

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 179
5304672

BETWEEN SARAH ANDERSON
applicant

AND BEACON PRINTING &
PUBLISHING LTD t/a
WHAKATANE BEACON
respondent

Member of Authority: James Wilson

Representatives: Anne-Marie McNally for the applicant
John Spring, Managing Director, for the respondent

Investigation Meeting: 30 November 2010 at Rotorua

Submissions received: 3 December 2010 from the applicant
9 December 2010 from the respondent

Determination: 3 May 2011

DETERMINATION OF THE AUTHORITY

Sarah Anderson's employment relationship problem

[1] Sarah Anderson ("Ms Anderson") was employed by Beacon Printing and Publishing ("Beacon Print") in an administrative position, for approximately 18 months. On 26 April 2010 she was dismissed for "*breach(ing) company rules by possessing alcohol at work and being under the influence of alcohol at work ... constitute(ing) serious misconduct*". Ms Anderson says that her employer did not carry out a full and fair enquiry, that she had given a credible and plausible explanation for her behaviour and that her dismissal was unjustified. She seeks compensation for the hurt and humiliation and for the wages she has lost as a consequence of her dismissal.

[2] Beacon Print say that Ms Anderson was dismissed after a thorough process and that her dismissal was justified.

The issues for determination

[3] The primary issue for determination is whether or not, in the words of section 103A of the Employment Relations Act (the Act), Beacon Print's actions, and how Beacon Print acted, in dismissing Ms Anderson *were what a fair and reasonable employer would have done in all the circumstances at the time....* If they were not then Ms Anderson has a personal grievance against Beacon Print. I will then be required to decide what remedies she should be awarded.

[4] It is now well established law that an employer, when considering dismissing an employee, must, before making that decision, undertake a full and fair enquiry into the issues about which they have a concern. If, on balance, those enquiries reveal that misconduct has occurred the employer must consider whether, under all the circumstances, that conduct was serious enough to warrant dismissal.

The events leading to Ms Anderson's dismissal

[5] The Managing Director of Beacon Print, Mr John Spring, says that following an incident in September 2009, regarding allegations of alcohol use and this allegedly affecting her work, he had occasion to remind Ms Anderson of the company rules (as detailed in the employee handbook). In particular Mr Spring says he highlighted the rule that says that *consumption, or being under the influence of intoxicating liquor during work hours, or while representing the company ...shall constitute serious misconduct, the penalty for which may be instant dismissal.*

[6] On 21 April 2003 Mr Spring advised Ms Anderson that he was investigating a complaint that she was hung over and had vomited in the staff toilets early that day and that she had had a bottle of alcohol at her desk the previous day. Mr Spring subsequently gave Ms Anderson a memorandum asking her to attend an investigation meeting to be held on 23 of April regarding *the allegation that you were hung over at work.*

[7] At the meeting on 23 April Ms Anderson admitted that she had had a bottle of Vok on her desk. Ms Anderson says that she explained that she had bought the alcohol during her lunch break and had simply brought it into the office rather than leaving it in her car. She agreed that the bottle had been passed around the office but none was consumed. She also said that the following morning she did take toothpaste and dental floss to work as was the usual practice to clean her teeth after morning tea. She said that she did spend some 10 to 15 minutes in the staff toilets as she was having trouble with her period but had not spent the 45 minutes that was subsequently suggested and she had certainly not vomited in the toilets. Shortly afterwards in what Mr Anderson says was a light hearted conversation she had jokingly said that she had drunk half the bottle of Vok the previous night.

[8] According to Mr Spring's notes:

Ms Anderson presented a number of testimonials from staff saying that from their experience that Wednesday they did not think (Ms Anderson) was hung over. This is not disputed and is not unexpected. It provides evidence that they didn't think she was hung over, it doesn't prove that she wasn't. Also they wouldn't have been looking for any signs of a hangover.

[9] At the end of the meeting, at Ms Anderson invitation, Mr Spring accompanied Ms Anderson to her home and confirmed that that in fact the bottle of Vok had not been half consumed.

[10] Following the meeting Mr Spring prepared what he referred to as an *analysis of the evidence*. In this analysis, Mr Spring says:

*I believe the likely scenario is this:
(Ms Anderson) was hung over, not from the bottle of Vok evidenced at her house, but by other alcohol. She may have been suffering from period pains as well. It is impossible to tell. On other occasions when she was suffering from period pains she has said so to the staff. She did not on this occasion. She talked to G. about a hangover and to Q. about soaking up alcohol. G. was certain she was hung over and had had previous experience of how (Ms Anderson) behaved when hung over (going to the toilet, brushing teeth, drinks at the desk, the way she looked and behaved) C. smelled alcohol at her desk.*

Ms Anderson has had previous allegations of alcohol use and this allegedly affecting her work....(I) talked to(her) about it in October 2009

There is strong evidence that (Ms Anderson) has a serious drinking problem. She has been hung over at work a number of times and this has affected the quality of her work. She has been given a verbal warning and a written warning about poor performance.

...

The undisputed possession of alcohol and being under the influence of alcohol at work are both breaches of the company rules and are viewed as serious misconduct warranting instant dismissal as stated in the company rules.

The decision therefore is that (Ms Andersons) employment is terminated immediately. (Emphasis added)

[11] At a meeting on 26 April Mr Spring advised Ms Anderson that he had gone through all the evidence and had spoken to another staff member who had not been present previously. This new witness had said that another employee, C., had told her that she had smelt alcohol in the vicinity of Ms Anderson's desk on the Wednesday in question. At this point Ms Anderson's support person asked Mr Spring if there was any other sign of strange behaviour to which Mr Spring responded that he was unsure and would have to ask C. Mr Spring then read his analysis of evidence, conclusions and decision. In response to this decision Ms Anderson indicated that Mr Spring had not covered everything in question. She said that she had never had a toothbrush or toothpaste at work, asked if Mr Spring had spoken to Q about the Vok and said that all avenues had not been investigated. She also said that she was only joking about drinking half a bottle Vok and that she did not say to G. that she had a hangover.

Discussion

[12] Ms Anderson says that she was stunned by Mr Spring's decision to dismiss her. She says that she had assumed that the misunderstanding would be put behind them but instead Mr Spring had made up his mind before he had talked to her. Mr Spring, on the other hand says that his enquiry was thorough and Ms Anderson was given the opportunity to state her case and the decision was based on sound evidence. He says that dismissal was a fitting response to a breach of the Company rules which Ms Anderson was aware of.

Was Mr Spring's investigation full and fair?

[13] Put simply Mr Spring did not accept Ms Anderson's explanation for the events of 20 and 21 April 2010. Ms Anderson did bring alcohol (a bottle of Vok) into the office which breached at least the letter of the Company rules in this regard. Mr Spring concluded that, while she did not drink half a bottle of Vok, she had come to work with a hangover. He reached his conclusion based on her previous history and what he considered to be sound evidence from other staff.

[14] There are two aspects of Mr Spring's investigation which are of concern. Firstly it is not at all clear whether Ms Anderson was made aware, at the commencement of Mr Spring's investigation, that dismissal was a possible outcome. She says she was astonished by that outcome. Mr Spring says that she must have been aware of the possibility and that at the meeting of 23 April he had quoted from the company rules regarding serious misconduct. It is a principle of natural justice that an employee should be advised, at the commencement of an investigation, not only of the conduct of which she being accused but of the possible consequences should the conduct be proven. The question however is whether or not this failure on the part of Mr Spring to specifically advise Ms Anderson of the possible consequences of his investigation made any difference to the outcome. It is my assessment that had Ms Anderson been made aware of the possibility of dismissal in a more formal manner she would still have been dismissed. She was aware of the rules and the possible consequences of breaching them. She was advised of her right to be represented during Mr Spring's investigation and was given, at least at the first meeting, an opportunity to provide her version of events. I can think of no additional information or actions that Ms Anderson could have provided or taken to reduce the likelihood of being dismissed.

[15] The second aspect of Mr Spring's investigation which is of concern is his failure to properly investigate her version of events or to disclose all of the evidence he had to Ms Anderson, before he made his decision, not only that she was guilty of serious misconduct but also to dismiss her. In his "analysis of evidence" after the meeting of the 23 April Mr Spring outlines what he refers to as "new evidence". This evidence was not put to Ms Anderson until after the decision to dismiss her was made. While he accepts that it was "difficult to know" if Ms Anderson had period pains he

appears not to have checked whether she had any evidence to support this claim (evidence that I have no doubt her medical practitioner could easily have verified if requested). Lastly Mr Spring appears to have rejected the written statements of other staff, without talking to them, on the basis that those statements did not *prove that she was not hung over*. A full and fair process would have involved at very least, interviewing the staff who were supporting Ms Anderson's position. It would also involve a further meeting with Ms Anderson before a decision to dismiss her was taken. At this second meeting Mr Spring should have advised Ms Anderson of the new evidence and the responses of her supporters when questioned, and sought her response. He should also have advised her that he was considering dismissing her, why he did not, to that point, accept her evidence and given her an opportunity to advance any additional evidence or mitigating factors. He did none of these but simply decided, after the meeting of 23 April, that Ms Anderson was not being honest about being hung over, had brought alcohol into the office, and should be dismissed. Mr Spring did not carry out a full and fair enquiry.

Was Ms Anderson guilty of serious misconduct?

[16] Ms Anderson accepts that she brought alcohol into the office. In terms of the Company rules this was serious misconduct. Mr Spring reached the conclusion that she was hung over at work and that this was also in breach of the Company rules and serious misconduct. Unfortunately this conclusion is undermined by the less than thorough investigation that Mr Spring carried out. Unfortunately Mr Spring based this conclusion not on the properly tested evidence in front of him but on his previous knowledge of Ms Anderson's earlier behaviour. While it is possible that Ms Anderson was hung over at work, that, based on Mr Springs limited investigation could not be considered probable. Given that the outcome of his inquiries was Ms Andersons dismissal, it was beholden on Mr Spring to ensure that his investigation considered every possible explanation. In my finding he allowed his assumptions override the need to consider Ms Anderson's explanations with an open mind.

Was Ms Anderson's dismissal what a fair and reasonable employer would have done?

[17] The answer to this question is not as straight forward as the comments I have made above might suggest. Ms Anderson did bring alcohol into the workplace when she must have known that this was against the Company rules. She did have a history of problems in regard to alcohol and had been reminded of the Company's expectations in this regard. On the other hand, Mr Springs investigation suggests that he did not properly consider Ms Andersons explanations for her behaviour – explanations which I must say I found plausible. Would a fair and reasonable employer have dismissed Ms Anderson? On balance, by a small margin, I find the answer is no! Dismissal is an extreme sanction. Where there are doubts and mitigating circumstances, lesser sanctions should be considered. Ms Anderson says (and it seems reasonable) that her bringing alcohol into the office was entirely innocent. She says that she was not hung over and offered what is a plausible explanation for her behaviour. A fair and reasonable employer would have, and in my finding should have, issued Ms Anderson with a formal, written final warning.

Determination

[18] For the reasons set out above, I find that Ms Anderson' dismissal was unjustified and she has a personal grievance against her former employer. Beacon Print.

Remedies

Contribution

[19] Before considering what remedies should be awarded to Ms Anderson I am required in terms of section 124 of the Employment Relations Act (the Act) to consider whether or not she *contributed to the circumstances which gave rise to (her) personal grievance*. If she did I am required to reduce any remedies accordingly.

[20] Ms Anderson did breach Company rules by bringing a bottle of alcohol into the office. If she had not done so perhaps the subsequent complaints and investigation regarding her behaviour the following day would not have occurred. Because of this breach of the rules I find that Ms Anderson contributed 25% to the circumstances which gave rise to her dismissal and the remedies set out below a reduced accordingly.

Compensation for hurt and humiliation

[21] Ms Anderson says that it was absolutely humiliating to be dismissed for being under the influence of alcohol at work and that it was frustrating that Mr Spring dragged in allegations that she had never had a chance to respond to, including that the incident was a culmination of her work performance declining. Since the dismissal she says she had trouble sleeping and been admitted to hospital at one point as a result of chest pains caused by her anxiety. She produced a medical certificate to indicate that her doctor had prescribed sedatives because of the high degree of stress that she was experiencing. She says she also felt humiliated and embarrassed by the manner of her dismissal in that she was required to clean out her desk and leave the building in full view of her colleagues.

[22] I accept that Ms Anderson was humiliated and distressed by her dismissal and she is entitled to receive compensation for that distress. After taking into account the 25% contribution she made to the circumstances that led to her dismissal, Beacon Print is to pay Ms Anderson \$3000, without deduction, in terms of section 123(1)(c)(i) of the Employment Relations Act for the hurt and humiliation her unjustified dismissal has caused her.

Recovery of wages

[23] Ms Anderson says that she had trouble finding a new job following her dismissal but did find a part time position at her daughter's child care centre. During the first 3 months after her dismissal she would have earned \$4,440 net at Beacon Print but earned only \$1663.09 at the child care centre – a shortfall of \$2,776.00 net. In the following 3 months she earned \$2,4832.82 at the child care centre– a shortfall of \$1958 net from what she would have earned at Beacon Print.

[24] Given the reasons for her dismissal, the relatively small size of the job market in Whakatane and the economic conditions prevailing at the time, I accept Ms McNally's submission that Ms Anderson should be reimbursed for 6 months loss of wages. However this amount must be reduced by 25% to take account of Ms Anderson's contribution and the wages she earned at the child care centre during that time. My calculation of the wages to be reimbursed is \$3550 (wages lost from Beacon Print minus wages earned at the child care centre less 25% for contribution). This amount will need to be adjusted to a gross amount for tax purposes to ensure that Ms Anderson receives \$3550 net after tax.

[25] **After taking into account her contribution, Beacon Print is to pay Ms Anderson \$3550.00 net of tax as reimbursement of the wages she lost as a result of her unjustified dismissal.** Should the parties disagree over the calculation of this amount they should first try and reach agreement as to the correct calculation. If they are unable to agree they may refer the matter back to the Authority, with the disputed figures, for final calculation.

Costs

[26] Costs are reserved. If the parties are unable to agree on this matter between themselves Ms Anderson may file and serve a submission in respect to costs within 28 days of the date of this determination. Beacon Print will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority