

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 354/08
5123780

BETWEEN LYNETTE DOYLE
 Applicant

AND NATURAL TREE PRODUCTS
 LTD
 Respondent

Member of Authority: Dzintra King

Representatives: Applicant In Person
 Phillip Walker, Advocate for Respondent

Hearing: 18 July 2008

Determination: 14 October 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Lynette Doyle, says that she has been unjustifiably dismissed by the respondent, Natural Tree Products Ltd.

[2] Natural Tree Products Ltd provides hire plants. Ms Doyle was employed as a nursery/service person to maintain the plants, carry out stock takes and associated administration tasks and landscaping.

[3] Ms Doyle signed an employment agreement in July 2007. This agreement purported to be made under the repealed Employment Contracts Act 1991.

[4] Ms Doyle was dismissed by Mr Phillip Walker, the director of the respondent, on 6 February 2008. She says the dismissal was unjustified. She seeks a reference and an apology and six months' wages as compensation for injury to her feelings.

[5] Ms Doyle says that a proper process was not followed. She was not asked to attend a meeting, was given no notice regarding the purpose of a meeting and was not invited to have a representative present.

[6] This is not disputed by Mr Walker.

[7] Ms Doyle said that at the end of the day she was in the yard as was Mr Walker. He asked her to go into the shed and asked her if she was happy like a pig in shit in her job. She said she liked her job. Mr Walker told her he would give her a month's notice, then said he would sack her there and then. He kept asking how she felt about being sacked. She did not say anything. He told her she wasn't a plant technician and asked her three times how she felt about being sacked. He smelt of alcohol. Eventually she walked out. She said he was yelling at her to go and get anything of her's in the work vehicle. She was too scared to do that at the time these events took place

[8] Mr Walker said he was very intemperate about the whole situation. Ms Doyle was refusing to follow his directions and was disruptive with the staff. He was distressed about the swearing and the disruptive behaviour. He denied that he had yelled.

Events Preceding the Dismissal

[9] Mr Walker issued a termination letter which said that despite oral warnings given in October 2007 and January 2008 he had come to the conclusion that Ms Doyle was unable to properly perform her duties.

[10] On 5 September 2007 Mr Walker received a letter of complaint about Ms Doyle's manner from an art centre to which the company supplied plants. Mr Walker said he spoke to Ms Doyle about this and she was redeployed. Ms Doyle accepted he had spoken to her but did not tell her who the client was. Not having been told who the complainant was, Ms Doyle was not able to properly address this issue.

[11] On 25 September he visited a customer in Mt Eden and noticed distressed plants. He suggested to Ms Doyle that she should have attended to deadheading and weeding. He revisited the site the next day and nothing had changed. He spoke to her about the matter and said she was confrontational. Mr Walker considered these instances constituted oral warnings. They do not.

[12] On 8 October Mr Walker received a letter from an employee complaining about Ms Doyle swearing at him and telling him “*to fuck off back to India*”.

[13] On 8 October a meeting was held with Ms Doyle, Mr John Halverson (a staff member) and Mr Walker. This meeting was to discuss the carrying out of correct stock takes. As a result a verbal warning was issued.

[14] Ms Doyle contacted AWUNZ and asked that a meeting be arranged with Mr Walker regarding his bullying and aggressive behaviour. Mr Douglas contacted Mr Walker. Mr Walker subsequently emailed Mr Douglas saying there were additional matter that he wished to discuss in a meeting.

[15] Mr Walker sent Ms Doyle a letter dated 10 October , the final paragraph of which read: “*I must advise that if an allegation of misconduct or substandard work performance is established, disciplinary action may be taken and your employment may be in jeopardy*”.

[16] A further meeting took place on 15 October. This was attended by Mr Todd Douglas from AWUNZ. The topics for discussion were inability to follow work procedures, a complaint received from a client regarding unacceptable language and unacceptable comments made regarding a staff member’s ethnicity.

[17] Ms Doyle said she recalled stocktaking being discussed; and that she did not do the paperwork properly and that the plants were in a bad state.

[18] On 15 November Mr Walker had a phone call complaining that Ms Doyle has spilt bark on the floor and had not cleaned it up and had sworn.

[19] On 6 December 2007 Mr Walker spoke with all staff about updating contact names on the call sheets and also about stock takes. He said Ms Doyle would do none of those tasks.

[20] A staff meeting was held on 7 January 2008 to discuss a restructuring issue. Mr Walker learned that Ms Doyle had subsequently expressed her dissatisfaction with the proposal to other staff. He sent her a letter about this and said she had denied making the comments when he raised the matter with her. Ms Doyle accepted she had denied making the comments and said it was because she was scared of him. Mr Walker regarded this letter as a written warning and said her discussing matters with other staff was one of the many reasons he dismissed her.

[21] There was no prohibition on Ms Doyle discussing work matters with her colleagues.

[22] Mr Walker said that between January and February she had a confrontational attitude towards staff, plants were coming back distressed and she lied to him. Matters had got to the stage where the business was floundering. He suspected she did not make regular calls and the paperwork was inadequate. It emerged that Ms Doyle was dyslexic although she had not told this to Mr Walker. It is apparent, however, that he suspected it was a possibility as there is reference to dyslexia in his notes of 6 December.

[23] On 4 February plants exchanged by a new staff member on Ms Doyle's run showed extensive overwatering causing the plant to rot. Mr Walker said this should have been picked up within the previous three to four weeks as the plant was serviced on a fortnightly basis.

[24] On 5 February he had a discussion with Ms Doyle about this and said he would show her the damaged plant.

[25] Mr Walker said that by February he was becoming increasingly concerned about the high number of damaged plants. Mr Walker said he called her to a disciplinary meeting on 6 February. Ms Doyle was angry about his accusations and told him so in "*loud and colourful language*". He concluded that she had received a

final warning about the same issues and that he couldn't tolerate her work habits continuing and so terminated her employment. He said it might be suggested that the dismissal was unjustified on procedural grounds but he was satisfied that there was sufficient proof that she was guilty of serious misconduct which, if properly investigated, would inevitably lead to dismissal.

Decision

[26] The dismissal was unjustified. No element of procedural fairness attached to it.

[27] Ms Doyle is entitled to an award pursuant to s123 (i) (c) (i). I set this at \$4,000.

[28] Ms Doyle made insufficient efforts to mitigate her losses and cannot be awarded lost remuneration. Also, she was unfortunately hospitalised for a period and would not have been able to earn an income.

[29] Mr Walker maintained that Ms Doyle had contributed to the personal grievance to such an extent that she should be disentitled to any remedies.

[30] What Mr Walker regarded as warnings were sometimes discussions about issues that fell short of being warnings. Warnings have to contain an indication that employment will be at risk if the problem continues.

[31] It is a pity that the matter of Ms Doyle's dyslexia was not discussed and that Mr Walker did not follow up his suspicion as it may well have provided an explanation for some of the paperwork problems.

[32] There were complaints about Ms Doyle's behaviour both from other staff and clients. I am not satisfied that she was given an adequate opportunity to address the 5 September complaint and the bark and swearing complaint.

[33] Ms Doyle did engage in behaviour which contributed to her personal grievance and accordingly the remedies should be reduced by 50%.

Respondent's Actions

[34] Mr Walker refused to attend a directed mediation and refused to participate in a conference call.

[35] He contended that the provisions of the employment agreement entitled him to take the matter to an independent mediator selected by himself. Clearly, the clause in question does not give him this power. Although I issued a Minute intended to clarify some concerns prior to a conference call being arranged Mr walker refused to take part in a call and therefore matters regarding the employment agreement and matters relating to mediation could not be canvassed further with him.

[36] Mr Walker wished to have a retired Judge as a mediator. He subsequently told the Authority that the same Judge would be appearing at the Investigation as his support person. Given that Mr Walker made a number of comments asserting that neither the Mediation Service nor the Authority were independent bodies, the claim that his chosen mediator would also be his support person is strange.

[37] Mr Walker wrote to an MP (which he is fully entitled to do) about this dispute and referred to the "*interference of the ERA*". He also made allegations that the Authority had "*taken the applicant's position*" and had been involved in compiling her responses to correspondence. He asserted that her letters had clearly been written on her behalf and that he believed the Authority was biased and was not independent and had been advising Ms Doyle.

[38] This comments and allegations were unfortunate and unhelpful.

[39] Neither party was legally represented so there is no issue of costs. Ms Doyle is entitled to recover her \$70 filing fee. This amount is to be paid by the respondent in addition to the compensation of \$2000.

Dzintra King

Member of the Employment Relations Authority

