

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 389
5415923

BETWEEN

ANN RAWSON
Applicant

A N D

KIWIANA TRADING
COMPANY LIMITED T/A
CAMELOT ARMS MOTOR
LODGE
Respondent

Member of Authority: Rachel Larmer

Representatives: Debra Law, Counsel for Applicant
David Smyth, Counsel for Respondent

Investigation Meeting: 26 July and 01 August 2013 at Auckland

Submissions Received: 08 August 2013 from Applicant
16 August 2013 from Respondent
19 August 2013 from Applicant

Additional Information Received: 20 August 2013 from Applicant
21 August 2013 from Respondent

Date of Determination: 30 August 2013

DETERMINATION OF THE AUTHORITY

- A. Kiwiana Trading Company Limited trading as Camelot Arms Motor Lodge (Camelot Arms) unjustifiably dismissed Mrs Rawson on 4 April 2013. It is ordered to pay her:**
- (a) \$5,687.50 lost remuneration;**
 - (b) \$ 9,000 distress compensation.**
- B. Camelot Arms did not unjustifiably disadvantage Mrs Rawson in her employment.**

- C. Camelot Arms breached s.120 of the Employment Relations Act 2000 by failing to provide Mrs Rawson with a written statement of the reasons for her dismissal upon request.**
- D. No penalty is imposed for Camelot Arms' breach of s.120 of the Act.**

Employment relationship problem

[1] Mrs Rawson was employed for nine years as the Head Cleaner at Camelot Arms. Kiwiana Trading Company Limited¹ (the new owners) purchased Camelot Arms in December 2012. Mrs Rawson's employment ended less than four months later on 04 April 2013.

[2] Mrs Rawson claims she was unjustifiably dismissed and she seeks \$15,000 distress compensation, three months' lost remuneration together with \$15,000 exemplary damages to compensate her for the manner in which Camelot Arms responded to her grievance. Camelot Arms denies Mrs Rawson was dismissed, it says she resigned.

[3] Mrs Rawson claims Camelot Arms breached s.120 of the Employment Relations Act 2000 (the Act) by failing to provide her with a written statement of the reasons for her dismissal. She seeks a penalty for that breach. Camelot Arms admits not providing Mrs Rawson with a written statement of the reasons for her dismissal because it says it was not required to do so because she was not dismissed. It also says a penalty is inappropriate.

[4] Mrs Rawson also claims she was unjustifiably disadvantaged in her employment because Camelot Arms:

- a. Unilaterally changed her terms and conditions by reducing the number of hours she worked despite work being available; and
- b. Criticised her on 04 April for taking too long to clean rooms and told her she needed to complete her cleaning quicker.

¹ Mr Michael Dawson is a director and 75% shareholder and Mr David Yang is a director and 25% shareholder.

[5] Mrs Rawson seeks \$5,000 distress compensation for her disadvantage grievance.

[6] Camelot Arms denies disadvantaging Mrs Rawson. It says it did not reduce or change her contractual hours of work and it denies criticising her for the time it took her to clean rooms.

[7] Mrs Rawson's claim for wage arrears arising from Camelot Arms' failure to pay her final wages and holiday pay and her penalty claim associated with that alleged breach were withdrawn prior to the Authority's investigation.

[8] Mrs Rawson had a written employment agreement dated 14 December 2012. This was the same employment agreement she had signed with the previous owners on 01 June 2007 but the new owners added a handwritten notation beside the reference to her hours of work in the "*Hours of Work*" clause that says "*regular days Sunday to Thursday.*"

[9] Clause 5 of the employment agreement records that Mrs Rawson will normally work 15-30 hours per week, between the hours of 8.30am and 3pm, with her regular days being Sunday to Thursday.

[10] Mrs Rawson's actual hours of work on any given day varied according to demand. She started at 8.30am and would finish when the work was completed. On three occasions (one of which was to avoid her working on a public holiday) the new owners advised Mrs Rawson she was not required to work the following day.

[11] When Mrs Rawson finished work on 02 April she left three rooms for her to clean the following day (03 April). She was also aware that in addition to the three rooms which were carried over there would be additional rooms to clean and service arising from the overnight guests and long term guests Camelot Arms had accommodated that night.

[12] At 6.49am on 03 April Mrs Rawson received a text from one of the new owners Mr Michael Dawson² (who owned and operated Camelot Arms with his partner David Yang) saying "*There is only two rooms occupied tonight and we don't have bookings for tomorrow. Take the day off and rest. The calm before the storm.*"

² He had sent the text at 9.34pm the evening of 02 April but by Mrs Rawson had turned her phone off so she did not receive it until the next morning.

[13] Mrs Rawson was surprised to be told not to come to work so immediately sent a reply text asking “*what about the three left from yesterday?*” When Mr Dawson did not respond Mrs Rawson phoned him and they had a brief discussion. There is a conflict about what was discussed during this telephone call.

[14] There is no dispute that as the call ended Mrs Rawson commented “*This is fucking pathetic*”. Mrs Rawson says she made the comment to herself out of frustration as she was putting the phone down and did not mean for it to be heard by Mr Dawson. Mr Dawson believes the comment was directed at him and he considered it unacceptable abuse of him by an employee.

[15] Mrs Rawson’s comment was the catalyst for the incident which occurred the following day and which resulted in her employment ending.

[16] The incident on 04 April occurred in the Camelot Arms’ reception area after Mrs Rawson reported to work and attempted to sign in around 8.30am. Mr Dawson, Mr Yang, his son Edwin Yang, Mrs Rawson and her husband Mr Todd Rawson were all involved in the incident at various times. There is conflict between the witnesses about when each person became involved in the incident and over what each participant said and did during the incident.

Section 174 of the Act

[17] Under s.174(b) of the Act the Authority is not required to set out a record of the evidence heard or received; to record or summarise the parties’ submissions; or to indicate why it made, or did not make, specific findings as to the credibility of any evidence or person.

[18] This is a case in which almost everything is in dispute. Areas of agreement were extremely limited so my assessment of credibility issues and my factual findings are critical to determining this matter. I have very carefully considered all of the evidence presented during the two day investigation meeting, together with the written submissions which followed.

[19] It is not efficient for me to set out the evidence, the conflicts, or the reasoning behind my assessment of the submissions and of credibility issues, so pursuant to s.174 of the Act I do not do so. Instead this determination states my findings of fact, my findings on relevant issues of law, and my conclusions on matters I consider

require determination in order to dispose of this matter in accordance with s.174(a) of the Act.

Issues

[20] The issues for determination include:

- (i) Credibility findings;
- (ii) Factual findings;
- (iii) Was Mrs Rawson disadvantaged in her employment?
- (iv) If so, was the disadvantage justified?
- (v) If not, what if any remedies should be awarded for the disadvantage grievance?
- (vi) Was Mrs Rawson dismissed?
- (vii) If so, was dismissal justified?
- (viii) If not, what if any remedies should be awarded for the dismissal grievance?
- (ix) Was Camelot Arms required to provide Mrs Rawson with a written statement of reasons for her dismissal?
- (x) If so, should a penalty be imposed on Camelot Arms for failing to provide Mrs Rawson with a written statement of reasons for her dismissal?
- (xi) Should exemplary damages be awarded to Mrs Rawson for Camelot Arms' conduct following the submission of her grievances?
- (xii) What costs should be awarded?

Credibility findings

[21] I have carefully reflected on credibility issues. Overall I found Mr and Mrs Rawson to be far more credible witnesses than the Camelot Arms witnesses. They gave clear and consistent evidence which was not undermined by cross examination. Mrs Rawson's account was in material respects supported by documentary records such as text messages and other communications between the parties. It was also consistent with her actions at the relevant times.

[22] I was concerned that aspects of the evidence given by Camelot Arms witnesses (i.e. Edwin's website posting; threats of Police complaint; criticisms of Mrs Rawson which were never raised with her and which did not appear in the witness statements) tended to undermine the overall credibility of their witnesses. Also noteworthy is that two of its witnesses expressed what appeared to be hostility and animosity towards Mrs Rawson. That contrasted with the calm and considered manner in which the Rawsons gave their evidence.

[23] Mr Dawson was the key witness for Camelot Arms and I found his evidence unsatisfactory. He changed his evidence under cross examination, he provided evidence which contradicted the first Statement in Reply, in some respects his evidence was inherently unlikely, his evidence conflicted with other Camelot Arms' witnesses, he inappropriately attempted to shift responsibility for any matters which were unfavourable to him onto others, he presented as known facts information which he later had to concede he had no knowledge of, he was reluctant to provide full answers to questions which showed him in an unfavourable light (i.e. the Edwin website posting, Police complaint, and staffing issues). Some of his evidence contradicted the available documentation.

[24] Mr Smyth appears to recognise in his submissions that Mr Dawson's evidence was unsatisfactory because he submits that Mr Dawson's concentration was affected as he became tired as a result of a stroke he had previously suffered. I was not convinced by this explanation. This was not an issue raised during the Authority's investigation meeting. I would expect counsel as experienced as Mr Smyth to have spoken up on Mr Dawson's behalf if he was experiencing difficulties giving his evidence due to health problems. That did not occur.

[25] Mr Dawson did not appear to me to be tired or to be having concentration problems or I would have addressed that at the time. The Authority is used to accommodating witnesses to ensure they are able to give their best evidence. I am proactive about taking steps to intervene where I consider a witness is having difficulty giving their evidence say because of language, health, cultural, emotional or other such reasons. I do not wait for counsel to raise an issue before taking steps to accommodate a witness who is in difficulty. That was not the case here.

[26] I consider that Mr Dawson's problems appeared to be with the reliability of his evidence not with his ability to understand or answer questions.

Factual findings

[27] Material conflicts in the evidence are to be resolved on the balance of probabilities, i.e. what is more likely than not to have occurred. I make the following factual findings which I consider all meet or exceed the required onus of proof:

- (i) There was sufficient work for Mrs Rawson to do on 03 April but Camelot Arms told her not to work that day;
- (ii) Mrs Rawson was annoyed and frustrated that she did not find out until just before 7am on the morning of 03 April that she was not to work that day;
- (iii) Mr Dawson told Mrs Rawson they (meaning him and Mr Yang) would do the cleaning on 03 April which shocked Mrs Rawson because it was her job to do the cleaning;
- (iv) Mrs Rawson asked Mr Dawson on 03 April whether she should be looking for another job and he did not reply;
- (v) Mrs Rawson said "*That's fucking pathetic*" when hanging up the phone after speaking to Mr Dawson on 03 April. Her comment was borne out of frustration at being told not to come to work when there was work available and of her surprise that the new owners intended to do cleaning themselves;

- (vi) Mrs Rawson's comment was not directed at Mr Dawson and was not intended to be heard by him. She also did not know that Mr Dawson had heard it;
- (vii) When Mrs Rawson reported to work on 04 April Mr Dawson came into the reception area and uplifted the sign-in book so she could not sign in. He demanded an apology for Mrs Rawson's comment the previous morning;
- (viii) Mrs Rawson explained to Mr Dawson she had not sworn at him and that her comment was not intended to be heard by him;
- (ix) Nevertheless Mrs Rawson apologised to Mr Dawson. His response was to tell her to "*get out*" whilst hugging the sign in book to his chest;
- (x) Mrs Rawson believed Mr Dawson's actions in keeping the sign-in book from her (preventing her from starting work) together with the instruction to "*get out*" meant he was firing her;
- (xi) Mrs Rawson told Mr Dawson she was entitled to a support person so she was going to get her husband to come to reception to assist her. Mr Dawson he did not tell Mrs Rawson she did not need a support person which suggests her on-going employment was indeed in jeopardy;
- (xii) Mrs Rawson texted her daughter to get her husband to come to her work immediately because she was "*being fired*". Mr Rawson arrived approximately ten minutes later;
- (xiii) While waiting for her husband to arrive Mrs Rawson also texted a colleague "*They are firing me*";
- (xiv) Her colleague called Mrs Rawson and overheard shouting and Mrs Rawson saying "*you can't treat your staff like this*" before the colleague's phone cut off because it ran out of battery;
- (xv) Mr Yang entered the reception area and criticised Mrs Rawson for the time she took to clean rooms. He told her she had to work faster;

- (xvi) When Mr Rawson arrived at Camelot Arms said to Mr Dawson “ *I hear you have terminated Ann’s position.* ” Mr Dawson replied “*I don’t know*” then Mrs Rawson reminded Mr Dawson he had told her to leave. Neither Mr Dawson nor Mr Yang used this opportunity to clarify they had not dismissed Mrs Rawson and did not intend to dismiss her. Nor did they dispute that she had been told to leave;
- (xvii) Mr Yang started talking about Mrs Rawson’s hours of work so Mr Rawson asked Mr Yang if he was changing her hours. Mr Yang replied that he was;
- (xviii) When Mr Rawson tried to explain to Mr Yang that he could not just change her hours without consultation Mr Yang became angry and yelled he could do whatever he wanted because he was the boss;
- (xix) When Mr Rawson told Mr Yang he still had to consult about any changes, Mr Yang lunged at Mr Rawson and was held back by his son Edwin Yang;
- (xx) Mr Yang yelled at the Rawsons to “*fuck off, just fuck off*”;
- (xxi) Edwin Yang also told the Rawsons to “*fuck off*”;
- (xxii) The Rawsons left. Mr Rawson was concerned about his wife’s safety and Mrs Rawson was crying and shaking;
- (xxiii) The day this occurred the Rawsons instructed their lawyer to raise a personal grievance for unjustified dismissal and to request Camelot Arms to attend mediation;
- (xxiv) Mrs Rawson’s personal grievance letter containing the mediation request was received by Camelot Arms by at 4pm the same day as the incident;
- (xxv) Camelot Arms also instructed a representative (not Mr Smyth) the day of the incident but did not respond to the personal grievance letter;

- (xxvi) Camelot Arms' response to the request to attend mediation was to inform Mediation Services it was not available to attend mediation in April;
- (xxvii) Despite the parties being in regular communications through their respective representatives Camelot Arms did not communicate its view that Mrs Rawson had resigned until it filed its Statement in Reply on 27 May - 8 weeks after she had first advised it she believed she had been dismissed;
- (xxviii) Camelot Arms employed another cleaner on 30 March (4 days before Mrs Rawson's employment ended) but they attempted to conceal that from Mrs Rawson by telling her not attend work on the day they interviewed the new cleaner;
- (xxix) Camelot Arms held extremely adverse views about Mrs Rawson which were never communicated to her during the employment relationship;
- (xxx) Camelot Arms financially benefited from Mrs Rawson's employment ending on 04 April. It entered into more favourable terms and conditions of employment with replacement casual cleaners; saving \$3 per hour in wages and avoiding the need to provide her replacements with a minimum number of hours work per week.

Was Mrs Rawson disadvantaged in her employment?

[28] Mrs Rawson's counsel in an email to the Authority on 22 July clarified that the disadvantage claim related to two issues:

- (i) Unilateral changes to her terms and conditions by reducing the number of hours she worked despite work being available; and
- (ii) Advice that she was taking too long to clean rooms and should complete the cleaning quicker than she was.

[29] I find that Camelot Arms did not take work away from Mrs Rawson it just arranged for her to do it on 04 April instead of 03 April. Whilst this undoubtedly inconvenienced and probably annoyed Mrs Rawson because of the short notice, I find

that it did not disadvantage her. Her total minimum weekly hours of work remained unchanged. Her total amount of work to do also remained unchanged.

[30] Although I have found Mr Yang criticised how long Mrs Rawson took to do a room I do not accept that criticism disadvantaged her in her employment.

[31] Mrs Rawson's unjustified disadvantage grievance does not succeed so I do not need to consider justification or remedies.

Was Mrs Rawson dismissed?

[32] Because Camelot Arms says it did not dismiss Mrs Rawson she bears the onus, on the balance of probabilities, of establishing that her employment ended as the result of a dismissal.

[33] Camelot Arms says it never told Mrs Rawson she was fired or terminated or dismissed. I accept that. However, those particular words do not have to be used in order for an employer to dismiss an employee. It has long been recognised by the Employment Court that a dismissal is a sending away of the employee which occurs at the employer's initiative. The sending away may occur as a result of the employer's words or actions or both. There is no set form of words that must be used by an employer before it can be found to have dismissed an employee.

[34] Camelot Arms claims Mrs Rawson resigned. I do not accept that. There was no evidence (such as a resignation letter or words or actions by Mrs Rawson that indicated a wish to resign) to support a resignation scenario. Mrs Rawson's actions were inconsistent with a resignation. I also consider that the manner in which Camelot Arms' acted after the incident was inconsistent with its stated view that Mrs Rawson had resigned.

[35] I consider that the factual findings that have been made establish that Mrs Rawson's employment was ended at Camelot Arms' initiative, not on her own initiative. There is no evidence to show she freely or genuinely resigned.

[36] The factual findings satisfy me that Mrs Rawson's employment ended at the sole initiative of Camelot Arms. It was Camelot Arms who sent Mrs Rawson away. She did not leave voluntarily. She was prevented from signing in to work. She was also told to "*get out*" "*fuck off, just fuck off*" and "*fuck off*". Her immediate request

for mediation was not accepted. Despite Camelot Arms engaging representation from the outset it waited eight weeks before it contradicted Mrs Rawson's view that she had been dismissed.

[37] The evidence Camelot Arms presented to the Authority strongly suggests it was very happy to relieve itself of Mrs Rawson's services. It is also clear that Camelot Arms immediately financially benefited from Mrs Rawson's dismissal because it entered into new cleaning arrangements on terms far more favourable to it than the terms and conditions Mrs Rawson had, which the new employer had inherited from her previous employer.

[38] Camelot Arms also hired a new cleaner on 30 March (4 days before Mrs Rawson's employment ended) in circumstances where it had attempted to conceal that from Mrs Rawson, by telling her not to come in to work on the day the new cleaner was interviewed and hired.

[39] For all these reasons I find that Mrs Rawson has discharged the onus of proving that her employment ended as the result of a dismissal.

Was dismissal justified?

[40] Having established Mrs Rawson was dismissed the onus passes to Camelot Arms to justify its dismissal of her. Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether "*how the employer acted, and the employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time [...] or dismissal arose.*"

[41] Camelot Arms did not attempt to justify Mrs Rawson's dismissal because it denies a dismissal occurred. I find that Camelot Arms is unable to discharge the onus of justifying Mrs Rawson's dismissal. It did not comply with its statutory obligations because it failed to comply with any of the four procedural fairness tests in s.103A(3) of the Act. It also breached its s.4(1)(a) good faith obligations to Mrs Rawson.

[42] I find that Camelot Arms' actions and how it acted were not what a fair and reasonable employer could have done in all the circumstances at the time Mrs Rawson was dismissed.³ Mrs Rawson's dismissal was therefore unjustified.

What if any remedies should be awarded?

Mitigation

[43] I consider that Mrs Rawson took adequate steps to mitigate her loss. She approached other motels in her area for work but has been unable to obtain permanent work. Mrs Rawson recently accepted a casual role as a cleaner on a lower hourly rate.

Lost remuneration

[44] Although Mrs Rawson was out of work for more than three months she has limited her claim to three months' lost remuneration. I am satisfied Mrs Rawson has lost at least \$5,687.50 as a result of her unjustified dismissal so it is appropriate that she be compensated for that loss.

[45] Camelot Arms is ordered to pay Mrs Rawson \$5,687.50 lost remuneration under s.128(2) of the Act.

Distress compensation

[46] Mrs Rawson claims distress compensation of \$15,000. The evidence does not support an award at that level but it does require a high award. Mrs Rawson had been working for Camelot Arms for nine years and had been described by previous employers in positive terms. Her job fitted well with her family commitments and she did not have far to go to work. She believed she had a long term future working at Camelot and it was a terrible shock for her to lose her job in the way she did.

[47] Mrs Rawson describes being fired as "*a truly awful and distressing experience*". She has also found it difficult to come to terms with the fact that she was dismissed in such a degrading way from a job that she enjoyed and which she thought she did well. She became tearful during the Authority investigation meeting when discussing the adverse affects the dismissal had on her.

³ S.103A of the Act.

[48] I accept Mrs Rawson's evidence that the way in which Camelot Arms responded to her grievance has significantly increased her distress. She describes being "*horrified*" to read the unpleasant things that have been said about her. She says she lies awake at night unable to sleep and has struggled to focus on day-to-day things. Mrs Rawson finds herself in tears at the mention of work and what has happened. The stress and anxiety has adversely affected her health and she has suffered constant headaches which is something she has not experienced before.

[49] Mrs Rawson's distress was compounded by the evidence Camelot Arms produced which attempted to denigrate her as an employee and as a person. Camelot Arms successfully turned Mrs Rawson's former colleagues (who she had considered friends) against her by telling them she had said horrible things about them.

[50] Camelot Arms threatened to make a Police complaint about Mrs Rawson but would not provide her with details of what criminal activities it alleged she had engaged in. I accept Mrs Rawson's evidence that this threat caused her a huge amount of stress, distress, and humiliation, because she had no idea about what she could possibly have done.

[51] The basis of the supposed Police complaint was thoroughly explored during the Authority's investigation meeting and I find it was unfounded. Under cross examination Mr Dawson admitted that no Police complaint was made because there was no evidence to support any such complaint. I accept Ms Law's submission that the threat of a Police complaint was improperly made in order to gain a tactical advantage over Mrs Rawson by deliberately causing her huge anxiety and embarrassment.

[52] Camelot Arms is ordered to pay Mrs Rawson \$9,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity, and injury to feelings she has suffered as a result of her unjustified dismissal.

Contribution

[53] Having determined Mrs Rawson has a grievance, s.124 of the Act requires me to consider whether she contributed to the situation which gave rise to her grievance and if so to reduce remedies accordingly.

[54] I find that Mrs Rawson has not engaged in blameworthy conduct. Her remark about a situation that had caused her shock and frustration was precipitated by Camelot Arms' actions towards her. It is perhaps not surprising she expressed some frustration and although it was unfortunate Mr Dawson overheard the comment Mrs Rawson did not intend for him to do so and she apologised for it. I therefore decline to reduce remedies on the grounds of contribution.

Was Camelot Arms required to provide Mrs Rawson with a written statement of the reasons for her dismissal?

[55] Mrs Rawson requested a written statement of the reasons for her dismissal from Camelot Arms more than once. When Camelot Arms was reminded by Ms Law that it has still not responded to her request she was advised they would do it when they were ready. Surprisingly Camelot Arms did not ever advise Mrs Rawson that she was not entitled to a written statement of reasons for her dismissal because it had not dismissed her.

[56] Section 120 of the Act requires an employer to provide a statement in writing of the reasons for an employee's dismissal, if requested to do so by the employee within 60 days of the dismissal. The employer has 14 days from the date of the employee's request to provide the employee with its written statement of the reasons for dismissal.

[57] Mrs Rawson was dismissed so Camelot Arms was required to provide her with a written statement of the reasons for her dismissal. It therefore breached s.120 of the Act by failing to do so.

Should a penalty be imposed on Camelot Arms for failing to provide Mrs Rawson with a written statement of the reasons for her dismissal?

[58] Mrs Rawson did not address this issue in her submissions. I decline to impose a penalty.

Should exemplary damages be awarded to Mrs Rawson for Camelot Arms' conduct following the raising of her grievances?

[59] Mrs Rawson did not address this claim in her submissions except to note that *“the respondent’s response to the grievance has been vindictive and threatening, and in turn warrants a substantial award of damages.”*

[60] I consider that Mrs Rawson has been appropriately compensated for the distress she has suffered under s.123(1)(c)(i) of the Act. Notwithstanding my concerns about the way in which Camelot Arms responded to Mrs Rawson’s grievance I decline to award exemplary damages.

What costs should be awarded?

[61] Mrs Rawson as the successful party is entitled to a contribution towards her legal costs. The parties are encouraged to resolve costs by agreement. If that is not possible then Mrs Rawson has 14 days to file her costs memorandum. Camelot Arms has 14 days to respond. Mrs Rawson then has 7 days to file any response. Any departure from this timetable requires the prior leave of the Authority.

[62] The Authority is likely to adopt its usual notional daily tariff based approach to costs. The parties are therefore invited to identify any factors they say should result in an adjustment to the notional daily tariff which is currently \$3,500.

Rachel Larmer
Member of the Employment Relations Authority