Determination Number: AA 323/05
File Number: AEA 592/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Cecilia Faamatuainu (Applicant)
AND	Croxley Stationery Limited (Respondent)
REPRESENTATIVES	Paul Pa'u, Counsel for Applicant Paul Tremewan, Advocate for Respondent
MEMBER OF AUTHORITY	Leon Robinson
INVESTIGATION MEETING	4 August 2005
DATE OF DETERMINATION	24 August 2005

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved by the following order:-

A. Croxley Stationery Limited is ordered to pay to Cecelia Faamatuainu the sum of $2,250.00 as compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

The problem

[1] Ms Cecelia Faamatuainu ("Ms Faamatuainu") claims she has a personal grievance for unjustifiable disadvantage. She also asks the Authority to order that her employer Croxley Stationery Limited ("Croxley") comply with the duty of good faith it owes to her, and that it reinstate her. Ms Faamatuainu has not been at work since an unfortunate incident that occurred on Tuesday 26 April 2005.

[2] I accorded urgency to this investigation because there is a continuing employment relationship between the parties. The *Employment Relations Act 2000* ("the Act") has as one of its principal objects an emphasis on supporting productive employment relationships. The parties are deserving of every assistance to see that object is achieved.

[3] I have received and considered submissions. The applicant's submissions were received today, well outside the timetable I had set.

The facts

[4] It is not disputed that early on the morning of Friday 22 April 2005, Ms Faamatuainu (also known as "Losi") called another employee Ms Eseta Apasia ("Ms Apasia") a "slut". Ms Faamatuainu tells the Authority that Ms Apasia had first called her a "shit" and an "arsehole".

[5] There developed continuing tension between Ms Faamatuainu and Ms Apasia. Ms Faamatuainu's mother Mrs Sina Faamatuainu ("Mrs Faamatuainu") was also employed at Croxley.

[6] The tension escalated into an unsavoury incident in the carpark at the end of the evening's shift on Tuesday 26 April 2005 at midnight. It is not disputed Ms Apasia punched Ms Faamatuainu and pulled her hair. Ms Faamatuainu says she was punched about four times and that Ms Apasia's mother restrained her (Ms Faamatuainu) while she was being assaulted. She also tells the Authority that the Police have laid charges against Ms Apasia.

[7] All four women immediately proceeded to report the matter to the Bindery supervisor Mr Kenny McQueenie ("Mr McQueenie"). Mr McQueenie was unable to deal effectively with the matter because of the obvious heightened emotions and he resolved that he would deal with the situation the following day. He sent Ms Apasia and her mother home. Both Ms Faamatuainu and Mrs Faamatuainu tell the Authority that as they were leaving the workplace with Mr McQueenie, he told them that Ms Apasia would be sacked. Mr McQueenie denies this.

[8] The following day on Wednesday 27 April, Mr McQueenie interviewed Ms Apasia with a union delegate Mrs Joy Ihaka ("Mrs Ihaka") present.

[9] Mr McQueenie gathered written statements from Ms Faamatuainu, Ms Apasia, and other employees Mina and Sarah.

[10] Ms Faamatuainu presented Mr McQueenie with a report from her doctor detailing injuries she had sustained from the assault on her the previous evening.

[11] He then held a meeting at 6.45 pm with Ms Faamatuainu, Ms Apasia, Mrs Ihaka, Mrs Faamatuainu, and one Ms Lana Papalii ("Ms Papalii") whom Mr McQueenie had asked to attend to assist him. No objection was raised about Ms Papalii's involvement.

[12] At the meeting it was not disputed that Ms Faamatuainu had called Ms Apasia a slut and Ms Apasia had assaulted Ms Faamatuainu.

[13] I find that Mr McQueenie referred to the Croxley handbook and told Ms Faamatuainu and Ms Apasia that they could both be dismissed. I find that he then directed them to resolve the matter between them. I can understand that both Ms Faamatuainu and Mrs Faamatuainu could well have understood Ms Faamatuainu was being presented with a seemingly insidious ultimatum but I find that Ms Faamatuainu was not expressly told that if she failed to resolve the matter that she would be dismissed.

[14] Ms Faamatuainu, Mrs Faamatuainu, Mrs Ihaka, Ms Papalii and Ms Apasia all went to the cafeteria. Ms Papalii spoke in Samoan to Ms Faamatuainu and Ms Apasia using biblical references. She encouraged them towards reconciliation. Ms Apasia apologised to Ms Faamatuainu and asked for forgiveness. Ms Faamatuainu reciprocated. They both hugged and kissed and then both thanked Ms Papalii. They thanked Ms Ihaka as well. Then Ms Papalii suggested they return to Mr McQueenie.

[15] In Mr McQueenie's office, Ms Papalii advised Mr McQueenie the matter had been resolved. She told him Ms Faamatuainu and Ms Apasia had apologised to each other, hugged and kissed. Mr McQueenie was pleased.

[16] I accept that both Ms Faamatuainu and Mrs Faamatuainu did not give any indication to Mr McQueenie that they were unhappy with the resolution reached.

[17] On Monday 2 May, Ms Faamatuainu and Mrs Faamatuainu met with Mr Roy van den Hurk Croxley's manufacturing manager and Mr Mark Gilchrist Croxley's factory manager, because they were unhappy with the resolution reached. Both men advised that they would not intervene.

[18] Ms Faamatuainu did not return to work. Her lawyers wrote to Croxley by letter dated 3 May 2005 advising Ms Faamatuainu was taking sick leave. The lawyers also requested mediation.

[19] Croxley's Human Resources Manager Ms Jacqui Tong agreed to investigate the matter. Ms Faamatuainu's lawyers confirmed this action by further letter dated 4 May 2005 and also enclosed a medical certificate.

[20] The lawyers wrote again by advice dated 5 May 2005 taking issue with Croxley's indication that Ms Faamatuainu may have breached Croxley's house rules relating to verbal abuse. The lawyers sought agreement to attend mediation.

[21] Croxley's representative advised Ms Faamatuainu's lawyers by letter dated 10 May 2005, that Croxley considered the matter resolved but would issue final written warnings to both Ms Faamatuainu and Ms Apasia.

[22] By letter dated 11 May 2005, Ms Faamatuainu's lawyers advised Croxley the matter would be referred to the Authority.

[23] The parties were unable to resolve the differences between them by the use of mediation.

Discussion

[24] I understand that Ms Faamatuainu feels aggrieved. Croxley appears to me to have adopted a view that Ms Faamatuainu as equally blameworthy as Ms Apasia. Mr McQueeine told me he considered the matter was about *"two silly girls fighting over a boy"*.

[25] That view is most unfortunate. I do not agree with it. Ms Faamatuainu describes a vicious assault and that is not disputed. It is wrong to regard that alleged criminal behaviour as equally abhorrent as calling someone a "slut". One is criminal behaviour, the other is not.

[26] I agree then that Ms Faamatuainu should feel let down by Croxley. She expected her employer to sympathise with her and denounce such behaviour appropriately. She did not expect Croxley to respond by judging her equally blameworthy.

[27] It is not however, for Ms Faamatuainu to dictate to Croxley how Ms Apasia should be disciplined. It is Croxley's prerogative to decide any appropriate disciplinary action. Ms Faamatuainu has no place requiring Croxley to dismiss Ms Apasia.

[28] Ms Faamatuainu makes application for an order that Croxley be made to comply with *"implied obligations of good faith and fair dealing, including dealing with [Ms Faamatuainu] in a reasonably and culturally appropriate way."*

[29] I have already said that it was wrong for Croxley to regard Ms Faamatuainu's conduct as equally blameworthy as Ms Apasia's. That was wrong because there is never any justification or excuse for violence. I consider that Mr McQueenie's handling of the matter, although misguided, was well-intentioned. He and Ms Ihaka were motivated to preserve both Ms Faamatuainu's and Ms Apasia's employment.

Compliance and Reinstatement

[30] The resolution to this employment relationship problem does not lie with a compliance order and I decline to consider the same. I do not agree with Counsel's submission that to comply with its duty of good faith, Croxley was required to dismiss Ms Apasia. Nor do I accept that there is a case for an order for reinstatement. Ms Faamatuainu has not been dismissed. I consider other remedies are appropriate to resolve the problems between the parties.

Unjustifiable disadvantage

[31] Croxley decided it would issue written warnings to both Ms Faamatuainu and Ms Apasia. That is its prerogative. Ms Faamatuainu was sent this advice dated 29 April 2005 in the mail:-

> *Final Written Warning*
>
> *At the conclusion of our enquiries regarding the incidents in which you were involved in on Friday 22nd April 2005 and Tuesday 26th April 2005.*
>
> *We have found that you actions of offensive behaviour which include verbal and insulting comments to another member of staff on the Company premises were totally unacceptable and are regarded as serious misconduct within the workplace.*
>
> *This conduct would normally have resulted in your employment being terminated, but due to reconciliation with the other party, we are issuing this letter as a final written warning as was agreed with you and the other party at the meeting held to conclude the investigation at 10pm on Wednesday April 27th 2005.*

Any future incident of misconduct will lead to termination of your employment.

This warning shall remain on your personal file.

Ken McQueenie
Bindery Supervisor

[32] That purported final written warning was unjustified. It fails to comply with the governing collective employment agreement between the parties which at Part 8 provides as follows:-

8.2 Disciplinary Procedure

…

(d) All warnings will be recorded detailing the incident, the employee's explanation, and stating the consequences of further misconduct or substandard performance. A copy of any written warnings shall be given to the employee.

[33] Nor did the warning comply with Croxley's House Rules booklet which provides that:-

Warnings shall be issued in formal surroundings with the employee having the opportunity to have a representative or fellow employee of his/her choosing present during the meeting.

[34] The warning letter does not detail any incident or any explanation in reply. That is because the allegation was not formally and properly investigated.

[35] Ms Faamatuainu was not advised of any formal allegation against her in respect of the warning. Ms Faamatuainu was told she was liable to face disciplinary action. No details were provided to her of a specific allegation and her explanation was not sought. There was no investigation or disciplinary process adopted. As such, the resultant written warning was unjustifiable and not the actions of a fair and reasonable employer. Obviously, the matters which Ms Faamatuainu advises the Authority of would have been relevant in any such investigation. It is no answer to say the disciplinary procedure had not been formally invoked because of a reconciliation. The formal written warnings issued must first be preceded by a full and fair investigation. I find that they were not.

Determination

[36] **I find that the final written warning given to Ms Faamatuainu constitutes an unjustifiable disadvantage and Ms Faamatuainu has a personal grievance in relation to it. She is entitled to remedies in settlement of that personal grievance.**

[37] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Ms Faamatuainu's actions contributed towards the situation that gave rise to the personal grievance as I have found it, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[38] The personal grievance I have found is the unjustifiable disadvantage relating to the final written warning. I do not consider that Ms Faamatuainu contributed to the complete and total lack of process or investigation in relation to that warning. That was all Croxley's doing. But she did contribute to the "situation" which led to the unjustified warning by calling Ms Apasia a "slut". That is blameworthy conduct which requires a reduction in remedies. I note that Ms Faamatuainu alleges that Ms Apasia had first called her a "shit" and an "arsehole". I consider a reduction in

remedies of 25% is required. I make it clear, this is a not finding of contribution in respect of the alleged assault - it relates entirely and solely to the personal grievance arising out of the unfair warning.

[39] Ms Faamatuainu seeks an award of compensation. She is entitled to compensation in relation to the unfair warning in respect of hurt and humiliation that she suffered because of it. Much of the evidence I heard from her was of anxiety and trauma about the assault itself and a fear of being unsafe at the workplace in the future.

[40] I accept however that Ms Faamatuainu does have a sense of grievance about receiving a warning after she was assaulted. That warning was unfair and I accept that she has suffered hurt, humiliation and injury to her feelings because of it. I award her the sum of $3,000.00 as compensation but reduced to $2,250.00 because of contribution. **I order Croxley Stationery Limited to pay to Cecelia Faamatuainu the sum of $2,250.00 as compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

[41] While Ms Faamatuainu has sought reinstatement she is reluctant to return to work because of concerns about her physical safety with Ms Apasia. Ms Faamatuainu is justifiability concerned. However, she is not entitled to require Ms Apasia be dismissed and I do not accept the submission Croxley has breached its duty of good faith to Ms Faamatuainu in not dismissing Ms Apasia. It is necessary to facilitate Ms Faamatuainu's return to work when she is medically fit to do so and I trust that Croxley will make appropriate arrangements to ensure Ms Apasia's safety.

Costs

[42] I encourage the parties to resolve any costs issues between them but if they are unable to agree, Mr Pa'u is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Tremewan is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority