

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Taryn Catherine Stevens (Applicant)
AND Kerry Williams trading as Williams & Co (Respondent)
REPRESENTATIVES Mark Henderson, Counsel for Applicant
Nick Rout, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 17 August 2006
28 August 2006
DATE OF DETERMINATION 12 September 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Stevens) alleges that she was unjustifiably dismissed by the respondent (Mr Williams). Mr Williams resists that claim and says that the decision to dismiss was substantively justified and procedurally fair.

[2] Ms Stevens worked for Mr Williams as an office junior/receptionist in Mr Williams's law firm. It was Ms Stevens' first job in a law firm and she was excited about the possibility of *bettering herself*, having previously worked as a checkout operator in a supermarket.

[3] Mr Williams gave evidence that Ms Stevens had been provided to him through a Launch Pad School Leaver Scholarship which had previously provided two earlier office juniors to his firm.

[4] The two previous employees whom Mr Williams had obtained through Launch Pad were, in Mr Williams' opinion, both better suited to working in a law firm than Ms Stevens was.

[5] Mr Williams thought Ms Stevens was not temperamentally suited to work in legal services and there were a number of difficulties with lateness and accuracy.

[6] Mr Williams said that there was at least one written warning given to Ms Stevens during her employment; the only evidence available to the Authority was a written warning dated 16 January 2004 which listed a number of matters where it was alleged that Ms Stevens was deficient.

[7] I am not satisfied that the warning played a part in the dismissal; it is true it was mentioned in the letter of dismissal dated 17 May 2004 but only in passing and, by all accounts, was not referred to at all in the dismissal meeting.

[8] Because that written warning was not in any sense a factor in the dismissal, it need not be the subject of detailed consideration in this determination. I do, however, remark in passing that were the January 2004 written warning to have formed part of the basis for Ms Stevens' dismissal, I should have grave reservations about relying on its fairness. The warning was written before Ms Stevens was given any opportunity to respond to Mr Williams' allegations and she was simply handed it at a meeting she had not been given prior warning about and without her having had any opportunity to have a representative or support person present. Some of the allegations made against her in that warning letter are, in my opinion, unreasonable and could not on any proper basis ground a disciplinary warning.

[9] In the context then of what Mr Williams describes as an unsatisfactory employment relationship, it is appropriate to traverse the issues which led to Ms Stevens' dismissal. Amongst other things, Ms Stevens was responsible for attending to the firm's banking requirements. On Wednesday 12 May 2004, she was given two cheques to lodge as part of the firm's banking for that day. One of those cheques was a trust account cheque. The firm's policy, which she understood, was that she was to obtain receipts for all lodgements.

[10] Ms Stevens gave evidence that she had attended to the banking on that afternoon leaving the firm at around 3.30pm and returning to the office at about 4.35pm. She says that she attended at a number of banks. Indeed, her evidence was that she had been to every bank except KiwiBank and the ANZ Bank. The firm's bank was Westpac and she says that she will have lodged the requisite cheques at Westpac's Armagh Street branch.

[11] When she returned to the office, Mr Williams asked her for the evidence that the cheques had in fact been deposited. She could not produce any such evidence. She says that she was under no apprehension on that day that there was any particular difficulty and she understood Mr Williams to be simply making what amounted to a casual inquiry.

[12] Mr Williams firmly resists that evidence and said that he was seeking from Ms Stevens evidence that the cheques had in fact been lodged in accordance with the firm's requirements. Mr Williams said that he was particularly concerned to pursue the matter because the physical evidence of those deposits having been made was simply not available. Ms Stevens could not provide documentary proof that the cheques had in fact been deposited.

[13] In answer to my questions, Mr Williams was quite explicit that on Ms Stevens' return from the banking he asked her where the receipts were for the two cheques in question and she told him that she did not have them. He then was again absolutely explicit, despite being pressed both by me and by opposing counsel, that Ms Stevens gave him *the positive assurance that the deposits had been made* and that he was not *put on notice there was a problem with the deposits*.

[14] The nub of the issue from Mr Williams' point of view is that Ms Stevens gave him a positive affirmation that the cheques had indeed been banked and he relied on that advice. He told me that he had to rely on that advice because there was no documentary evidence of the deposits having been made. Given that, on inquiry subsequently, Mr Williams discovered that there was in fact no evidence that the deposits had been made, Mr Williams contends that he was *lied to* by Ms Stevens on the day that the event happened and it was ultimately because Mr Williams said that he was lied to by Ms Stevens that he made the decision the following Monday to dismiss her for serious misconduct, he having lost any residues of confidence that he had in her. Put simply, Mr Williams said that Ms Stevens *did not enjoy my confidence*.

[15] For her part, Ms Stevens says that she had no idea there was a problem with the cheques on that day. She knew that she did not have the documentary evidence that she had banked them, but she claims not to have apprehended from Mr Williams that there was any problem on that day.

Ms Stevens says that she told Mr Williams that she had no reason to believe that the deposits had not been made, notwithstanding the absence of documentary evidence. That of course is different from Mr Williams' recollection of what she told him. Mr Williams says that had Ms Stevens expressed herself in those terms, he would have been put on notice that there was a potential problem and he would have immediately conducted further investigations which would have led to the discovery that the bank had no record of the cheques being lodged.

[16] In the result, in reliance on what Mr Williams says he was told by Ms Stevens, Mr Williams gave advice to a client in relation to the drawing of a cheque to pay for tax and of course the funds to support that cheque were not in the account.

[17] Needless to say, Mr Williams was profoundly embarrassed by this series of events, had to take corrective action, deal with a disgruntled client and generally take the steps necessary to remedy the firm's default.

[18] Mr Williams says that he simply would not have assumed that everything was in order if Ms Stevens had said to him that she *had no reason to think that the cheques had not been banked*. I accept that evidence as more credible than Ms Stevens' recollection of events. If Ms Stevens had indeed correctly recalled what she said to Mr Williams, it seems to me inconceivable that a senior commercial lawyer of Mr Williams' standing would not have been sufficiently anxious about the possibility that the matter had not been properly handled to conduct some inquiries of his own. As it was, what Ms Stevens said to Mr Williams lulled him into a false sense of security that all was well, and I do not believe that that was possible if Ms Stevens' recollection of what she said, is correct.

[19] I do not, however, wish to impugn Ms Stevens' honesty. She was at the relevant time very young and inexperienced (just 18 years old) and this was her first job of any significance. Clearly, by her own evidence, she was struggling to meet the more stringent demands of work in a legal practice.

[20] Ms Stevens was away for the next two days ill and during that time Mr Williams says that she rang the office and asked to whoever she spoke to whether *everything was all okay*. Mr Williams gives that evidence because of Ms Stevens' contention that on the day of the banking problem, she had no apprehension from Mr Williams that there was in fact *a problem*. Mr Williams says that this question by Ms Stevens as it were from her sickbed suggests that she was in fact worried and knew there was indeed a problem. None of the respondent's witnesses could give me first hand evidence of this supposed call, so I discount it.

[21] Ms Stevens returned to work the following Monday, was called in to Mr Williams' office, interviewed by Mr Williams and two other employees of the firm (both of them senior) and effectively again asked for an explanation as to what had happened. Ms Stevens' evidence is that she again said that she had no reason to believe that the cheques were not banked, but by then of course Mr Williams had established that the cheques had not been banked and Ms Stevens was invited to conduct a search in and around her own work space to see if she could find the missing cheques. She did that but was unsuccessful and reported that back to Mr Williams.

[22] There was then a period when Mr Williams obviously reflected on what he was to do and after a short interlude, Mr Williams summoned Ms Stevens back to his office and initially indicated that he was going to send her home and encourage her to *reflect on her behaviour* but then, as he talked to her, and himself reflected on the situation in her presence, he reached the conclusion that dismissal was for him the only option and he summarily dismissed her.

Issues

[23] The first issue for determination is whether the process followed by Mr Williams was a fair one. Then I need to consider whether the decision to dismiss was substantially justified, having regard to the relevant test of the time, namely that set out in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 483: *The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken* (emphasis mine).

Procedure

[24] There were three meetings between Ms Stevens and Mr Williams, the first on the day of the banking, Wednesday, 12 May 2004 wherein Ms Stevens was simply asked to provide information about the banking of the two subject cheques. I find nothing improper in this meeting and, in particular, no unreasonable power imbalance. Indeed if Ms Stevens' evidence on this point is to be believed, she did not consider there was a problem on the day of the banking so this meeting clearly was not stressful for her.

[25] There were two meetings between Ms Stevens and Mr Williams on the day of the dismissal, 17 May 2004. The first seems to have taken place around 9.30 am. Ms Stevens' evidence is that she was summoned into a meeting with Mr Williams and two other senior staff of the firm. The evidence suggests that Ms Stevens was addressed by two of the respondent's personnel during this meeting. Mr Williams acknowledges that he did not give Ms Stevens the opportunity to have a representative present at this meeting and Ms Stevens claims she had no idea what the meeting was about before she entered the room.

[26] A second meeting between just Mr Williams and Ms Stevens took place later the same morning and after apparently considering whether to just send Ms Stevens home to reflect on what had happened, Mr Williams decided to summarily dismiss her, and did so.

[27] I am absolutely satisfied that the procedure adopted here by Mr Williams, no doubt in the heat of the moment, is so flawed as to make the resulting dismissal unsafe. There is a clear power imbalance between employer and employee which is graphically illustrated by the first meeting on 17 May 2004 when an 18 year old woman in her first serious employment is questioned by three senior representatives of the employer having been summoned to the meeting without notice and without having an opportunity to obtain representation for the meeting.

[28] I do not accept the submission made on behalf of Mr Williams that a different procedure would not have enabled Ms Stevens to deal more appropriately with the allegations she faced. Had Ms Stevens been represented by an appropriate person not only might Ms Stevens have dealt with matters differently, after taking advice, but potentially other outcomes might have been negotiated which would have dealt with her more fairly.

[29] The fact that Ms Stevens was given no notice of the reason for the first meeting on 17 May 2004 is inherently unfair; her evidence was that she was unaware there was a problem with the banking until matters were put to her at this meeting. Mr Williams was unable, through his evidence, to dislodge that view. Ms Stevens was entitled to prior warning of the burden of the complaint and its possible consequences so she could prepare her response. It was certainly not until the first meeting on 17 May 2004 that Ms Stevens was advised the cheques had not in fact been lodged. Clearly this intelligence alone pointed up the seriousness of her position; in my opinion, she ought to have been provided with that information in advance of the meeting.

[30] The failure to afford an opportunity for Ms Stevens to have a representative present for the two meetings on 17 May 2004 is acknowledged by Mr Williams. This is so notwithstanding the obligation in the relevant employment agreement, the applicable provision reading as follows:

4 c) You are entitled to have a support person present at any discussions relating to your employment

In effect the failure to ensure a support person was available to assist Ms Stevens is a breach of an agreed term of the employment agreement. It follows that a meeting sprung on a young inexperienced employee without giving her the opportunity to obtain the assistance of a representative is not the behaviour of a fair and reasonable employer.

[31] There is ample precedent for the view that a young and inexperienced worker is particularly vulnerable to disadvantage when representation is not facilitated in disciplinary meetings: see for instance *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* [1983] ACJ 653. This was such a case.

Substance

[32] Given the fact that I have found the procedure used by Mr Williams to be unfair to Ms Stevens the substantive merits of the dismissal are in a sense academic but for the sake of completeness I deal with that matter now.

[33] In my opinion, were there not procedural deficits of such gravity as to place the whole dismissal at risk, it may have been available to Mr Williams to reach a conclusion that Ms Stevens could be dismissed.

[34] The allegations against her were serious and, on the basis of the evidence I heard, difficult for Ms Stevens to avoid some culpability. Ms Stevens herself acknowledges that the situation was *serious and that it may have been my fault* that the cheques had been lost.

[35] I found that I preferred Mr Williams recollection of what Ms Stevens said on the day of the banking. I think it more rather than less likely that Ms Stevens reassured Mr Williams that all was well. Were that not the position, then Mr Williams' behaviour is inexplicable given his status as a senior and capable commercial lawyer. The only other issue is whether it is available to Mr Williams to make the decision that, by virtue of what Ms Stevens told him, she had in fact *lied* to him, thus entitling him to reach the conclusion that she did not *enjoy his confidence*.

[36] Given that this decision to dismiss was made in 2004, it predates the change in the law effected by s103A of the Employment Relations Act 2000.

[37] Looking at the decision which Mr Williams made in context, it is not difficult to see that the relationship between the parties was at the time the cheque issue fell for consideration an already unsatisfactory one. There had been difficulties between the parties on a regular basis since the employment relationship commenced and Mr Williams was plainly dissatisfied with Ms Stevens and thought she compared poorly with her two predecessors.

[38] On the other side of the ledger, however, Ms Stevens was very young, very inexperienced and, if she did indeed mislead Mr Williams (as I believe she did), then I think it relevant to ask whether that was an innocent mistake or a deliberate deception. I confess that I much prefer the former explanation which really raises the question of whether, in short, Mr Williams was expecting too much of Ms Stevens.

[39] Having regard to the appropriate legal test for the time, I think it would have been available to Mr Williams to reach the conclusion that he did, that he had been lied to by Ms Stevens and that therefore she no longer had his confidence. Although I think that result harsh and do not myself think Ms Stevens deliberately misled Mr Williams, I do think it would have been available to him to reach that conclusion and of course it is not for the Authority to place itself in the position of replacing its judgment with the judgment of the employer.

Determination

[40] I have found that Ms Stevens does have a personal grievance by reason of the procedural deficiencies and so there is an unjustified dismissal.

[41] I am required by Section 124 of the Act to consider the question of contribution both in respect of the nature and extent of the remedies which might otherwise be provided. The question must be whether Ms Stevens' actions contributed to the situation that gave rise to the personal grievance and, if so, to what extent.

[42] I have given earnest consideration to this issue and reached the conclusion that, but for Ms Steven's mistake with the lodgement of the two cheques, and the communication of the circumstances to her employer, there would have been the prospect of a continuing employment relationship. It follows that her contribution to the circumstances giving rise to the personal grievance is very significant indeed.

[43] Ms Stevens' claims compensation under s123 (1)(c)(i) and reimbursement of wages lost as a consequence of the termination of her employment. I consider it would be fair to determine contribution at 60%.

[44] Without contribution, I would have awarded compensation of \$3000. With contribution, a figure of \$1000 is arrived at. Ms Stevens' claims \$6,264.00 in lost wages being four months wages. Given that is her actual loss, I think it proper to award that sum abated by the 60% contribution. On this basis her entitlement to lost wages is \$1,879.20.

Summary

[45] Ms Stevens is to receive compensation of \$1,000.00 under section 123(1)(c)(i) of the Act.

[46] Ms Stevens is to receive \$1,879.20 as a contribution to the reimbursement of lost wages.

Costs

[47] Costs are reserved.

James Crichton
Member of Employment Relations Authority