

**ATTENTION IS DRAWN TO THE
ORDER PROHIBITING PUBLICATION
OF CERTAIN INFORMATION REFERRED
TO IN THIS DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 63
5341102

BETWEEN

ANNE KEMP
Applicant

AND

HAWERA CINEMA 2 TRUST
INCORPORATED TRADING
AS HAWERA CINEMAS
Respondent

Member of Authority: P R Stapp

Representatives: Lars Hansen Solicitor for Applicant
Barry Henderson Counsel for Respondent

Investigation Meeting: 29 March 2012 at New Plymouth

Determination: 5 June 2012

DETERMINATION OF THE AUTHORITY

Prohibition on publication of information and names

[1] The Authority agreed by consent to a prohibition on the publication of financial information provided by the Hawera Cinema 2 Trust Inc (the Trust and or the cinema). Also, by consent the names of people not directly involved in the Authority's investigation are prohibited from publication.

Employment relationship problem

[2] This is an employment relationship problem involving one black jelly bean and/or a handful of lollies, a packet of salt and vinegar chippies, the operation of a candy counter cash machine (the till), an allegation made by Mrs Kemp of dishonesty

on the part of the manager's son, and personal relationships and supervision at the Hawera cinema. Arising out of these matters a private mediation was arranged by the cinema's manager Mrs Kirsty Bourke.

[3] Mrs Kemp claims that she was unjustifiably disadvantaged by a suspension from work on 10 January 2011 and a written warning in her employment on 17 January 2011. Mrs Kemp was subsequently dismissed on 19 January 2011 by Mrs Bourke. Mrs Kemp claims her dismissal was unjustified.

[4] During the Authority's investigation meeting the Trust's counsel, Mr Henderson conceded in his submissions that the procedures for the suspension, the warning and dismissal were flawed. However, the Trust contends that its actions were otherwise justified. Also, the Trust contends that Mrs Kemp contributed to the situation culminating in her dismissal. The Trust denies Mrs Kemp's claims to resolve the employment relationship problem.

Issues

[5] There are a number of factual disputes between various witnesses, but the employment relationship problem crystallises around what reasons Mrs Bourke had for deciding to suspend, warn, and dismiss Mrs Kemp from her employment. In particular the primary issues are:

- a. Whether the employer's action of suspension was what a fair and reasonable employer would have done in all the circumstances at the time?
- b. Whether the employer's actions of warning were what a fair and reasonable employer would have done in all the circumstances at the time?
- c. Whether the employer's action of dismissal was what a fair and reasonable employer would have done in all the circumstances at the time?

- d. If there is a personal grievance what remedies apply to resolve the employment relationship problem?
- e. What is to happen in regard to costs?

Mrs Kemp's behaviour in the workplace and suspension from work

[6] Mrs Kemp started work on 18 May 2010 as a supervisor and reported to the manager of the theatre. She was employed on a roster and paid \$13.25 per hour. There was no job description appended to the individual employment agreement as there was supposed to be.

[7] The Trust runs a small cinema in Hawera. It employs a few people, including another supervisor who crossed over rosters with Mrs Kemp. There were a number of junior candy bar employees required to work with Mrs Kemp stocking, preparing and selling confectionary. There is a manager in charge and she reports to the Trustees and had the ability to get advice from a lawyer.

[8] During her employment an issue arose in regard to the signing off of duties involving one of the junior candy bar employees. Mrs Bourke says that Mrs Kemp altered terms and conditions that she had no authority to do. This matter becomes relevant later over a number of findings reached by Mrs Bourke, but essentially related to Mrs Kemp's role in supervising the staff.

[9] Also there was a matter about Mrs Kemp's use of the cash till in the middle of the candy bar and how she allegedly behaved over what amounted to an attempt to ensure the correct procedures were followed.

[10] Also during Mrs Kemp's employment the other supervisor informed Mrs Bourke that she had witnessed Mrs Kemp take one black jelly bean out of a lolly jar to eat. She says she said to Mrs Kemp taking the jelly bean was theft. The supervisor says that Mrs Kemp previously had taken hand full's of confectionary and that she ate ice-cream. Mrs Kemp denies this. It is common ground that employees were allowed a couple of drinks and could have pop corn, but nothing else, unless they paid for it.

[11] On 10 January 2011 Mrs Kemp was sent home by Mrs Bourke on full pay. This was after Mrs Bourke and the Trust's chairperson decided that Mrs Kemp's alleged behaviour that day towards Mrs Bourke was unacceptable and inappropriate in front of other employees and in public. Mrs Kemp denied the allegations about her personal behaviour towards Mrs Bourke. Mrs Kemp had no notice of any particular allegation and the decision had been made before she had any opportunity to discuss a proposal to suspend her. The parties remain in dispute about what happened that day that upset Mrs Kemp.

Mrs Kemp's complaint about Mrs Bourke's son

[12] Mrs Kemp made an allegation that Mrs Bourke's son, a candy bar assistant, had taken a packet of salt and vinegar chippies without paying for it. Mrs Bourke interviewed a number of the employees. She talked to her son about the matter of the payment for the bag of chippies. She believed that he could provide a receipt and the detail from the bank, which (much later) have been produced. Mrs Kemp believed Mrs Bourke's conclusion was unfair because Mrs Bourke investigated her own son, and as such Mrs Kemp decided that she did not want to deal with Mrs Bourke.

Mrs Bourke's findings

[13] On 12 January 2011 a letter (Document J) from Mrs Bourke requested Mrs Kemp to attend a meeting to discuss what Mrs Bourke called seven (7) "findings". Her "findings" were:

1. *The use of inappropriate language in the workplace*
2. *Eating Cinema 2 confectionary/breach of Hawera Cinema 2 policies*
3. *Not giving clear instructions to junior staff*
4. *Attend a workshop to improve supervisory skills*
5. *Clarify who you report to*
6. *Job Description*

7. *Non compliance of clauses 4.2 (i), (iii) and (vi) of your employment contract.*

[14] There were no details provided on at least the first two findings: first that Mrs Kemp had used inappropriate language and second that she had been eating the confectionary. Indeed there were no reasons disclosed how Mrs Bourke came to believe what she had heard about Mrs Kemp taking a hand full of lollies, given that Mrs Kemp denied the allegation of eating confectionary. However, Mrs Kemp did admit taking the one black jelly bean. This created some acrimonious discussion at the time between Mrs Kemp and the other supervisor. I hold that this gives a hint about Mrs Kemp's behaviour at work, and I further hold that when she took the jelly bean she was being mischievous. This is because she continued to take the one black jelly bean when she knew she was not allowed to eat confectionary without paying for it in reaction to the supervisor's comment to her.

[15] The other matters were discussion issues about Mrs Kemp's work. The last matter was about breaches and compliance with Mrs Kemp's employment agreement. There was also an opportunity given to Mrs Kemp to discuss the dishonesty allegations she had made against Mrs Bourke's son. Also, Mrs Kemp was requested to provide a list of any issues she wanted to discuss. Mrs Bourke then put in place arrangements to meet Mrs Kemp in a private mediation meeting.

A private "mediation meeting"

[16] There are a number of aspects that are relevant on what has become called "*the mediation meeting*". First the Trust obtained the services of a person purporting to be a mediator. The person was engaged by Mrs Bourke free of any charge to do the role. The person was an acquaintance of Mrs Burke's and a friend of the other supervisor. That person met Mrs Bourke at the Trust a few days before and was seen by Mrs Kemp. Mrs Kemp became concerned about the independence of that person when the person turned up at the mediation meeting held on 17 January 2011 as the mediator.

[17] Second, Mrs Kemp had no input and/or any say about the mediator for the meeting. Mrs Kemp attended with her husband.

[18] Third, there is an issue about the role of the mediator acting independently when she did a lot of the talking for Mrs Bourke and gave Mrs Kemp three oral warnings in regard to three of the matters raised. Then the mediator handed Mrs Kemp a written warning. The warning had been prepared and the decision made to issue it prior to the meeting. These are not what a fair and reasonable employer would have done, I hold. A fair and reasonable employer would not have engaged the mediator actively on the side of the employer and have her conduct the meeting in essence for the employer and deliver prepared warnings. I hold that the “mediator” was not therefore impartial.

[19] Mrs Kemp was informed that it had been found that she had sworn inappropriately, had eaten confectionary without paying and had not given clear instructions to other staff. Since Mrs Kemp had denied the allegations Mrs Bourke was required to provide reasoning for such a decision, which she has not done, even at the investigation meeting.

[20] Outcomes of the “mediation meeting” were that Mrs Kemp and Mrs Bourke would need to discuss a list of Mrs Kemp’s allegations and that they were to make arrangements for Mrs Kemp to attend a workshop to improve supervisory skills. The two last matters involved Mrs Kemp’s reporting to Mrs Bourke and having a discussion about her job description. The reporting to Mrs Bourke became an issue because Mrs Kemp only wanted to deal with the Trust and not Mrs Bourke. Mrs Kemp had formed the view that Mrs Bourke was not objective and lacked independence when her son was the one Mrs Kemp accused of dishonesty. Mrs Bourke accused Mrs Kemp of avoiding her. Mrs Bourke insisted that she had the responsibility in the reporting line as Mrs Kemp’s manager. Both of them were talking past each other and I hold that Mrs Kemp’s attitude of giving an impression that she would not deal with Mrs Bourke was wholly unhelpful.

[21] On the next matter, there was no job description, yet it was supposed to be attached to the employment agreement. Mrs Bourke relied on the details for Mrs Kemp’s role from the job advertisement.

[22] In all, there are seven matters Mrs Bourke wanted to mediate and move forward on. At the time she considered the mediation was her *plan A* to move on. In the event that the mediation meeting did not work, Mrs Bourke had no *plan B*. However she considered that Mrs Kemp's attitude was still not helpful.

[23] At the end of the meeting Mrs Kemp believed that she could return to work on a new roster arrangement on 23 January, but events meant that she never would return to work.

The dismissal

[24] Later Mrs Bourke received the mediator's minutes of the meeting and discussed them with the Trust's chairperson. In addition, she had information from her investigation interviews about Mrs Kemp's allegation of dishonesty and that other staff did not want to work with Mrs Kemp. Also, Mrs Bourke had a letter from her son who had obtained legal advice about working shifts with Mrs Kemp. He did not want to work the same roster with Mrs Kemp because of the allegations Mrs Kemp had made about him. Mrs Bourke and the Trust's chairperson then decided that it would be better to dismiss Mrs Kemp as they considered there were no other options. A letter was written up and arrangements were made for a relative of Mrs Bourke's to deliver it to Mrs Kemp personally at her home, where it was given to her.

[25] Mrs Bourke's reasons for the dismissal were:

- a. That Mrs Kemp refused to meet with the manager to present her employment issues and was unwilling to develop a working relationship.
- b. That Mrs Kemp refused to attend a supervisor's workshop.
- c. That Mrs Kemp refused to accept the manager as her direct line of report.

[26] Also, Mrs Bourke concluded that Mrs Kemp's attitude at the private mediation was both negative and destructive; that Mrs Kemp demonstrated a complete lack of

any accountability for the behaviour that had been complained about and her disruptive conduct, and consequently that Mrs Kemp's attitude and conduct fatally undermined the importance element of trust and confidence. She decided that Mrs Kemp's relationship with the cinema had been irrevocably destroyed.

[27] A personal grievance was raised on 18 February 2011 (by letter Document R).

[28] The parties did attend mediation, but it falls to the Authority to make a determination.

Determination

[29] Mrs Kemp has a personal grievance because:

- a. The suspension and warning procedure were grossly flawed. Mrs Kemp had no input before the decisions were made to send her home and to issue her with the warning. In other words the decisions had been made before Mrs Kemp was informed and there was a step missing that should have involved Mrs Kemp having an opportunity to give her input.
- b. The suspension was carried out contrary to the individual employment agreement, and thus in breach of the agreement. This put Mrs Kemp's employment at risk. A fair and reasonable employer's actions would not have included the process followed by the Trust, I hold. Mrs Kemp did not, however, lose any wages.
- c. The dismissal was unfair because Mrs Kemp was not put on notice that the findings involved the possibility that her employment was in jeopardy and there was a complete absence of a disciplinary discussion about the penalty. A fair and reasonable employer would have allowed Mrs Kemp an opportunity to mitigate on any findings and to have some input on the penalty. Both were missing and are significant defects, I hold.

- d. A fair and reasonable employer would not have come to a conclusion without a proper process that Mrs Kemp's behaviour meant that the "*relationship had been irrevocably destroyed*" [dismissal letter 19 January 2011]. I am supported in this conclusion because:
- i. Mrs Kemp did not refuse to meet with Mrs Bourke as no arrangements for a meeting had been put in place. Indeed given the continuing problem there was still mediation available from the Department of Labour. A fair and reasonable employer would not have found this was a breach of the employment agreement, I hold.
 - ii. Mrs Kemp did not refuse to attend a supervisor's workshop when that proposal was only ever put up for discussion. It is entirely possible both parties have misunderstood each other in regard to the issues. Mrs Bourke acted precipitously in regard to making decisions, given the mediator's minute that contained findings. Also, it is more likely than not that there has been some confusion about what Mrs Kemp meant by not wanting to deal with Mrs Bourke, given the issue she had over Mrs Bourke's involvement in the dishonesty allegation with her son, the general issues of performance, and the disciplinary process that have become mixed up together. A fair and reasonable employer would not have concluded that Mrs Kemp's behaviour was in breach of the terms of her employment in regard to the reasons in the dismissal letter
 - iii. Mrs Kemp was not provided with the opportunity to have comment and input on Mrs Bourke's finding in the dismissal letter that Mrs Kemp's attitude at the mediation was "*destructive and negative*". This was an entirely a new matter devoid of any investigation and disciplinary process, I hold. Given the differences that remained following the "mediation" the situation was that the mediation had not worked and that no other disciplinary meeting had been

arranged. Moreover there is the underlying existence of the performance issues, which mean that the Trust has not been able to establish that the matters relied upon were the real reasons for the penalties and dismissal. Indeed the reasons provided by Mrs Bourke in the letter of dismissal were all new reasons. They had never been put to Mrs Kemp in a disciplinary process for her comment and input and there was no discussion on a penalty.

[30] Therefore I hold that Mrs Kemp has a personal grievance.

[31] I hold that even although the Trust involves a small theatre operation the defects in the procedure followed by Mrs Bourke, even if she was acting on advice, were significant failures, and thus, flawed. Also, Mrs Bourke did a lot of consulting with people on the Trust and the Trust's lawyer, without providing the same opportunities to Mrs Kemp before any decisions were made. I am not satisfied that the financial figures prove that the Trust is not able to make arrangements to meet its liabilities on the remedies in the future. In any case that is more for a matter of enforcement than the current proceedings, I hold.

[32] Mrs Kemp is entitled to remedies for lost wages and compensation claimed for hurt and humiliation. Her lost wages for three months is based on \$505.56 per week gross. Her earnings since her dismissal have been \$2,071.33. As this is a net sum then it will need to be deducted from the after tax sum of her lost earnings. The total amount of lost wages payable is \$6,572.28 gross before any other deduction. She has attempted to mitigate her losses by getting other work and she said she had tried in various ways to get a new job.

[33] Mrs Kemp has claimed compensation, but left the compensation to the Authority to decide. The applicant has requested that the remedies should be treated globally and I will do this for the compensation.

[34] I assess compensation in the amount of \$4,000. This relates to the hurt feelings Mrs Kemp described. The process followed by the Trust would have added to Mrs Kemp's hurt because the process was so flawed and the decisions made

unilaterally. However I hold that Mrs Kemp's mischievousness and unhelpfulness leaves me with the impression that she would not have been hurt as much as she claims.

[35] I have to assess any contribution under s 124 of the Act. The thrust of the Trust's evidence was that Mrs Kemp refused to talk and meet appropriately. I hold that from the evidence there seems to have been some misunderstanding around that and it is likely that both parties have been confused about each other's position in regard to the meetings. However, Mrs Kemp can not be blamed for the Trust's process that has been the cause of the employment relationship problem, I hold.

Orders of the Authority

[36] Mrs Kemp has a personal grievance. She was unjustifiably disadvantaged by the suspension and the warning. The dismissal was unjustified. Mrs Kemp established that she had lost wages and that she should be compensated for humiliation, loss of dignity and injury to her feelings. She did not contribute to the personal grievance.

[37] Hawera Cinema 2 Trust Inc is to pay Mrs Kemp:

- i. \$6,572.28 gross lost wages, less \$2,071.33 net in earnings.
- ii. \$4,000 net compensation for humiliation loss of dignity and injury to feelings under s 123 (1) (c) (i) of the Act.
- iii. \$71.56 filing fee. There are no other issues in regard to costs.