Determination Number: CA 6/07
File Number: CEA 394/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Melody Anne Alexander (Applicant)
AND	The Home Centre Limited trading as Marlborough Mitre 10 Home and Trade (Respondent)
REPRESENTATIVES	David Fraundorfer, Counsel for Applicant Peter D Zwart, Advocate for Respondent
MEMBER OF AUTHORITY	Paul Montgomery
INVESTIGATION MEETING	Picton 20 July 2006 27 July 2006
DATE OF DETERMINATION	24 January 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant alleges she was unjustifiably dismissed from her employment as a Creditors' Accounts Clerk with the respondent company on the ground of serious misconduct. The dismissal was summary. Ms Alexander claims remuneration lost as a result of the dismissal in the sum of $3,440, compensation for stress, humiliation, loss of dignity and injury to feelings in the sum of $10,000 and costs.

[2] The respondent denies the dismissal was unjustified and declines to meet the remedies sought by the applicant.

[3] The parties have attempted to resolve their differences using the Mediation Service of the Department of Labour, but have been unsuccessful.

What caused the problem

[4] Ms Alexander began her employment on 27 April 2004 following an interview with Mr Hawtin, the respondent's Managing Director, and Ms Wood, from the company's chartered accountants. The applicant was employed under a written individual agreement.

[5] In June 2004, Ms Alexander was convicted of receiving a sickness benefit while employed by an employer other than the respondent. The respondent says the applicant did not notify it of the charges when being interviewed. The applicant said the charges had not been laid at the time of her

application to and interview by the respondent, and that she had received a summons two or three weeks after beginning work with the respondent.

[6] Upon reading of the conviction in the *Marlborough Express*, the respondent met with Ms Alexander and reached the decision it would continue to employ the applicant.

[7] The applicant approached Ms Rachel Rutherford to request leave in advance for the period 22 December 2004 to 12 January 2005 which Ms Alexander says was discussed and agreed to by Mr Hawtin and Ms Wood at interview. Neither Mr Hawtin nor Ms Wood could recall this being covered in the interview. However, Ms Rutherford approved the leave. She says that the approval was granted on the condition that Ms Alexander worked the weekend of 15 and 16 January 2005 to ensure the creditors' accounts were ready for payment before 20 January 2005. Ms Alexander says this condition was not in place at the time the leave was granted.

[8] A meeting took place between Ms Rutherford and the applicant on 30 November 2004 to discuss a number of concerns with Ms Alexander's performance. Ms Rutherford says they related to incorrect GST and freight charges on invoices, failing to match packing slips with invoices correctly, failing to meet deadlines for passing creditor payments to enable payment before the 20th of each month and her not being prepared to work overtime to meet month-end account runs when this was required.

[9] Ms Rutherford says Ms Alexander accepted that she was behind in her work saying she had never had to meet deadlines in her previous work and had had no previous experience in account reconciliation. Ms Rutherford says she told the applicant that if her performance did not improve in the coming months, the applicant was likely to receive a written warning. The applicant says she does not recall this meeting and denies she was formally warned.

[10] Ms Alexander went on leave on 23 December 2004 as arranged. She went to the Takaka/ Golden Bay area with friends. On 10 January 2005 weather in the area brought very heavy rain causing significant slip damage on the Takaka Hill road and the applicant says that when she attempted to leave the area on 11 January, she found the road closed. Her evidence was that she had no credit available on her cellphone and rang her mother, Debbie Alexander, using a phone card and advised her mother of the position and asked her to contact her employer to let them know she was marooned.

[11] Ms Alexander says she was unable to travel until 12 January and kept her mother informed using pay phones asking her to relay the situation to the respondent.

[12] Mrs Debbie Alexander says her daughter told her she intended to return to Blenheim on 11 January 2005. On 11 January she received a telephone call from Melody who said she was trapped in Takaka and was ringing from a pay phone as her cellphone was out of credit. Mrs Alexander said Melody asked her to ring the respondent and advise it of the situation. She says she did this that afternoon and spoke with Ms Rutherford and told her that Melody would not be at work the following day. Mrs Alexander says she rang again on 12 January *before work* and again spoke to Ms Rutherford advising her her daughter was not yet back in town. Later the same day, Mrs Alexander says she rang the respondent again around lunchtime and while unsure to whom she spoke, advised that Melody still had not returned.

[13] In the morning of 13 January, Mrs Alexander says she rang the respondent again. She said she believed she spoke again to Ms Rutherford but was not completely sure if it was her or another employee. She says she advised that the road was likely to be cleared that day. Finally, Mrs Alexander said her daughter returned to Blenheim late on 13 January and believed that she returned to work the following day.

[14] On behalf of the respondent, Ms Rutherford says Mrs Alexander had telephoned her on 11 January to advise *she had not heard from her daughter who had not returned on 9 January as planned, and also had a call from Mrs Alexander on 13 January and said she was again told the mother had still not heard from her daughter*. Ms Rutherford accepts that the applicant returned to work on Friday, 14 January 2005 but when the issue of the applicant working on 15 and 16 January to get the creditors' accounts out, Ms Alexander refused as she had made arrangements to travel to Christchurch for that weekend.

[15] A series of meetings took place that day involving Ms Rutherford, Mr Hawtin and Ms Alexander. It is common ground that no representation was offered to the applicant and that no minutes were kept. In brief, Ms Alexander denied ever agreeing to work to bring the creditors' accounts up to date over Saturday, 15 and Sunday, 16 January. Mr Hawtin asked the applicant to reconsider her decision not to work and to meet with him later that day. The group met around about 3.30pm when Mr Hawtin again asked if the applicant would work the weekend but she refused.

[16] On Wednesday, 19 January a further matter arose between the parties. The applicant approached Ms Rutherford asking if she could go to the hospital at 10.30am. Ms Rutherford said she was told by Melody that she had a specialist's appointment at that time and declined the request as the notice given was insufficient. She did agree to speak to Mr Hawtin. Mr Hawtin spoke to the applicant and granted her permission to attend but he told her that he required a letter from the specialist confirming when the appointment had been made. Mr Hawtin says he was then told the hospital visit was not an appointment but to return some scan results. The applicant then told him she would return the scans in her own time.

[17] About 10.30 that morning the applicant told the cashier she was going to morning tea, and shortly after Mrs Alexander left a message for Mr Hawtin that the applicant had gone home ill and would provide a medical certificate. That certificate was supplied when the applicant herself handed to a member of the retail staff at about 3.45pm that day. The certificate stated Ms Alexander would be fit for work on 24 January 2005.

[18] On 20 January 2005, Mr Hawtin wrote to the applicant. The text of the letter follows:

> *Dear Melody,*
>
> *I am very concerned that the events of the last two weeks and want to meet with you upon your return to work to discuss these matters, and to provide you with the opportunity of an explanation. The specific issues are:*
>
> 1. *You were due to return to work on 12 January 2005 but failed to do so until 14 January 2005 without contacting the company. You gave no explanation for your lateness and explained your failure to contact us by stating us that you had no money to buy a telephone card. This is not accepted as a valid reason. We require an explanation for your failure to return to work and a further explanation for your failure to contact.*
>
> 2. *On 19 January 2005 at 8.20am you informed Racheal Rutherford that you needed to leave work to see a specialist at 10.30am. Racheal asked why she had not been informed earlier, you stated that you had only been informed of the appointment the night before (18 January 2005). Racheal refused your request. I spoke to you, granted the request to attend the specialist and a short confirmation of when the appointment had been made. You denied the specialist appointment and stated that you wanted to leave to take an x-ray/scan to the hospital. You confirmed that*

> *there was no 10.30 appointment and agreed to take the x-ray/scan in your own time. At 10.30am you informed the cashier that you were going to morning tea, at 10.35am your mother contacted the company and stated that you had left the workplace and would provide a medical certificate. At 3.45pm you provided a medical certificate stating that you would be unfit for work until 24 January 205* [sic]. *We require an explanation for this conduct, specifically:*
>
> *(a) Did you tell Racheal that you had a specialist (or doctor's) appointment at 10.30? If so, why?*
>
> *(b) Did you have an x-ray or scan to return to the hospital on 19 January 2005? If so, please provide confirmation of this.*
>
> *(c) Why did you leave work at 10.30am?*
>
> *(d) Why did you fail to advise the company of your departure?*
>
> *Both of the above issues are potentially serious as <u>they bring our ability to trust you into question</u>. You are advised that your employment is potentially in jeopardy and you are invited to have representation at our meeting. I propose to meet with you at 9am on Monday 24 January 2005. Please contact me immediately if this time is not practicable.*
>
> *Yours sincerely,*
> *G Hawtin*
> *Managing Director*
>
> (Emphasis added)

[19] The meeting took place on 24 January and was attended by the applicant supported by her father, Mr John Alexander, and Ms Stephanie Moses, a case worker at the Marlborough Community Law Centre. The company was represented by Graham Hawtin, his wife and fellow director Shirley Hawtin, and Ms Angela Wood. Notes were taken by Ms Wood at the meeting and were provided to the Authority.

[20] The matters raised in the respondent's letter were put to the applicant for her responses. On the issue of her delayed return from Takaka, the notes record the applicant as saying she was *not quite honest* as she had a phone card but had used this to telephone her mother rather than the company directly. A little later in the meeting, the applicant admitted that she was not quite truthful and that she was not stuck due to weather or blocked roads.

[21] On the issue regarding the scan return, Ms Alexander said she had not said she needed to see a specialist. Further, she said that she intended to go to morning tea but found herself unable to return. The applicant told the meeting she left the office because no one was listening to her but did not know who to talk to about the situation in which she found herself.

[22] When asked about the arrangements regarding her holidays, the applicant told the respondent she had no recollection of asking for holidays, but later said she had asked and that Ms Rutherford had granted them. Further, she said that no conditions were attached to her taking leave at Christmas.

[23] The meeting was adjourned to the following morning to allow the respondent to consider the responses given by the applicant. It was reconvened at 11am on 25 January. The applicant was not accompanied by any support person and confirmed that this was by choice. Mr Hawtin advised

Ms Alexander that the company had considered the matters and had found they amounted to serious misconduct and that she would be dismissed.

[24] Following notifying Ms Alexander of her dismissal, Mr Hawtin gave the applicant the opportunity to resign if she preferred. He explained that if she resigned she would receive two weeks' wages but that would be in full and final settlement of any claim she may have against the company. He also explained that if the applicant wished to take a grievance action against the company, she should not resign. Given the remainder of the day and overnight to consider the options, the applicant, after attempts to negotiate a mutually acceptable arrangement, was dismissed effective 26 January 2005.

The issues

[25] To determine this case, the Authority needs to resolve the following issues:

- What were the grounds on which the dismissal were based; and
- Were these grounds, in all the circumstances, capable of amounting to serious misconduct; and
- Was the procedure adopted by the respondent that of a fair-minded and reasonable employer; and
- Was the dismissal unjustified; and
- If so, what contribution did the applicant make to the circumstances giving rise to the dismissal; and
- What, if any, remedies are due to the applicant?

The investigation meeting

[26] The Authority heard evidence in support of the applicant from Ms Alexander herself, Mrs Alexander and Ms Moses. An affidavit from Ms Melinda Higgins was also submitted. On behalf of the respondent, evidence was provided by Mr and Mrs Hawtin and by Ms Wood. Brief affidavits were submitted by Mr Barry Task and Ms Pauline Tisch in support of the respondent and in response to Ms Higgins' affidavit.

[27] I want to record the Authority's appreciation of the assistance all witnesses provided in the investigation and also express my thanks to both representatives for conducting the matter in a timely manner.

Analysis and discussion

[28] Counsel for the applicant referred the Authority to a range of Court precedents relevant to the matter in hand. Central in this case are the two considerations set out in *Northern Distribution IUW v. BP Oil NZ Ltd* [1992] 3 ERNZ 483 (CA).

> *The first is as to the gravity of the misconduct; was it sufficiently serious to justify summary dismissal. The second is whether, even if it were sufficiently serious,* [the applicant] *ought in all the circumstances to have been dismissed.*

[29] The Court of Appeal referred in this judgment to its judgment in *BP Oil NZ Ltd v. Northern Distribution Workers Union* [1989] 3 NZLR 580.

> *Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship. … In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances.*

[30] Section 103 of the Employment Relations Act 2000 sets out the test for the Authority.

> *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.*

[31] These are the appropriate tests in this matter and it is the Authority's role to apply these to the facts of the case.

[32] The lack of documentation is a considerable difficulty in this case. No record was made of the job interview which would have most likely covered whether or not the applicant did request leave in advance of her entitlement. No leave application form was completed when the applicant spoke to Ms Rutherford about her leave in advance and no records were kept of the alleged conditions under which the leave was being granted. Again, no records were kept of the meetings held with the applicant on 14 January 2005. Finally, the reasons for the applicant's summary dismissal were not set out in a formal letter to her and so the Authority has had to rely on the minutes or notes taken at the meetings prior to the decision to dismiss. Oddly, neither the applicant herself nor any of those representing or supporting her requested that the reasons for the dismissal be put in writing.

[33] In its letter of 20 January 2005 to the applicant, the respondent sets out the two issues it wishes to discuss with the applicant, namely her failure to return to work on 12 and 13 January 2005 and the events of 19 January 2005. Under questioning at the investigation meeting, Mr Hawtin confirmed that the applicant was dismissed on both of these grounds.

[34] In his submissions, Mr Fraundorfer urged me to find that the applicant's failure to return to work was insufficiently serious to justify summary dismissal and posed the question *can two days' of unauthorised absenteeism amount to serious misconduct*. In the context of these issues, he referred me to a range of precedents and in particular to *Materoa v. New Zealand Aluminium Smelters Ltd* which was a case decided in the Employment Tribunal in 2002. Counsel provided me with a copy of that decision which I have studied with considerable interest. However, I think that this case cannot be simply classified as a matter relating to absenteeism.

[35] This total matter needs to be placed in the context of the discovery of the applicant's convictions for benefit abuse. This seriously eroded the respondent's confidence in Ms Alexander's integrity. I accept that having discussed the issue with the applicant, and in engaging Ms Wood to speak with the applicant on her convictions, the company elected to maintain her in its employment. As Ms Wood deposed, the concerns were that Ms Alexander had access to the cheque book and was relief cashier with access to cash floats for the till. I think it significant that Ms Wood and Mr Hawtin came to the view, following the discussion with the applicant, that Ms Alexander … *had*

made a serious error of judgement. We chose to document the incident in her employee file and to take the matter no further.

[36] Had the applicant's unauthorised absenteeism of two days been all that was at stake here, I would almost certainly find that it was insufficient to amount to serious misconduct and certainly not to justify summary dismissal. However, the factual matrix in this particular case is considerably different. Had Ms Alexander simply absented herself for the reasons she originally conveyed to the employer, the matter would not be quite so serious. In this matter, it was the admitted deceit involved and the surrounding actions such as having her mother call the company, returning to Picton on 12 January 2005 rather than going on to Blenheim thus cribbing another day away from work, and then admitting that she could have got back earlier as she was not prevented by weather or blocked roads from returning from Takaka.

[37] It appears the applicant, having been accorded a considerable degree of understanding and leniency by her employer in respect of the convictions and having retained her job, deliberately deceived the respondent on the reasons for her not returning on time to her workplace. Further, rather than face the possibility of close scrutiny during her phone calls had she rung the company, Ms Alexander used her mother as the conduit for her messages to the respondent to shield herself from that likely prospect. The circumstances here differ markedly from those in *Materoa* where the issue of deceit was not a factor.

[38] Counsel for the applicant has submitted that the dismissal was seriously flawed procedurally. He referred the Authority to the conduct of the respondent leading up to the 24 January 2005 meeting, the meeting itself and the respondent's conduct after that meeting.

[39] During the period 14-19 January 2005, Mr Fraundorfer criticises the conduct of Ms Rutherford towards Ms Alexander, going so far as to call the behaviour bullying. The applicant raised this during the meeting on 24 January. However, the respondent did not investigate the matter, relying on its view that its Office Manager of over five years would act appropriately in respect of this staff member.

[40] The issue of the meetings on 14 January is also raised by counsel as lacking the essential requirements of natural justice in an investigation process. Having considered this aspect of the case, I am clearly of the view that these meetings were confined to resolving the issue of Ms Alexander's refusal to work the weekend. They were not investigative meetings in a disciplinary setting. They were to meet a serious operational difficulty resulting from the applicant's refusal.

[41] I accept the evidence of Ms Moses in respect of the 24 January 2005 meeting. This witness had no axe to grind and her evidence that the respondent's representative did not allow the applicant the opportunity to respond is a serious matter. I do not have a difficulty with the raising of the applicant's convictions in this meeting. The respondent was entitled to raise them in the context of an inquiry into the applicant's trustworthiness.

Determination

[42] Returning to the issues set out earlier in this determination, I find the applicant was dismissed primarily for absenting herself from work on 12 and 13 January 2005 and for deceiving her employer over the reason for her absence.

[43] I find that the applicant's behaviour in deceiving her employer was behaviour which struck at the heart of the employment relationship and was capable of amounting to serious misconduct. But for this culpable deceit, I would likely have found the absence itself fell short of serious misconduct.

[44] I find the issue over the return of the scan results and the applicant's failure to notify the respondent of her departure from the company premises on 19 January 2005 could not be classified as serious misconduct.

[45] I find that the procedures adopted by the respondent at the 24 January 2005 meeting were seriously deficient in that the applicant was denied the benefit of being able to put her views forward and the respondent failed to inquire into the issue of the relationship between the applicant and Ms Rutherford which Ms Alexander raised with her employer at that meeting. A fair employer would have adjourned pending inquiry into the alleged dysfunctional relationship and what, if any, bearing it had on the total issue being considered.

[46] I find the applicant's dismissal to be unjustified.

Remedies

[47] The applicant sought $3,760 gross for wages lost as a result of her dismissal. I am satisfied this claim is justified on the evidence before the Authority. Further, Ms Alexander seeks compensation for hurt and humiliation. Mr Fraundorfer submits that $10,000 would be *an appropriate starting point* when considering compensation.

[48] Mr Zwart, on behalf of the respondent, submits that as the applicant failed to quantify her compensation claim in the course of the investigation meeting, his client was of the view that the evidence of Ms Moses (in attachment "A") established, at a time close to the dismissal, a readiness to accept a lower quantum based on the witness's supervising solicitor's advice. Having considered this point, I am of the view that the various options set out in that document and the numbers included in those options were in the context of without prejudice negotiations with a view to resolving the grievance.

[49] There was evidence from Mrs Debbie Alexander who described her daughter as an *emotional mess*. She said the applicant *was very stressed and upset as to what had happened to her*. I found Mrs Alexander an open and reliable witness and had no reason to doubt her evaluation of the effects she observed in her daughter.

[50] Given that the applicant had been in employment with the respondent for a period of less than a year, I think it just, in all the circumstances, to award compensation under s.123(1)(c)(i) in the sum of $5,000.

[51] Having found the applicant's dismissal unjustified, s.124 requires that I consider the contribution Ms Alexander made to the circumstances giving rise to it. Her counsel submits that 10% deduction would be just in the circumstances of this case. I disagree with that submission. The applicant was a very significant contributor to her demise. But for the significant flaws in the process adopted by the respondent, it is probable her claim would have failed.

[52] Having stood back and considered the evidence and the matter in its entirety, I evaluate Ms Alexander's contribution at 50%.

Orders

[53] I order the respondent to pay the applicant the following sums:

- $1,880 gross under s.123(1)(b);
- $2,500 without deduction under s.123(1)(c)(i).

Costs

[54] Costs are reserved.

Paul Montgomery
Member of Employment Relations Authority