

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 76/09
5121982**

BETWEEN LESILA LATUNIPULU
 Applicant

AND VEDA ADVANTAGE (NZ) LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: John Minto for Applicant
 Lewis Turner for Respondent

Investigation Meeting: 6 October 2008

Determination: 10 March 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Lesina Latunipulu (“Ms Latunipulu”) says she was unjustifiably dismissed from her employment with Veda Advantage (NZ) Limited (“Veda”).

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

The facts

[3] Ms Latunipulu commenced employment with Veda's predecessor on 14 September 1998 as a call centre customer services representative.

[4] Veda holds credit records for New Zealanders. It is a credit reporting agency formerly known as Baynet. Baycorp is a Veda client. Previously Baycorp and Veda were part of the same company.

[5] Ms Latunipulu wrote this email to Baycorp's Mr Paul Natac ("Mr Natac") on Friday 8 February 2008 at 12.16pm:-

Hi Paul

Its Lesila here I am calling if you can help me as I am trying to apply for a first time HOME LOAN and my adverse are shattering my chances of owning my own home, can you please request for my paid baycorp collection to be removed I have paid them all but I would like them to be requested to be removed PLEASE as I am trying to get a home but these baycorp collection is just happening for me. Is there any chance that you could email our assistonline.nz@vedaadvantage.com and request for them to be removed? Your help or advice would be greatly appreciated.

Regards

Lesila Lo-Latunipulu

VISS CSR Subscriber Operator

[6] At 12.29pm she sent this further email to Mr Natac:-

Sorry paul here are my baycorp that I have paid:

310079502176 \$150

312042800067 \$96

311169104599 \$435

308723303856 \$48

308723302984 \$88

304502422897 \$1176

305791600997 \$60

307755400948 \$48

These debts are all paid is there any chances of these been deleted as they have been paid and I am aware of the policy but if you request to veda for them to be removed for your reasons they can action this, Please can this be action as I'm trying so hard to get our home loan but these collections are actually holding me back or even if the 3 highest collection be removed, I will await your reply.

[7] At 12.53pm Ms Latunipulu wrote to Baycorp's Lance Crooks ("Mr Crooks"):-

Hi Lance

Its Lesila here you probably wont remember me because I was one of those little people who use to work for cashier department. Well I am writing in request that I have Baycorp Collection on my credit file which have been paid for a while but I am going for my first time home loan BUT they cannot process further because of my collection, I am pretty much stuck as there is no other option to me I have paid the collection the banks still wont approve because my collection still appears on my credit file. Is there any chance of my collections being removed? Your help or advise will be MOST APPRECIATED.

Regards

Lesila Lo-Latunipulu

[8] There was a reply from Baycorp's Wanda Reay ("Ms Reay") at 1.00pm as follows:-

*Hi Lesila
Thank you for your email
Can you please supply me with our references on the defaults in question so I can confirm that the defaults are reflecting the correct status.
Unfortunately I am unable to request these defaults be removed as this does not comply with our policy for removal with Veda.
Regards
Wanda Reay*

[9] Mr Crooks responded at 1.04pm:-

*Hello Lesila,
Yes I remember you.
I will need your address and DOB so I can locate any records. Do you know what is showing?
Regards...*

[10] At 1.08pm Ms Latunipulu replied to Ms Reay as follows:-

*Hi Wanda
Adfit 304502422897 \$1,176 and baycorp 311169104599 \$435 which are already showing as PAID. That's fine, its hard especially in situations like this ... but thanks for looking at my request thou.
Regards
Lesila Lo-Latunipulu*

[11] Baycorp management became aware of Ms Latunipulu's correspondence and subsequently informed Veda's management. Ms April Smith Veda's call centre manager ("Ms Smith") and Ms Joyce Marsters Veda's call centre team leader ("Ms Marsters") held a discussion with Ms Latunipulu on 12 February 2008.

[12] Ms Latunipulu said her emails merely asked the procedure through Baycorp and was not meant as a request for instant removal of her defaults. She said she was enquiring as to the possibility of the defaults being removed earlier than the normal listing period.

[13] Ms Smith advised Ms Latunipulu to go away and think about things and a formal disciplinary meeting would be held the following day on 13 February 2008 at 2.00pm. Ms Smith advised the matter was serious and Ms Latinupulu was encouraged to bring a support person. Ms Latunipulu was given various policy documents and relevant team correspondence including an excerpt of the Veda misconduct policy.

[14] Ms Latunipulu forwarded her email correspondence with Mr Crooks to her supervisors Ms Smith and Ms Marsters:-

This is the email sent lance crooks on Friday. I hope this helps on my investigation, I hope that you understand that I had no intention of any misconduct but just bad wording on my email.

[15] At about 5.00pm as she was leaving for the day, Ms Smith handed Ms Latunipulu a letter dated 12 February 2008 headed "Serious Misconduct Allegation" directing Ms Latunipulu to attend a disciplinary meeting at 2.30pm the following day.

[16] The following morning Ms Latunipulu gave this resignation letter to Ms Marsters and Ms Smith:-

*This is a letter of my resignation effectively immediately.
I would like to take this opportunity to thank you for all the knowledge, held and skill that I have achieved during my time with Baycorp Advantage and Veda Advantage.
This is not how I wanted to exit VA but I have thought hard about this and it wasn't easy for me as well but I have decided this and this is my best decision for me.
So once again thank you for everything and I do hope that you accept my resignation.*

[17] Ms Smith informed Ms Latunipulu that as a formal investigation had commenced Veda "was not in a position to accept [Ms Latunipulu's] request". Ms Latunipulu then withdrew her resignation.

[18] The disciplinary meeting was held on 15 February 2008 and Mr Minto attended as Ms Latunipulu's representative. There was a further meeting held on 18 February

2008. By letter dated 18 February 2008 Ms Smith confirmed Ms Latunipulu's summary termination.

The merits

[19] The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

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.

[20] The only allegation I am able to discern is that Ms Latunipulu requested to remove defaults from her file.

[21] The letter of dismissal dated 18 February 2008 repeats the allegation against Ms Latunipulu that she made a request to remove defaults from her file. Ms Latunipulu's explanation is recorded as these bullet points:-

You stated that:

- *you sent the email enquiring about their procedure and process for removal of defaults*
- *the email was not meant to be a request for instant removal of the defaults*
- *you knew the debts were paid and*
- *that you were only seeking clarification through Baycorp of what their process would be and the possibility of the debts being removed earlier than the normal duration.*

[22] The letter eventually dismisses Ms Latunipulu as these somewhat clumsy paragraphs explain:-

Your response was that having considered your explanations provided on 15 February 2008 and 18 February 2008(sic). We have considered you(sic) responses thoroughly and determined that there is sufficient reason for a decision to dismiss without notice.

...

In summary we feel the misconduct serious enough to impact upon the basic confidence and trust essential to the employment relationship.

On behalf of Veda Advantage NZ Ltd, I confirm that your conduct is seen as serious misconduct and that your employment will be terminated immediately. The reason for the termination of your employment is serious misconduct as per Section 8.3 of our Employee guidelines.

[23] The sole question for determination is whether Ms Latunipulu's admitted conduct constituted serious misconduct. The admitted conduct was a request to remove defaults. Ms Latunipulu did not attempt to interfere with the computer system herself and there is no evidence of any direct action by her and nor is that alleged.

[24] But Veda says that it is justified in reading Ms Latunipulu's emails as an attempt by her to manipulate the data on her credit file in a way she knew was not legitimate.

[25] Was Ms Latunipulu's conduct serious misconduct? Conduct which justifies summary termination must be repudiatory in nature and go to the very heart of the relationship of confidence and trust. On the question of what will constitute serious misconduct, the Court of Appeal in *North Island Wholesale Groceries v Hewin*¹ has said:-

Regard must be had to the nature and degree of the alleged misbehaviour and so to its significance in relation to the business of the employer and to the position held by the employee. In making the factual assessment, the Court must weigh the question of conduct and, viewing the matter objectively, its effect on the maintenance of the confidential relationship between them as against the severe consequences of immediate dismissal. If it is to warrant that response behaviour must go to the heart or root of the contract between them.

[26] I find persuasive the legal principles set out in *Click Clack International Ltd v James*². The Employment Court in that decision adopted the observations of the Court of Appeal in *BP Oil NZ Ltd v Northern Distribution Workers Union*³ where Hardie Boys J said:-

For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look further than this Court's judgment in BP Oil 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

¹ [1982] 2 NZLR 176 (CA)

² [1994] 1 ERNZ 15

³ [1992] 3 ERNZ 483 at page 487 (CA)

the employment relationship. In the context of a personal grievance claim under the Labour Relations Act, questions of procedural and substantive fairness are also relevant. 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. (See also Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd [1990] 3 NZLR 549, 555.)

[27] I have reached the conclusion that Ms Latunipulu was guilty only of making a request. Veda's stated justification proceeds as though there was direct interference. That of course did not occur as a matter of fact.

[28] Ms Latunipulu's request was transparent. There was no concealment or anything clandestine about her communication. She makes enquiries and invites the deletion of defaults. But ultimately her request is declined entirely in accordance with policy and no doubt Ms Latunipulu's own expectation. She accepts the refusal.

[29] I do not consider that Ms Latunipulu's mere request can be properly characterised as repudiatory conduct. If it may put it colloquially, all she did was ask. But there was no harm to Veda because Ms Latunipulu was plainly told her request could not be acceded to. I do not consider that mere "asking" is repudiatory conduct. The severe consequences of immediate dismissal was not the appropriate response to the request.

[30] I think Veda errs by elevating potential harm as though it were actual harm. Ms Latinupulu's conduct was not converted to serious misconduct because she asked for something she knew was contrary to policy. There was no harm done because she was plainly told her request would not be met. I conclude that Veda's lack of perspective and objectivity led it into error.

The determination

[31] Summary dismissal was not the appropriate response to Ms Latinupulu's mere enquiry. I do not consider that Veda's decision to summarily terminate Ms Latinupulu's employment was a decision that a fair and reasonable employer would have made in all the circumstances. **I determine that Ms Latinupulu was unjustifiably dismissed. She has a personal grievance for unjustifiable dismissal**

and she is entitled to remedies in settlement of that personal grievance.

The resolution

[32] Having made finding of unjustifiable dismissal, 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 Latinupulu's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I do not consider that Ms Latinupulu's actions can be described as blameworthy. I therefore find she did not contribute to the situation that led to the personal grievance. There is no basis therefore to reduce either the nature or extent of remedies to be provided to her.

Reimbursement

[33] Ms Latinupulu obtained alternative employment about 2.5 weeks after her termination at CNG Rothbury. I award her three weeks lost wages as reimbursement.

I order Veda Advantage (NZ) Limited to pay to Lesina Latinupulu three weeks gross wages as reimbursement.

Compensation

[34] I accept that Ms Latinupulu has suffered hurt and humiliation, loss of dignity and injury to her feelings. She was dismissed after ten years service, in my view, for making a mere request. Having regard to her evidence, her length of service and the nature of the personal grievance I award her \$8,000.00 compensation. **I order Veda Advantage (NZ) Limited to pay to Lesila Latinupulu the sum of \$8,000.00 as compensation.**

Costs

[35] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Minto is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Turner 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 without leave.

Leon Robinson
Member of Employment Relations Authority