

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 190
5399880

BETWEEN BARBARA ANN TAWAKA
Applicant

A N D SUNRISE CLEANING
SERVICES (NELSON)
LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: Gavin Amey, Advocate for Applicant
Nicole Ironside, Counsel for Respondent
Investigation Meeting: 21 August 2013 at Nelson
Submissions Received: On the day
Date of Determination: 12 September 2013

DETERMINATION OF THE AUTHORITY

- A. The final written warning given to Ms Tawaka on 13 September 2012 was unjustified but Ms Tawaka's contribution was such that she is not entitled to any remedies for that unjustified action.**
- B. The dismissal for poor performance but not serious misconduct was justified. Ms Tawaka is owed one week's pay in lieu of two weeks' notice. One week has already been paid.**
- C. I have reserved the issue of costs and failing agreement I have set a timetable for an exchange of submissions.**

Prohibition from publication

[1] Barbara Tawaka gave evidence to the Authority about the reason she had struggled with undertaking some of the requirements of her role. She confirmed that she had never raised the reason with her employer at any time during her employment and had instructed Mr Amey not to do so during the disciplinary process. There was some doubt on the part of the respondent whether there was any such issue but I think it more likely that Ms Tawaka over the years of employment simply compensated for the issue and in that way camouflaged its existence. I do not want to cause Ms Tawaka any further distress by publishing the reason she gave the Authority for struggling to undertake parts of her role. I prohibit publication of the reason under clause 10(1) of the second schedule of the Employment Relations Act 2000.

Employment relationship problem

[2] Ms Tawaka was employed by Sunrise Cleaning Services (Nelson) Limited (Sunrise) from 4 March 2001 as a cleaner at the ENZAFOODS (ENZA) site in Stoke, Nelson. Her duties included cleaning, laundering, inspecting and repairing overalls worn by ENZA staff.

[3] Sunrise is a duly incorporated company having its registered office in Nelson and carrying on business as a cleaning business throughout Nelson and the wider Tasman area. The business has been operating for 27 years and employs 110 staff. The two directors and owners of Sunrise are Bruce Farley and his wife Phillipa Rutherford.

[4] On 29 October 2012 Ms Tawaka was dismissed from her employment for serious misconduct for failing to follow a reasonable and lawful instruction to complete quality assurance check sheets. This followed warnings that failure to do so could result in disciplinary action.

[5] Ms Tawaka says that her dismissal was not justified. Although not altogether clear from the amended statement of problem lodged I find there is also a challenge to the fairness of the final written warning contained in the letter dated 13 September 2012. The Authority heard evidence about this and Ms Ironside dealt with this in her

final submissions. Ms Tawaka seeks reimbursement of lost wages, compensation and costs.

[6] Sunrise say that the dismissal was justified and that Ms Tawaka is not entitled to the remedies that she seeks. It does not accept that the September final written warning was unjustified.

The Issues

[7] The Authority needs to determine the following issues:

- (a) Was the September 2012 final written warning justified?
- (b) Was there a further warning given to Ms Tawaka on 15 October 2012?
- (c) Was the dismissal justified for serious misconduct and/or for poor performance?
- (d) If it was not then what remedies is Ms Tawaka entitled to?

The justification of the warning and the dismissal are assessed in accordance with the test of justification in s103A of the Employment Relations Act 2000 by the Authority objectively assessing whether Sunrise's *actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the disadvantage/dismissal occurred*. The Authority must have regard to the fairness of any process in light of the tests in s 103A (3) of the Act and any other appropriate factors. The Authority must not determine the warning or dismissal unjustified solely because of minor procedural defects which did not result in Ms Tawaka being treated unfairly.

Was the final written warning justified?

The background against which this is to be assessed

[8] Ms Tawaka was not provided with a written employment agreement when she commenced her employment. In early December 2008 all staff were sent an individual employment agreement, consent for alcohol and drug testing, standard terms and conditions of employment which comprehensively dealt with the terms and conditions of employment, the company cleaning manual and the company policy on health and safety. There was some suggestion that the documents provided were not

in a complete form. I accept the evidence of Mr Farley that all the documents were provided to Ms Tawaka and despite requests she never signed the employment agreement she was provided with. I accept Ms Tawaka's explanation about the reason she did not sign and return the agreement although she did not inform Sunrise about it.

[9] Early in Ms Tawaka's employment there were some issues raised with her about her performance. Mr Farley said that she was generally a reliable worker although he noticed throughout her employment a pattern where if he was required to talk to her about standards of cleanliness there would be a general initial improvement and then a gradual drop off in standards. Ms Tawaka was the main cleaner on the ENZA site from Sunrise. Occasionally there would be other cleaners brought in for a larger spring clean or as cover for Ms Tawaka when she was away.

[10] From early 2011 ENZA had new owners who put into place strict guidelines around maintaining standards of cleanliness and hygiene. Mr Farley was sent emails in 2011 from the factory manager of ENZA Clayton McIntyre with concerns about the washing of overalls, private washing and hygiene with cleaning the toilets. By letter dated 16 May 2011 Mr Farley amongst other matters warned Ms Tawaka that she must not launder private washing in the ENZA laundry, explaining that Sunrise could not charge ENZA more because of extra time spent and then spend that time doing private washing. The letter provided that Ms Tawaka must abide by this requirement and any transgression would result in disciplinary action. Mr McIntyre emailed other concerns to Sunrise in July 2011 and noted that approaches to Ms Tawaka on any issue were met with defence and criticism by her which made improvements difficult to achieve. Mr McIntyre implemented at that time a system of white boards on the walls of the areas cleaned by Ms Tawaka which she was required to tick and date as she cleaned the particular area. This was to give him reassurance that every area had been cleaned to a satisfactory standard. Ms Tawaka initially completed the boards but then stopped doing so.

[11] On 2 May 2012 Mr McIntyre sent an email to Mr Farley that he had over the previous two weeks been observing the cleanliness of the new amenities and was dismayed at the poor standard of cleaning. He set out a number of concerns and wrote that he had resisted writing the email for some time but *nearly all aspects of Sunrise's services here are less than optimum*. He advised that he was reviewing the services Sunrise provides and investigating all possible options for cleaning services and

laundry requirements. He noted in his email that the sign off boards in each area to signify when the area was last cleaned have been ignored. The Authority heard evidence from Mr McIntyre about his concerns at this time and he explained that due to his frustration he was considering terminating the Sunrise contract and had asked for quotes from other cleaning companies at that time.

[12] Mr Farley spoke to Mr McIntyre after receipt of the email and Mr McIntyre advised that Sunrise would have to introduce a quality assurance system at the site for Ms Tawaka to complete. Mr McIntyre said that he wanted assurances that Ms Tawaka was cleaning the areas when required and completing the task for each area so that cleaning standards could be lifted. He gave an example to Mr Farley of finding food products on the walls, urine on the toilet walls and dust on appliances. Mr Farley undertook to work on the quality assurance sheets for each of the 12 areas so that Ms Tawaka could complete them to provide assurance of cleaning and lift the standards.

[13] Mr Farley carried out an inspection of cleaning carried out by Ms Tawaka at the ENZA site. Ms Tawaka was then advised by letter dated 14 May 2012 that there were issues regarding the standard of her cleaning, management and maintenance of the laundry and repairs to overalls. There was a concern raised about Ms Tawaka spending time on her own enterprise of supplying food to ENZA staff. Ms Tawaka was advised that Mr Farley and Ms Rutherford wished to meet with Ms Tawaka to discuss the situation and show her the areas of concern. A list was enclosed with the letter of areas that needed immediate attention and on-going attention on site. Ms Tawaka was advised in the letter that the situation was serious and that a failure to address the issues on her and Sunrise's part could lead to disciplinary action and possible termination of the ENZA contract with Sunrise.

[14] A meeting took place on 22 May 2012 at the work site. Ms Tawaka attended with a support person, Tracy Cave, who is a leading hand employed by ENZA. Mr Farley and Ms Rutherford also attended the meeting. Ms Tawaka could not remember very much about this meeting. Ms Cave's evidence demonstrated that she had a much better recollection about what occurred at the meeting. Ms Cave accepted that there was a discussion about the matters Mr Farley had recorded in a handwritten note but said the notes did not include her request that Mr Farley should do a *time in motion* study. Mr Farley denied this was ever requested but said that it was agreed with Ms Tawaka that all mending and repair work to the ENZA overalls would be

removed from the list of duties to provide Ms Tawaka with additional cleaning and laundering time. The renovations resulting in the new amenities at ENZA I accept had lightened Ms Tawaka's workload somewhat as the floors only required wet mopping and not buffing. Ms Cave recalled discussion about the quality assurance check sheets and that they were going to be put out in the areas Ms Tawaka cleaned for her to complete. Mr Farley also asked for Ms Tawaka about her employment agreement and it was agreed a further one would be sent to her. That was sent out in June 2012. Ms Cave recalled a discussion that Ms Tawaka should stop supplying food to ENZA staff on ENZA premises. Mr Farley said that Ms Tawaka was again told not to use the ENZA laundry for her personal laundry. That was not in the notes but in any event Ms Tawaka had been warned about that matter previously as I have set out. I accept that Mr Farley advised Ms Tawaka she would be monitored by him and Mr McIntyre to ensure the cleaning and laundry was up to standard and that she was completing the quality assurance sheets.

[15] I am satisfied that Ms Tawaka was verbally warned at the end of the meeting on 22 May that if she failed to perform to expected standards then that could result in disciplinary action. Ms Cave recalled that warning was given to Ms Tawaka. That still leaves the dispute about the time in motion study. Ms Tawaka accepted in her evidence that she had never raised issues about her ability to undertake the tasks in the time allocated. In those circumstances I find even if there was some mention of a time in motion study it would not have been unreasonable that it not be carried out as Ms Tawaka never suggested the work load was too great.

After 22 May meeting

[16] After the meeting on 22 May 2012, Mr Farley and Mr McIntyre monitored Ms Tawaka's performance quite carefully. Mr Farley took the quality assurance sheets to the ENZA site and put one in each of the 12 areas in a clear folder on the wall with a pen so that they would be ticked off with the time noted. I am satisfied that Ms Tawaka knew how to complete them because initially there was no difficulty for her in filling them out. As a matter of common sense it was in Mr Farley's best interests to have Ms Tawaka understand and properly undertake the requirements for those sheets because the contract with ENZA was at risk. There was initially a noticeable improvement in the cleaning and laundering undertaken by Ms Tawaka and Mr Farley and Ms Rutherford complimented her on this.

[17] Some additional issues were then brought to Mr Farley's attention by ENZA. There was an email from Mr McIntyre dated 24 May 2012 that Ms Tawaka had failed to ensure the men's toilet was supplied with toilet paper. There was also an issue raised on 30 May 2012 in a telephone call from Mr McIntyre that Ms Tawaka was still supplying food for the staff canteen in Sunrise's time.

[18] On 24 August 2012 Mr McIntyre sent an email to Mr Farley and advised that he had been prompted to write again upon his discovery of *odd fluff* on the ground coming from the laundry drain. He wrote that he had asked Ms Tawaka where the fluff had come from and she explained she had brought in a coir mat from her home and put it through the washing machine. Mr McIntyre wrote that it had disintegrated. The extent of disintegration was disputed by Ms Tawaka when this was put to her at the Authority investigation. Mr McIntyre said in his evidence that the washing of the mat had the potential to cause a major food safety breach with the potential recall of food product if fluff contaminated the production line from overalls laundered after the mat. In addition, Mr McIntyre in his email of 24 August referred to the quality assurance sheets and noted that they were getting ticked all at once and then a few days all at the same time. He said that this effectively negates the process and *this has continued the erosion of my confidence that Sunrise is capable of providing adequate service for us and has forced me closer to an alternative.*

[19] Mr Farley was away overseas at the time the email was sent. On his return he went to the work site and looked at the current status of the quality assurance sheets and cleanliness. I find if there was a discussion with Ms Tawaka about these issues it was of an informal nature.

[20] By letter dated 13 September 2012 Mr Farley wrote to Ms Tawaka advising her of concerns with respect to the mat being laundered. He said that the subject of bringing private laundry onto the ENZA site had been discussed many times over a long period of time. I accept that it had. Mr Farley also advised that he performed an inspection of the site at 2pm on 4 September and found a number of discrepancies. These included quality assurance sheets not being filled in for various parts of the site that were required to be cleaned. Mr Farley set out the areas that he considered the cleaning had been inadequate and where quality assurance sheets had not been filled out. He wrote that a further follow up visit had taken place on 7 September and further discrepancies had been found. Mr Farley wrote that the company wanted to make it clear that in future these items must be abided by:

- (a) No private use of ENZA laundry;
- (b) All supplies and consumables must be maintained;
- (c) The quality assurance programme must be adhered to and kept current at all times.

[21] The letter was recorded to serve as a final written warning and there was advice that failure to perform duties to the required standards could result in serious disciplinary action being taken and the termination of Ms Tawaka's employment.

[22] Ms Tawaka then instructed Mr Amey. Mr Amey wrote by letter dated 20 September 2012 to Mr Farley and questioned whether there had been a proper process in issuing the final written warning. He said that he wanted the new check sheet system explained. He also asked that a time in motion study be undertaken so that it could be clear that the cleaning requirements can be achieved on a daily basis. Mr Amey advised that no meetings or communication to do with performance and/or disciplinary issues would take place without support being available and present. He advised that he wished to have a meeting with Ms Tawaka, himself and Sunrise. Ms Tawaka was then on leave from Monday 24 September to Sunday 14 October 2012.

Meeting 15 October 2012

[23] A meeting was duly held on 15 October 2012. Mr Amey attended with Ms Tawaka and Mr Farley attended with Ms Ironside.

[24] There was a dispute raised as to whether Ms Ironside's letter of 16 October 2012 confirming the nature of the discussions that took place on 15 October 2012 was sent to Mr Amey on the day it was written. Primarily this letter is relied on by Sunrise to record the discussion that took place the previous day. Mr Amey's view is that the letter was not received by him until 25 October 2012.

[25] Mr Farley, in response to that matter, attached records from Ms Ironside's emails to his statement of evidence showing that a letter which I am satisfied was the 16 October 2012 letter, and a scanned copy of Ms Tawaka's employment file were sent to Mr Amey at his hotmail address on 16 October 2012 at 3.10pm. Further, on that same day at 3.13pm the email printout provided by Ms Ironside shows that Mr Amey was forwarded six copies of Ms Tawaka's earning summaries. Further, on

the same day at 3.13pm Ms Ironside provided email confirmation showing that also emailed to Mr Amey were details of Ms Tawaka's leave and holiday pay records.

[26] In those circumstances I find the evidence supporting that the letter of 16 October 2012 was sent to Mr Amey on that day by email is compelling.

[27] There was no reply to Ms Ironside's letter from Mr Amey or issue taken with its contents. I have taken the letter together with the evidence I heard from Ms Tawaka and Mr Farley to determine what was discussed during the meeting. I am satisfied that there was discussion about the washing of the mat and the filling out of the quality assurance check sheets. There was a suggestion that Ms Tawaka was apologetic about the mat but Mr Farley says that she was defensive and unapologetic about that issue. There was no dispute that the quality assurance check sheets that were the subject of the 13 September warning had not been completed. Although Mr Amey had referred to a time in motion study in his letter I accept that Ms Tawaka advised during the meeting she was able to complete the quality assurance checks and that she did not say she was having difficulty completing the tasks within the allocated time. In short therefore I am not satisfied that there was any further focus on undertaking a time in motion study.

[28] I am satisfied that Mr Farley advised Ms Tawaka, as recorded in the letter of 16 October 2012, that he would be monitoring Ms Tawaka's adherence to the quality assurance system and that the expectation was that Ms Tawaka would follow Mr Farley's instruction and complete the quality assurance system including showing the start and finish time of each duty. The letter also provided that if Ms Tawaka had any difficulty with following the quality assurance system then she was to raise this immediately with Mr Farley. The letter provided that except for any difficulties raised by Ms Tawaka any further non-compliance with the quality assurance system will result in further disciplinary action being taken against her and summary dismissal could be a possible outcome of that action. It was also recorded that there would be on-going monitoring of Ms Tawaka's standard of cleaning and she was required to adhere to not using the ENZA laundry for private use. Mr Amey it was recorded had asked for a review of Ms Tawaka's wages at the meeting but Sunrise was not minded to do that and also in the letter as discussed at the meeting there was reference to Sunrise considering that the cleaning work at ENZA may be more efficiently performed by operating a split shift. Ms Tawaka's feedback was requested

within 7 days from the date of the letter. Ms Tawaka was asked to return a signed copy of her employment agreement.

Conclusion on justification of 13 September 2012 final warning

[29] I find that there were substantive reasons that justified the issue of a final written warning in September 2012. Ms Tawaka knew that she should not use the ENZA laundry for private use and that it was very important that she complete the quality assurance check sheets. An inspection Mr Farley undertook of the site on 4 September 2012 showed that some of the quality assurance check sheets had not been filled in between 24 August and 4 September and others not properly filled in but for a lesser period. I find that the final written warning was issued for a combination of misconduct in relation to the mat and performance in relation to the quality assurance system implemented and designed to lift the cleaning standards after complaints from ENZA.

[30] Section 103A(3) requires that in applying the test of justification in s103(2) the Authority must also consider elements of procedural fairness. I am not satisfied that under s103A (3) (b) (c) and (d) of the Act the concerns which formed the basis of the final warning of 13 September 2012 were raised with Ms Tawaka so that she had an opportunity to respond to them in the knowledge that disciplinary action could result. I accept that there may have been some informal discussion. This lack of process can be contrasted with how Mr Farley approached the concerns which came to light in May. Ms Tawaka knew in May what was to be discussed at the meeting which was to be held and she had a support person. She knew that the issues were viewed seriously and could lead to disciplinary action. There is no evidence of any similar process before the September warning was issued. I do not find that the procedural deficiencies prior to the September final written warning were minor and I do not conclude that they did not result in Ms Tawaka being treated unfairly. Whilst the subsequent meeting of 15 October 2012 confirmed the substantive justification for the final written warning already in force, the procedural deficiencies could not be cured as the objective assessment taken to assess justification is of the employer's actions and how it acted leading up to and at the time of the issue of the final written warning.

[31] I find that the September final written warning was unjustified because a fair and reasonable employer could not have given Ms Tawaka a final written warning

without raising its concerns with her and giving her an opportunity to respond to the concerns and genuinely considering the explanation. The warning was though substantively justified and Ms Tawaka's contribution with respect to the mat in particular was such to deprive her of any remedies.

Was there a warning given to Ms Tawaka in the 15 October 2012 meeting?

[32] I find that Ms Tawaka was warned at the 15 October 2012 meeting and this was confirmed in Ms Ironside's letter of 16 October 2012 that any further non-compliance with the quality control system would result in further disciplinary action and summary dismissal could result.

Was the dismissal justified for serious misconduct and/or for poor performance?

Further monitoring after 15 October

[33] It was discovered after 15 October that there were further instances where Ms Tawaka had not filled in the quality assurance sheets. Mr Farley said that he went out to the site every day after Ms Tawaka had completed her work from 16 October 2012 to check her cleaning and filling out of the quality assurance sheets. For the first three days Mr Farley observed that Ms Tawaka appeared to comply with the check sheets and filled them out for each area on the day the cleaning was done. He said that then he discovered from 19 October instances where check sheets had not been completed. He noted that of the 12 sheets required to be completed for the areas only 5 were completed for several days in a row and some not at all between 19-22 October. He noted that the check sheet for the amenity block was retrospectively filled in at a later date.

[34] Mr McIntyre sent a further email dated 24 October to Mr Farley advising that he had been regularly checking the check sheets and observed that they are being missed on some days and then several days being checked off at once. He wrote that at an operational level *these check sheet have been trivialised and are not an effective monitoring tool for anyone*. He also noted that cleaning standards were unsatisfactory. He requested a review of all services and *Sunrise's strategy to recover from this untenable situation*. He wrote that he was not prepared to progress into 2013 with the same systems and standard of quality.

Letter of 24 October 2012

[35] Ms Ironside by letter of 24 October 2012 to Mr Amey set out the instances of non-compliance and attached photographs of the quality assurance check sheets where they had not been properly completed and Ms Tawaka was invited to a disciplinary meeting with Mr Amey to answer the allegations. The letter provided that a possible outcome, if the allegations are substantiated, may be Ms Tawaka's dismissal. The letter provided that there were potential serious consequences for Sunrise Cleaning in that it may lose the ENZA cleaning contract because of the alleged continued non-compliance with the quality assurance system. The disciplinary meeting was scheduled for 27 October 2012 although did not take place until 29 October 2012.

29 October 2012 meeting

[36] Ms Tawaka attended with Mr Amey at the disciplinary meeting on 29 October 2012. Mr Farley attended with Ms Ironside. The meeting was recorded by both Mr Amey and Ms Ironside. A transcript was provided of the meeting by Ms Ironside. The meeting commenced with Mr Farley explaining the nature of the allegation and the issues with the quality assurance checks. There was some discussion about the implementation of the quality assurance checks. I am satisfied that the cleaning to be ticked off as performed was cleaning Sunrise had agreed in its contract with ENZA to undertake and that there was no additional cleaning required because of the quality assurance system.

[37] Ms Tawaka's explanation was that she had forgotten to fill in the quality assurance sheets for three days in a row. She accepted that she had agreed to fill them in at the earlier meeting. At one point in the meeting Ms Tawaka said *her head was spinning when she was at work*. I am satisfied from the explanations given that Ms Tawaka did not dispute that there had been a failure to fill out some check sheets and some had been filled out retrospectively.

[38] An adjournment was taken and on return Mr Farley advised that Ms Tawaka had been warned on several occasions about filling out the quality assurance forms. He said that for three days they were all done and then the quality assurance system was not followed. He said that it only takes seconds to fill the forms out and he could not accept that Ms Tawaka had forgotten to complete the lists for up to three days at a time. He said that he could perhaps accept if just one was missing but *these are*

constant. Ms Tawaka was given the opportunity to comment on Mr Farley's conclusion that there had been serious misconduct for a failure to follow a proper work instruction and a proposed penalty of dismissal. Mr Amey responded that he did not accept there had been serious misconduct and that dismissal would not be fair and just. Mr Amey asked for two weeks' notice and Mr Farley agreed to pay one week as a sign of good will.

Conclusion as to unjustified dismissal

[39] There is a difference between poor performance and misconduct. Ms Tawaka was dismissed for failing to follow an instruction to complete quality assurance sheets. The purpose of the quality assurance sheets was to lift Ms Tawaka's cleaning performance in light of concerns voiced to Sunrise by ENZA's management about the standard of cleanliness on site. It was to give an assurance to ENZA that the different areas had been cleaned at the required times. I find that the failure to fill the quality assurance sheets out should have been approached as a performance issue rather than one of misconduct because the issue was about Ms Tawaka's on the job performance.

[40] The conduct in this situation is distinguishable from the conduct which was the subject of the Employment Court judgment in *Butcher v OCS Ltd* [2008] ERNZ 367. In *Butcher* the conduct of concern was smoking and a failure to obey a lawful and reasonable instruction about that, not about a performance related matter.

[41] I have then considered whether nevertheless dismissal was justified because it was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal took place.

[42] Although Ms Tawaka did not sign an employment agreement one was provided to her and I have regard to the process for termination for poor performance in clause 13 of that employment agreement. The process required the employer to formally meet with the employee and outline the areas of dissatisfaction. It required the employee be given the opportunity of an explanation and for Sunrise to indicate what was required as satisfactory performance. The employee was to be given a defined period within which the performance criteria must be met and advice in writing specifying the performance criteria and time period. Progress was to be reviewed fortnightly. At the end of the defined period the employee was to be invited to a meeting to discuss performance and the employer could then either dismiss on

notice provided in clause 12 or grant a further period to make the necessary improvement.

[43] In accordance with the process for poor performance Mr Farley did meet with Ms Tawaka commencing in May 2012 and he outlined a number of areas of dissatisfaction. Ms Tawaka had an opportunity to explain and Sunrise indicated that it required the completion of quality assurance sheets. Ms Tawaka knew that failure to complete the sheets may result in disciplinary action. She was not given a defined period within which to meet the performance criteria (the quality assurance check sheets) although the completion of the quality assurance sheets was a daily and/or weekly task rather than an improvement matter.

[44] Ms Tawaka's filling out the quality assurance sheets was not monitored again, or at least any matters brought to her attention, until early September after Mr McIntyre complained they were not being filled in correctly. A site visit by Mr Farley established that to be the case. The letter of 13 September 2012 was sent containing a final written warning that I have found to be unjustified. No fortnightly reviews followed however after the meeting on 15 October 2012 at which time another warning was issued there was regular auditing of the filling out of the sheets and Ms Tawaka understood that failure to complete them may lead to her dismissal. She knew that if she had difficulty completing the sheets then she could contact Mr Farley. For three days the forms were filled out correctly and then again there were issues.

[45] I find that a fair and reasonable employer could conclude as at 24 October 2012 that there had been sufficient adherence in all the circumstances to the performance clause in the employment agreement to require Ms Tawaka to attend at a disciplinary meeting to hear from her about whether she should be given further time to comply with the requirement to complete the quality assurance check sheets or whether her employment should be terminated on notice.

[46] The process I find at the 29 October 2012 meeting was fair and reasonable. Ms Tawaka was represented by Mr Amey. She had an opportunity to respond to the allegations and her explanation was that she forgot to fill out the forms and was under some pressure and this was given consideration. There was no explanation that the work load was too great and that it was not reasonable for the forms to be completed. I accept Ms Ironside's submission that Mr Farley was entitled to conclude there was

no reassurance given by Ms Tawaka or Mr Amey that the forms would be filled out consistently in the future. That was I find a matter that a fair and reasonable employer could put considerable weight on in making a decision whether to continue Ms Tawaka's employment for another defined period to see if the quality assurance forms were filled out correctly and consistently. Sunrise was facing a very serious and real risk of losing their contract to clean at ENZA. The forms themselves were simple but necessary because there was a concern about the standard of cleanliness. At no point at the meeting did Ms Tawaka or Mr Amey reassure Mr Farley that the quality assurance check sheets would be consistently completed in the future.

[47] In all the circumstances that existed at the time of dismissal I find that a fair and reasonable employer could have dismissed Ms Tawaka for poor performance on notice. The dismissal was justified.

[48] Ms Tawaka was paid one week's payment in lieu of notice but the employment agreement provides for two week's pay in lieu of notice in the event of a dismissal for poor performance.

[49] Sunrise is to pay Ms Tawaka one further week's pay in lieu of notice and I so order.

Costs

[50] I reserve the issue of costs. I would encourage the parties to see if agreement can be reached. Ms Ironside has until 2 October to lodge and serve submissions as to costs and Mr Amey has until 16 October to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority