms Smith had good cause to be absent from her employment between 9 and 16 June 2010.

[115] In examining the issue of whether Caprima had consented to Ms Smith being absent, I note that the Court of Appeal's conclusion in *EM Ramsbottom Ltd v Chambers*[5] that a failure by a company to make enquiry of an employee as to his intentions after apparently abandoning his employment cannot constitute dismissal of the employee. However the Court stated that there was "s*ubstantial force"* in a submission that an employer contending that the employee had ended the employment relationship by abandoning the employment must face a high threshold The Court commented:[6]

> *…clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make enquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment.*

[5] [200] 2 ERNZ 97
[6] Ibid at para [26]

[116] The Employment Court followed the approach in *Ramsbottom* in *Lwin v A Honest International Co Ltd*[7] , holding that an employer who believed an employee had abandoned her employment was "*…duly cautious in drawing that inference and took the very proper step of writing to her … to clarify the position"*[8]

[117] The statutory duty of good faith is also relevant to the consideration of this issue. Employers and employees have a duty to deal with each other in good faith under s 4(1A) of the Act which states:

> *The duty of good faith in subsection (1) –*
>
> *a. is wider in scope than the implied mutual obligations of trust and confidence; and*
>
> *b. requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative …"*

[118] It is clear from the relevant authorities that the wording of the Employment Agreement and the factual matrix of each case are of paramount importance. In this case Caprima during their communications with Mr Hope's office had not requested that Ms Smith return to work, nor had Caprima queried the reason for Ms Smith's absence.

[119] Caprima attended the disciplinary meetings with Ms Smith on 16 and 17 June 2010. Although the issue of abandonment was raised at the meeting on 16 June 2010 by Ms Bolstad, it is clear that Ms Hope on behalf of Ms Smith clarified Ms Smith's position which was that she had not abandoned her employment. It is significant that Caprima met again with Ms Smith the following day, which I find to be at variance with a belief on Caprima's part that an employment relationship was no longer extant between the parties.

[120] I find that in this situation Caprima had implicitly consented to Ms Smith's absence by attending the meeting with Ms Smith on 16 June 2010 and although the issue of abandonment was raised at that meeting, by further meeting with her on the following day.

[121] In all the circumstances I find that Caprima, by not making enquiry of the reason for Ms Smith's absence, and by attending meetings as arranged to discuss allegations of a disciplinary nature between the parties, affirmed an ongoing employment relationship. In

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[7] [2003] 1 ERNZ 387
[8] Ibid at para [34]

these circumstances Ms Smith could not be deemed to have abandoned her employment and did not thereby terminate her employment.

[122] I determine that Caprima did not act as a fair and reasonable employer would have done in all the circumstances at the relevant time. I determine that Ms Smith was unjustifiably dismissed by Caprima.

Remedies

[123] I have found Ms Smith to have suffered unjustifiable disadvantages and unjustifiable dismissal, and she is entitled to remedies.

Unjustifiable Disadvantage: Verbal Warning

[124] I have found Ms Smith to have suffered an unjustifiable disadvantage in respect of the verbal warning issued. Caprima is ordered to pay Ms Smith $300.00 compensation under s 123(1) (c) (i) of the Act

Unjustifiable Disadvantage: Written Warning

[125] I have found Ms Smith to have suffered an unjustifiable disadvantage in respect of the written warning issued. Caprima is ordered to pay Ms Smith $500.00 compensation under s123(1) (c) (i) of the Act.

Unjustifiable Dismissal

(i) Reimbursement of Lost Wages

[126] Ms Smith was able to obtain employment at New World supermarket following her dismissal, this period of employment was from 16 July 2011 until 16 January 2011. Since that time Ms Smith said she had been attempting to start her own business but did not provide details of any monies earned in that capacity since 16 January 2011.

[127] I make the following award:

- A payment of $130.66 for outstanding holiday pay;

- A payment of $32.00 for attendance at two disciplinary meetings of one hour duration each at an hourly rate of $16.00 per hour

- A payment of $3,946.88 gross in respect of 3 months salary payment pursuant to s 128(2) of the Act.

- A payment of $18,320.00 gross in respect of the period from week 14 until the close of the Investigation Meeting on 4 July 2011 pursuant to s 128 (3) of the Act.

- From these amounts is to be deducted the sum of $13,270.00 in respect of the monies earned by Ms Smith during the period of 16 July 2010 to 16 January 2011, calculated on the basis of an average weekly wage of $510.40 per week for 26 weeks.

- From these amounts is also to be deducted any monies earned by Ms Smith during the period from 17 January 2011 until 4 July 2011. I anticipate that the parties can resolve the amounts. If not, leave is reserved to return to the Authority.

(ii) Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[128] Ms Smith stated that as a result of the dismissal by Caprima, she lost confidence in her ability to work in her chosen profession. Ms Smith also said that the public nature of the disciplinary meetings caused her hurt and humiliation.

[129] In respect of the dismissal grievance, Caprima is ordered to pay Ms Smith the sum of $3,500.00, pursuant to s 123(1) (c) (i).

Contribution

[130] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

Unjustifiable Disadvantage: Verbal Warning

[131] In respect of the unjustifiable disadvantage relating to the verbal warning I find contribution on the part of Ms Smith. Ms Smith was aware of the House Rules in respect of the taking of staff meals; Ms Smith was also in a position of some authority in the kitchen area of Grillers and as such expected to ensure adherence to the House Rules by the kitchen staff, which made her own adherence to the House Rules more compelling.

[132] I find contributory fault on the part of Ms Smith in respect of the verbal warning unjustifiable disadvantage and reduce the figure awarded in respect of this compensation by 30 %.

Unjustifiable Disadvantage: Written Warning

[133] Ms Smith was aware of the safety risks involved in not having rubber mats on the kitchen floor; this is acknowledged by her instructing a kitchen hand to place a large towel on the floor under her workbench.

[134] Ms Smith was in a position of authority in the kitchen area and, far from ensuring the safety of the staff in that area, placed them at risk by not adhering to safety standards.

[135] I find contributory fault on the part of Ms Smith in respect of the written warning unjustifiable disadvantage and reduce the figure awarded in respect of this compensation by 50 %.

Unjustifiable Dismissal

[136] I have observed the duty of good faith to be relevant to the consideration of whether Ms Smith abandoned her employment or was dismissed. The duty of good faith is a two-edged sword in that there is a reciprocity: the employer's duty to be responsive and communicative is required to be reciprocated by the employee.

[137] Ms Smith stated that she had requested Ms McDonnell to telephone Caprima and report her absence. Ms McDonnell said, and I accept, that Ms Smith was unaware of the rather foolish nature of that call. However I note that that call did not take place until more than one hour after Ms Smith's shift was due to start, and further that Ms Evans had made several calls to Ms Smith's mobile telephone, which Ms Smith had not answered.

[138] Ms Smith having been the person responsible for the kitchen rostering, would have been aware that she was the only staff member able to perform the cooking duties on 9 June 2010, which made the requirement of timely notification of absence on her part more pressing. However Ms Smith did not ensure a call was placed in good time, nor did she respond to the several calls from Grillers during that evening.

[139] Whilst Ms Smith had not by 10 June 2010 breached the abandonment clause in her Employment Agreement, I consider that this lack of communication as to the reason for her absence contributed to Caprima's later conclusion that she had abandoned her employment,

which had been heightened by Mr Pennington's belief that Ms Smith had abandoned her employment by taking her personal knives home after finishing her morning shift on 9 June 2010

[140] While Caprima had not, following 13 June 2010, made any enquiry as to the reason for Ms Smith's continued absence, I consider that the duty of good faith required Ms Smith to be responsive and communicative as to the reason for her continued absence. The explanation that she was "*too upset*" to attend her employment, given upon enquiry into her absence by Mr Pennington at the meeting on 16 June 2010, I find did not fulfil the good faith requirements of s 4(1A) of the Act.

[141] I find contributory fault on the part of Ms Smith in respect of the written warning unjustifiable disadvantage and reduce the figure awarded in respect of hurt and humiliation compensation by 50 %.

Costs

[142] Costs are reserved. I encourage the parties to resolve the issues of costs themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority