

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Deborah Ann Stewart (Applicant)
AND Century 21 Huntly, Morrinsville & Papakura Limited (Respondent)
REPRESENTATIVES Prue Dawson for Applicant
Kate Ashcroft for Respondent
MEMBER OF AUTHORITY Vicki Campbell
DATE OF DETERMINATION 30 April 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Deborah Stewart was employed by Century 21 Huntly, Morrinsville & Papakura Limited (Century 21) as the company's rental manager based in Huntly. In her role Ms Stewart was responsible for managing the rental properties, including collecting and accounting for rents. Ms Stewart's terms and conditions of employment were set out in a written employment agreement.

[2] On Friday 17 February 2006 Ms Stewart was involved in a heated exchange with her employer, Mr Doug Boyde, (Mr Boyde is also Ms Stewart's step-father). The heated exchange resulted in Ms Stewart leaving the office believing she had been dismissed. Ms Stewart claims that dismissal was unjustified.

[3] Mr Boyde denies Ms Stewart was dismissed. He says Ms Stewart resigned when she told him to "*stick his job*" and walked out of the office.

[4] The first issue for this determination is whether Ms Stewart was dismissed or resigned. If I conclude Ms Stewart was dismissed I will then go on to apply section 103A 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.

[5] I must scrutinise Century 21's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate

out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

The employment agreement

[6] As already stated Ms Stewart's terms and conditions of employment were contained in a written employment agreement. Clause 37 of the agreement sets out the required disciplinary procedures to be followed:

Before entering into a formal disciplinary process, the Employee will be given a reasonable opportunity to improve. This may be in the form of an informal verbal reprimand. The intent is to encourage the Employee to behave in a manner that is appropriate to their employment. In some cases it may be more appropriate to move directly to the formal procedures.

Before considering any form of disciplinary action an investigation into the alleged misconduct must be carried out promptly.

Prior to any disciplinary meeting, the Employee will be advised of the specific allegation and of the likely consequences should the allegation be found to be true. The Employee will also be advised that they are entitled to have a support person at the formal disciplinary meeting. During the meeting the Employee will be given an opportunity to explain or deny the allegation. The employee's explanation and any mitigating circumstances will be considered before a decision is made on the appropriate course of action.

If the Employer decides to issue a warning, this will be formally and clearly issued and confirmed in writing. The Employee will be advised of any corrective action that is required and the consequence of continued or further instances of misconduct or substandard job performance.

There are 4 steps in the formal disciplinary procedure that will generally be followed:

1. Verbal warning
2. Written warning
3. Final written warning
4. Dismissal

Note: Warnings are not limited to repetitions of the same or a similar offence but may be applied to offences of a different nature.

Was Ms Stewart dismissed?

[7] Mrs Kathryn Boyd is employed as the administrator and wages clerk at Century 21. Kathryn is Mr Boyde's daughter-in-law. One of the properties Ms Stewart manages is owned by Kathryn's father, Mr Dave Parlour. Kathryn had mentioned to Ms Stewart that her father thought she hadn't returned his emails or communicated with him about his property. Mr Parlour denies raising issues with Kathryn. He told me he preferred not to raise issues with his daughter as he liked to distinguish between personal and business matters.

[8] I find it is more likely than not that Kathryn did raise issues with Ms Stewart. That is the only sensible conclusion I can reach given that Ms Stewart then rang Mr Parlour to ensure he was clear about what was happening with his property and that he was okay with the arrangements made. Mr Parlour confirmed Ms Stewart had made contact with him and advised him there was a new tenant going into the property.

[9] Ms Stewart explained to me that the outgoing tenants in Mr Parlour's property had paid their rent and were not required to hand over their keys until such time as the tenancy came to an end. She said that there was a gap of about seven to ten days between the tenants handing over the keys and her placing another tenant into the property. Ms Stewart told me the new tenant had previously been a tenant of Century 21 so she was aware of the tenant's credit history and therefore was a preferred tenant to others who did not have that history with the company. The property was vacant for seven to ten days which was not a long time given the requirement to inspect the property and clean it. Ms Stewart told me the inspection and cleaning process can sometimes take up to a week.

[10] On 17 February 2006, just after 8.30am, Mr Boyd approached Ms Stewart to find out what was happening with Mr Parlour's property. He told me there was a note on his desk indicating that Mr Parlour was not happy with the communication he was receiving. It was common ground that Ms Stewart advised Mr Boyd that everything was under control.

[11] Mrs Shirley Boyd (Mr Boyd's wife and the applicants' mother), had previously been a director of Century 21 but resigned in October 2005 because of her view, that she and her husband had different management styles. Mrs Boyd told me that for the sake of their marriage, she and Mr Boyd needed to be independent and work independently of each other. However, Mr and Mrs Boyd continued to operate from the same offices.

[12] Mrs Boyd was present during the conversation Ms Stewart had with Mr Boyd on 17 February. She confirmed Ms Stewart's evidence about that conversation and says Ms Stewart told Mr Boyd she needed to put the best tenant possible in because she wanted to take care of this very important client (Mr Parlour).

17 February 2006

[13] Following her conversation with Mr Boyd, Ms Stewart discussed with Mrs Boyd what action she should take. Ms Stewart and Mrs Boyd were both of the opinion that Ms Stewart should email Mr Parlour to address any concerns. Ms Stewart sent Mr Parlour the following email:

Hi Dave

I have had comments from Kathryn and Doug regarding you not being informed about the property ... and not being happy with the management of the property.

If you have any problems with the management, please contact me directly so I can supply you with answers to your enquiries and attend to any problems promptly for you.

As I advised you the last time we spoke, there is a tenant ready to go into the property. She will be going in next week.

... has been informed and mentioned that they only need to be contacted if the property is empty for over 30 days.

As I have a good tenant lined up, it won't be empty that long.

The last tenant was in credit so did not need to pay extra funds at the end of tenancy.

Please contact me if you have any further issues.

[14] Before sending the email, Ms Stewart ran it past Mrs Boyd as she wanted to be sure it was kept professional. On Mrs Boyd's suggestion, Ms Stewart left a copy of the email on Mr Boyd's desk. Ms Stewart then left the office to undertake some property inspections.

[15] Mr Boyd says he made contact with Mr Parlour later that morning. Mr Boyd told me after he had spoken to Mr Parlour, he decided that Ms Stewart had lied to him. Mr Boyd became very upset. Mr Boyd says he rang Mr Parlour because he needed to acknowledge the client. He says Mr Parlour told him he had concerns about when the new tenant would be going into the property, what needed to be done and how long he would have to top up the mortgage.

[16] Mr Parlour denies Mr Boyd called him at all that day. Mr Parlour told me he would have remembered if he had. He says he recalls receiving Ms Stewart's email, to which he responded.

[17] Whether Mr Boyd spoke to Mr Parlour or not, what he did next begs belief.

[18] Mr Boyde told me that when he saw the tone of the email Ms Stewart had sent to Mr Parlour, he became concerned because he had had major problems with Ms Stewart not obeying clear instructions previously, even though no warnings had been issued to Ms Stewart. He told me he found the email offensive. In answer to questions at the investigation meeting Mr Boyd could not point to anything specifically in the email that offended him.

[19] Mr Boyde told me he rang and asked Ms Stewart to return to the office immediately. Ms Stewart says Mr Boyd rang her on her mobile telephone and that Mr Boyde yelled at her to get her "...f****g a**se back into the office!" Ms Stewart says Mr Boyd continued to yell and scream at her until she hung up on him. Mr Boyde told me he does not recall using the words attributed to him, but anything was possible in the heat of the moment. I am satisfied it is more likely than not Mr Boyd was abusive and loud in his communication with Ms Stewart. I am supported in this conclusion by the evidence of Mrs Boyd who told me Mr Boyd was in his office shouting and was very agitated.

[20] Mrs Boyd says that when she heard Mr Boyd shouting she went into his office to find out what was going on. Mrs Boyd says when she enquired about what the problem was Mr Boyd indicated the email and was very angry. Mrs Boyd explained to her husband that she

had advised Ms Stewart to write the email, that she had proof read it and thought it was very professional.

[21] Mr Boyde confirmed he was angry. He said he has a right to be angry when someone defies him and he saw the email as a cover-up for something she had not done. However, in answering questions at the investigation meeting Mr Boyd was unable to either explain to me how Ms Stewart had defied him, or what it was Ms Stewart was covering up.

[22] Ms Stewart returned to the office immediately as required. She says when she arrived she was upset and went directly to Mr Boyd's office. Mr Boyd told me Ms Stewart was yelling and screaming abuse when she came back into the office. I do not accept this evidence as being a correct portrayal of Ms Stewart's return to the office. Mr Boyd's evidence is not supported by any other witnesses. Kathryn told me Ms Stewart came into the office and "...stormed..." into Mr Boyd's office, but does not recall her yelling and screaming.

[23] Further, Mr Craig Saunders, a computer technician who was at the office working on the Century 21 computers at the time, told me that Mr Boyde was very loud. He said that generally he cannot hear a lot from Mr Boyde's office but on this particular day, he could hear him very clearly. He had never heard him yell that loud and he [Mr Saunders] was most uncomfortable. He said he saw Ms Stewart go past him when she came back to the office but never heard her say anything until the door was shut and she was in the office. He said that both Ms Stewart and Mr Boyde were shouting at each other and he said that he could hear the word "...f**k..." being used by both parties

[24] Ms Stewart says that when she entered Mr Boyd's office, she closed the door and Mr Boyd screamed at her to "sit down in the f**g chair now!" She told me Mr Boyd told her that what she had done was a dismissable offence and asked for her keys. He then told her to get out of his face and "...f**k off!"

[25] Mrs Boyd was also present when the interactions between Mr Boyd and Ms Stewart took place. Mrs Boyd confirmed Ms Stewart's evidence. Mrs Boyd told me all three of them got into a very heated discussion, something also confirmed by Kathryn. Kathryn told me she could hear all three participants yelling at each other.

[26] Mr Boyde accepted it was quite possible he used the words attributed to him by Ms Stewart. He said he does not usually speak like that, but did not expect to be abused. He confirmed that the meeting was very heated. Mrs Boyd confirmed Mr Boyde was shouting at Ms Stewart and that Ms Stewart's voice was also raised. She said Mr Boyde was extremely angry. His language was not the type of language generally used in the office and Ms Stewart asked him to stop speaking to her like that.

[27] I find Mr Boyd told Ms Stewart in no uncertain terms that she was to leave the work site. Mr Boyd says that after he told her to go, she then resigned. I am not satisfied that Ms Stewart did resign. There is no dispute that Ms Stewart retorted to Mr Boyd's comments "I'll resign". I am satisfied Ms Stewart's statement was intended to convey her intention, should the shouting and bad language continue. No sooner had the words uttered forth from Ms Stewart, Mr Boyd pounced telling Ms Stewart he would accept!

[28] Ms Stewart then left the office and has not returned. Ms Stewart attended a doctor and provided a medical certificate on Monday 20 February 2006 stating she was not fit to work. Mr Boyd says this action by Ms Stewart is not consistent with her assertion that she was dismissed the previous Friday.

[29] I am satisfied that it is more likely than not that Ms Stewart attended her doctor on her mother's advise as a result of Mrs Boyd's concerns about Ms Stewart's health. Mrs Boyd also advised Ms Stewart to obtain proof of her medical state in anticipation of challenging her dismissal. Ms Stewart handed Mr Boyd the medical certificate at the same time as she handed him back her keys on Monday 20 February 2006. Ms Stewart's actions in handing back her keys was consistent with her understanding that she had been dismissed. Mr Boyd certainly never took any steps at that time to disabuse her of that notion.

[30] Indeed, Mr Boyd confirmed at the investigation meeting that he never took any steps personally, to contact Ms Stewart following her leaving the office. He says he suggested to Mrs Boyde that Ms Stewart could return to work until she found other employment and that her job was still open for her. I am not persuaded that Mr Boyd was genuine in his desire for Ms Stewart to return to work.

[31] Mrs Boyd told me that in the week following 17 February Mr Boyd did make enquiries as to whether Ms Stewart was coming back. Mrs Boyd told Mr Mr Boyd contradicted himself, when on the one had he made it clear to her that he did not want Ms Stewart back in the office while on the other hand he was saying Ms Stewart could come back and work out her notice as long as she stayed out of his way.

Was Ms Stewart dismissed or did she resign?

[32] Ms Stewart says she was dismissed. Mr Boyd says Ms Stewart resigned. I am satisfied Ms Stewart was dismissed. I regard Mr Boyd's conduct when he shouted, swore and told Ms Stewart in no uncertain terms that she was to go, as dismissive and repudiatory. Even if I was wrong about there being an actual dismissal, Mr Boyd's conduct plainly invited a resignation from Ms Stewart which in turn, would amount to a constructive dismissal.

[33] Having determined Ms Stewart was dismissed I have given consideration as to whether Mr Boyds actions and how he acted was what a fair and reasonable employer would have done in all the circumstances.

[34] I find Mr Boyd's conduct toward Ms Stewart on 17 February 2006 to be outrageous. He failed to undertake any investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. He acted in a belligerent manner towards Ms Stewart in contravention of all notions of procedural fairness. Further, Century 21 has failed to comply with its own terms of employment and to follow its own procedures.

[35] Evaluating Mr Boyd's actions against the objective standard of what a fair and reasonable employer would have done in the circumstances leaves me to conclude Mr Boyd has acted unjustifiably. Conducting himself in the manner he did, also fell well short of the obligation on employers to be constructive in maintaining a productive employment relationship.

I find Ms Stewart's dismissal from Century 21 Huntly, Morrinsville & Papakura Limited to be unjustified both substantively and procedurally. Ms Stewart is entitled to remedies.

Remedies

[36] Having found that Ms Stewart has a personal grievance, I now make the following orders in respect of remedies.

Lost wages

[37] Ms Stewart seeks reimbursement of lost wages from 17 February to July 2006. I am satisfied Ms Stewart took adequate steps to mitigate her loss of wages, including applying for a position with Calfitor Transport and attempting to turn her jewellery hobbie into a viable business. She is entitled to reimbursement for a period of three months (13 weeks) post dismissal less earnings received by her over that period.

[38] As set out earlier in this determination, Ms Stewart was paid five weeks pay following her dismissal. Ms Stewart is entitled to a further eight weeks wages amounting to \$4,642.00 (calculated as eight weeks pay of \$4,992.00 less earnings of \$250.00).

[39] Ms Stewart seeks interest on this amount. However, this remedy is not a “recovery” for wages due, but is a discretionary remedy available for a personal grievance and interest is not available.

Century 21 Huntly, Morrinsville & Papakura Limited is ordered to pay to Ms Stewart the sum of \$4,742.00 gross pursuant to section 123(1)(b) within 28 days of the date of this determination.

Compensation

[40] I am satisfied Ms Stewart the abrupt manner of the dismissal caused humiliation, loss of dignity and injury to feelings.

Century 21 Huntly, Morrinsville & Papakura Limited is ordered to pay to Ms Stewart the sum of \$5,000.00 pursuant to section 123(1)(c) within 28 days of the date of this determination.

Contribution

[41] I have considered whether any actions of Ms Stewart contributed towards the situation giving rise to the personal grievance and which would warrant a reduction of remedies. Considering the issue has a whole, I am satisfied that no such reduction for contribution is required.

Arrears of wages – holiday pay claim

[42] Ms Stewart’s application to the Authority includes a claim for the reimbursement for five days annual holidays paid out during the five week period following her dismissal. Kathryn told me she paid the leave as a result of an instruction from Mr Boyd when he told her to make up Ms Stewart’s pay to ensure all her holiday pay was paid out during the notice period.

[43] Ms Stewart was paid until 31 March 2006. The pay records provided to the Authority show Ms Stewart was paid as follows during this period:

Dates (inclusive)	Type of pay	Number of days
20-22 February	Sick Leave	3
23 February – 1 March	Annual Leave	5
2 March – 8 March	Ordinary pay	5
9 March	Annual Leave	1
10 March – 15 March	Ordinary pay	4
16 – 22 March	Ordinary pay	5

23 March	Annual Leave	½
23 – 29 March	Ordinary Pay	4 ½
31 March	Annual Leave	½
31 March	Ordinary Pay	12 hours

[44] Century 21 has unilaterally, and with no discussion with Ms Stewart, decided to pay Ms Stewart as if she was on annual leave for parts of February and March 2006. The Holidays Act 2003 requires an employee and employer to agree as to the taking of annual holidays. In this case, Ms Stewart and Century 21 reached no such agreement. Pursuant to section 27 of the Act Ms Stewart was entitled to receive payment of her outstanding holidays in her final pay.

Century 21 Huntly, Morrinsville & Papakura Limited is ordered to pay to Ms Stewart the sum of \$873.60 gross for annual leave, incorrectly paid to Ms Stewart between February and March 2006. Payment is to be made within 28 days of the date of this determination.

Interest

[45] Ms Stewart seeks a payment on interest on the above amount. The Authority has discretion to award interest on unpaid holiday pay. The manner in which Mr Boyd went about paying Ms Stewart during her four weeks notice period had the effect of reducing her statutory entitlements. This conduct warrants an award of interest.

[46] The interest calculated under clause 11 of Schedule 2 of the Employment Relations Act is to be at a rate not greater than the 90-day bill rate at the date of the order plus 2 per cent. Interest is to be paid at the rate of 8.5%.

Century 21 Huntly, Morrinsville & Papakura Limited is ordered to pay to Ms Stewart interest on the sum of \$873.60 at the rate of 8.5% per annum from the date of filing, 28 August 2006 until the date of payment and such interest to be paid within 28 days of the date of this determination.

Summary of Orders

[47] Century 21 Huntly, Morrinsville & Papakura Limited is ordered to pay to Ms Stewart the following amounts within 28 days of the date of this determination:

- a) \$4,742.00 gross pursuant to section 123(1)(b); and
- b) \$5,000.00 pursuant to section 123(1)(c); and
- c) \$873.60 gross for annual leave, incorrectly paid to Ms Stewart between February and March 2006 and interest on that sum at the rate of 8.5% per annum.

Costs

[48] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority