Determination Number: WA 136/05
File Number: WEA 75/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Karen Martin and David Anderson (Applicants)
AND	Foodstuffs (Wellington) Co-operative Society Limited (Respondent)
REPRESENTATIVES	David Patten for the Applicants Russell Buchanan for the Respondent
MEMBER OF AUTHORITY	P R Stapp
INVESTIGATION MEETING[1]	Wellington, 14 June 2005 1 July 2005 (Telephone Conference with representatives)
DATE OF DETERMINATION	23 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. Karen Martin and David Anderson were employed by Foodstuffs (Wellington) Co-operative Society Limited (Foodstuffs) as store persons on 16 April 2004 at Foodstuffs' Silverstream warehouse.

2. The applicants' terms and conditions of employment were provided in identical individual employment agreements (for waged employees). Both applicants worked 50 hours a week at 10 hours per day, 5 days a week.

3. On 7 December 2004 Mr Anderson challenged the validity of a warning with Mr Joseph Bolton, the General Manager of Group Operations. Mr Anderson says that Mr Bolton advised him that he would investigate the matter.

4. On 30 November 2004 Mr Raymond Check, the operations manager wrote to Ms Martin and Mr Anderson informing them of their shifts for the public holidays over the Christmas 2004 and New Year 2005 period. They were required to work their normal rostered days of

[1] Exchange of further information: 14 June 2005 (Notes from Karen Martin produced) and Submissions in writing: 8 July 2005 from the applicants' representative: 29 July 2005 confirmation from the Respondent's representative of nothing further to add)

Sunday 26, Monday 27 and Tuesday 28 December 2004 and Sunday 2, Monday 3 and Tuesday 4 January 2005. They accepted the arrangements and made themselves available to work.

5. On 21 December 2004 the applicants resigned their employment in writing and provided two weeks' notice of their intention to both finish work on 4 January 2005. They handed their written resignation to Mr Check who anticipated them working their notice out and finishing their employment on 4 January 2005.

6. On 22 December 2004 Mr Check informed Mr Anderson that he was going to receive a further warning in regard to allegedly using the wrong lifting procedure. Mr Anderson challenged this advice. Mr Anderson says that he considered that Mr Check was treating him unfairly and because of the earlier matter decided to write a formal letter of complaint (including a supporting letter from another employee). He handed the complaint to Jessie Batchelor, Foodstuffs' HR consultant. In the meantime Mr Check had gone on leave and Andrew Murphy, another manager, took over. Jessie Batchelor deposed in an affidavit handed into the Authority that she was told by Joe Bolton that they were to give the complaint to Andrew Murphy, the acting distribution centre manager, for Raymond Check to deal with when he got back from leave. Jessie Batchelor subsequently reported to Mr Bolton that David Anderson and Karen Martin were being disruptive. She deposed that she told Mr Bolton that they had resigned. Mr Bolton deposed that upon being sure about this he told Ms Batchelor to finish them up immediately and to pay them off to their last date and have them escorted off the premises. This instruction was given by Ms Batchelor to Andrew Murphy.

7. Mr Murphy says that he informed Mr. Anderson and Ms Martin that the decision had been made that they would not have to work out their notice. He told them that they were to finish up there and then and he was required to escort them off the premises. He told them they would be paid what they were entitled to. He says that Mr Anderson did not say much. Ms Martin did most of the talking. She was not very happy and asked for reasons and to speak to somebody higher up the ladder. Mr Murphy says he telephoned Ms Batchelor. She went to talk with Mr Bolton. Mr Murphy was given the information that no one else was available to talk to them. Mr Murphy telephoned Ms Batchelor back to inform her that Ms Martin wanted a reason and he wanted to know what to say. He says that Ms Batchelor told him that a reason did not have to be given, and that since they had resigned, the applicants were no longer employees. He was to tell them they would be paid out to the end of their notice

period and to escort them off the premises. Mr Murphy explained this to Karen Martin and David Anderson.

8. There was a further discussion about how much pay the applicants would be entitled to. Mr Murphy again checked this with Ms Batchelor who he says told him that as far as Foodstuffs was concerned, because they would not be at work on those statutory days, they would be paid at their normal rates and not time and a half.

9. Mr Murphy confirmed his actions in a written letter to the applicants (produced).

10. On 23 December 2004 the applicants attempted to meet with Mr Bolton. Initially Mr Bolton refused to talk to the applicants, but when he eventually did so, the applicants say that he was dismissive of them.

11. Subsequently the respondent paid the correct entitlement to the applicants including an extra day's pay each. Ms Batchelor says that when the pay had gone through Karen Martin telephoned her. Ms Martin informed her that they had been overpaid. She pointed out that they had been paid for 5 January 2005 and that she did not want the pay. Ms Batchelor says that since they had received pay for 5 January 2005 she told Ms Martin it was theirs and they should keep it. She says Ms Martin was not happy about that, but Ms Batchelor had to insist that it was hers now and she should keep it.

The issues in this matter

12. The terms of the employment agreements make provision for notice. Under clause 4(b) of the Agreement there is provision that reads:

> *"4(b) Not less than [5] working day's notice shall be given by either party of the termination of employment, provided that during the first six weeks of employment, one hour's notice shall be given by either party, and provided further, that nothing in this clause shall prevent the summary termination of employment for wilful misconduct as specified either in the handbook of company information or as matters that are capable of making out a claim for serious misconduct generally."*

13. Another provision in the employment agreements provides for termination of employment at clause 20 (a) as follows:

> *"20(a) Your employment can be terminated by giving the period of notice as outlined in the attached schedule. We can, at our discretion, choose to pay you out all or part of the notice given, instead of having you work it out."*

14. The schedules to the two employment agreements include wage details, the category of employment and a "*period of notice: (for either party)*". In both schedules there has been no agreement on the period of notice to apply.

15. The issue in this matter is whether Foodstuffs (Wellington) Co-operative Society Ltd, by its action on 22 December 2004, unjustifiably dismissed Karen Martin and David Anderson. Or was its action unjustified, and if so, was there any disadvantage to the applicants? Foodstuffs say there was no dismissal, and relied upon not having to provide any reasons in exercising its absolute discretion, to invoke clause 20 (a) of the employment agreement.

16. The applicants say they were unjustifiably dismissed and treated unfairly. Further, on their behalf a submission has been made that clause 20(a) is invalid or cannot operate because there is an absence of a notice provision in the schedule. Further, it is submitted the respondent has a duty to give reasons and justify its actions.

17. Both parties referred me to: *Coca–Cola Amatil (NZ) Ltd v Kaczorowski* [1998] 1 ERNZ 264.

18. I raised with both parties another case *Westpac Trust v Stevens* [2002] 2 ERNZ 682 for comment.

The actions of the employer on 22 December 2004

19. I conclude that Karen Martin and David Anderson reasonably concluded that upon giving their resignations to Foodstuffs that they would work their period of notice out. The period of notice is not in dispute between both parties. Raymond Check anticipated that they would work their notice out. It was not until Mr Bolton and Ms Batchelor came to a conclusion that the applicants were being disruptive that Mr Bolton decided to invoke the provision under clause 20(a) and required the applicants to finish up and be escorted off the premises. He relayed his instruction and it was carried out by the relieving manager, Andrew Murphy.

20. Mr Murphy called both applicants to a meeting and told them that they were to finish up and he was to escort them off the premises. They had no advance notice of any decision. They had no opportunity to obtain a support person or a representative. There has been no information provided on what the disruptive behaviour was other than it might have related to a complaint that David Anderson had made about the treatment he believed he was receiving from Mr Check. There would appear to have been no investigation made of this matter. It would appear that Mr Bolton's decision was a unilateral decision.

Conclusions

21. In *Coca-Cola Amatil (NZ) Ltd v Kaczorowski* [1998] 1 ERNZ 264, His Honour Chief Judge Goddard said that when the applicant decided to resign on extended notice:

> *"When she did so, she came under attack and was either dismissed or prevailed to resign with immediate effect, although on payment of a month's notice. This was clearly a dismissal. The employee's consent, if it can be called that, to the reduction of the notice period was not freely given. It was imposed. This is what constituted the dismissal. She was given no choice but was treated against her will as having resigned on one month's notice instead of three. She was escorted from the premises the same day instead of being allowed to work out her chosen notice period of three months as she was entitled to do."*

22. That decision went on appeal and the Court of Appeal decided:

> *"The first point to be made is that individual employment contracts extend to people who resign for reasons other than disaffection. Further, the individual employment contract neither requires nor provides for immediate payment in lieu of working out the period of notice. No doubt it was the employer's practice to pay out a resigning worker. But giving para. 11 its ordinary meaning, the intention is that the employee will work out the period of notice and employer practice to the contrary cannot be invoked to justify different interpretation of para. 11. A notice is an intimation by one of the parties to an agreement that it is to terminate at a specific time. If the employer in this case was dissatisfied with the length of the notice it had its own rights and remedies to seek an earlier termination and there is no evidence to warrant the conclusion that Coca-Cola itself purports to terminate the contract on one month's notice in writing."*

23. *Coca-Cola Amatil* can be distinguished only in that the termination provision under the terms and conditions of Ms Kaczorowski's employment did not have a provision for payment in lieu of any notice: (see paragraph 11 of this determination).

24. On notice the parties representatives were given by me the opportunity to comment on *Westpac Trust v Stevens* [2002] 2 ERNZ 682 which involves very similar facts to this situation, as it involves a unilateral decision. *Westpac Trust v Stevens* involved a clause in an agreement that read as follows:

> 9.2 *Where you have given four weeks notice of termination, the Bank may elect to pay you four weeks salary, or part thereof, and not require you to work out all, or part thereof, the notice period.*

25. The Court found that in invoking clause 9.2, Westpac Trust effectively placed Mr Stevens on garden leave and his employment relationship with Westpac Trust did not terminate until the expiry of the original notice period given by Mr Stevens.

26. The Employment Court was not convinced by the argument that because Westpac Trust had previously agreed that Mr Stevens could work out his notice, it was not entitled to later rely on clause 9.2 to achieve a sending away of Mr Stevens.

27. Further, although the Court accepted that Westpac Trust was required to exercise clause 9.2 in a fair and reasonable manner, it held that Westpac Trust had done so. The Court made that finding in spite of the fact that Mr Stevens had not been alerted to the possibility that the clause would be invoked, or asked for his comments, before Westpac Trust made the decision to invoke the clause. The only relevant discussion with Mr Stevens occurred after Westpac Trust had already made its final decision to invoke clause 9.2. The Court did not comment on whether failure to invoke clause 9.2 in a fair and reasonable manner would have affected the finding that there was no dismissal.

28. *Westpac Trust v Stevens* was decided under the Employment Contracts Act. The current circumstances arose under the Employment Relations Act (ERA). There is a requirement under the Employment Relations Act to act in good faith.

29. The statutory good faith obligations under the ERA are wider than those that existed when the case of *Westpac Trust v Stevens* was being considered. The statutory good faith obligations have been extended even further with the latest amendment to the ERA. This might affect what the employer had to do to *"fairly and reasonably"* to invoke clause 20(a). However, it may be that even a failure to invoke clause 20(a) in a fair and reasonable manner would not affect the conclusion that the clause had been invoked (albeit in an unfair manner) and that there was therefore no dismissal. The only possible personal grievance would therefore be an unjustified action causing disadvantage.

30. The Employment Court in *Westpac Trust v Stevens* agreed that Westpac Trust had a "valid reason" for exercising clause 9.2 (see paragraph 81: [2002] 2 ERNZ 682 page 703). That supported the Court's conclusion that the clause had been exercised fairly and reasonably.

31. In the *Westpac Trust v Stevens* case the valid reason for invoking the clause was clear evidence that Mr Stevens had breached company policy for handling difficult calls (the relevant conversation was tape recorded). In contrast, the *"valid reason"* for Foodstuffs invoking the clause was that Ms Martin and Mr Anderson had been involved in *"disruptive behaviour."* That seems to be a much vaguer allegation, without clear supporting evidence. It is arguable that such a vague allegation is not a *"valid reason"* for invoking clause 20(a),

especially where Mr Bolton made a unilateral decision without a proper inquiry involving the applicants.

32. It does not appear that Ms Martin and Mr Anderson were told that clause 20(a) was being invoked. In fact, they may have received the reasonable impression that they were being dismissed, and that their employment terminated the day they were escorted from the premises (see in particular the references in Ms Martin (paragraph 12) and Mr Anderson's (paragraph 17) affidavits to Mr Bolton's comment to Mr Anderson that *"[you] were marched off the premises yesterday, you're not employed so you will not talk to me"*).

33. I hold that Ms Martin and Mr Anderson sought reasons and were not given any reasons, which they were entitled to in good faith. Indeed Mr Murphy was not able to obtain any reasons himself as to why he was asked to inform them that they were to finish up and he was to escort them off the premises. The events that followed deprived the applicants of an ability to leave their employment with any dignity.

34. The failure of the employer to provide any reasons (where they were given in *Westpac Trust v Stevens*), and to give the applicants notice of the decision, (even after Ms Martin and Mr. Anderson reasonably concluded that upon giving their resignations to Foodstuffs that they would work out their period of notice and Mr Check anticipated that they would work out their notice too), was a breach of good faith.

35. The employer's action was therefore unjustified: it affected the applicants' employment to their disadvantage by them being prevented from leaving with some dignity. This has impacted differently on them both.

36. The applicants each have a personal grievance. There is no issue on any wages loss and other lost benefits. However both applicants are entitled to some compensation. Mr Anderson has given evidence that supports a sum of $3,000 compensation and Ms Martin is entitled to $4,000 compensation. They were both treated dismissively in trying to find out some reason for the employer's action. Mr Anderson was given an opportunity by Mr Murphy to go and say good bye to some people. They were both upset. Ms Martin's feelings would have been affected by waiting for Mr Anderson and then being escorted off the premises in front of her mother and workmates.

37. Costs are reserved.

P R Stapp
Member of Employment Relations Authority