

BETWEEN

LOU PIGOU
Applicant

AND

JADA AND DONYAE
INVESTMENTS LIMITED t/a JD
INVESTMENTS LTD
Respondent

Member of Authority: Eleanor Robinson

Representatives: John Coyle, Advocate for Applicant
Ramari Bristowe-Murray, Advocate for Respondent

Investigation Meeting: 15 October 2013 at Auckland

Submissions received: 15 October 2013 from Applicant and from Respondent

Determination: 1 November 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Lou Pigou, claims that she was unjustifiably dismissed on 23 May 2012 by the Respondent, Jada and Donyae Investments Limited (Jada).

[2] Jada denies that it unjustifiably dismissed Ms Pigou, and claims that Ms Pigou had breached the duties and obligations she owed to Jada as set out in paragraph a) of the individual employment agreement (the Employment Agreement) which she had signed on 14 October 2011.

Issues

[3] The issues for determination are whether Ms Pigou was unjustifiably dismissed by Jada.

Background Facts

[4] Jada is a bulk supplier of products including tinfoil, toilet paper, and candy store products. Ms Pigou said she had become acquainted with Ms Ramari Bristowe-Murray and her husband, Mr Joseph Murray, Director of Jada, when she was operating her own import and export business.

[5] Ms Bristowe-Murray explained that she had responsibility for managing Jada, and because she had limited experience in the import and export area, she had offered employment to Ms Pigou.

[6] On 14 October 2011 the parties entered into the Employment Agreement which had been supplied by Ms Pigou, and which specified:

- Term: 12 months with a 4 week termination provision;
- Job Title: Sales Executive Manager;
- Commencement Date: 14 November 2011;
- Remuneration: \$85,000.00 per annum with profit share incentive;
- Mobile telephone: provided for business and reasonable personal calls; and
- Fuel: provided on a weekly basis

[7] Under the section of the Employment Agreement headed: “**Duties and Obligations**” it stated:

The employee undertakes to carry out the responsibilities of the position honestly and diligently and to the best of the employee’s abilities. In particular the employee undertakes:

- a) Not to set up or engage in any private business or to undertake any other employment or paid or unpaid activity which would be in direct or indirect competition with the employer;*

[8] Ms Pigou said that at some time in February or March 2012 she had registered a company, House of Imports and Exports (HIE), with the intention of carrying on business through it following the termination of the Employment Agreement with Jada at the end of the 12 month period.

[9] Ms Bristowe-Murray said that on or about 23 May 2012 she had received a telephone call from the son of Mr Subhas Chand, a customer of Jada, enquiring about an order he had placed.

[10] Ms Bristowe-Murray said that as she had been unaware of such an order being placed, she had investigated and realised that the order had been placed with HIE. Subsequently she had confirmed this by means of a copy invoice she obtained which was dated 30 March 2012 and which itemised an order for plastic utensils which had been supplied to Chand Enterprise (NZ) Ltd by HIE.

[11] Ms Bristowe-Murray said she had been stunned as she had discussed Jada supplying plastic utensil products as suggested by Ms Pigou, and had supplies available in her office in preparation for the commencement of this extension to Jada's products supply service.

[12] Ms Bristowe-Murray said she had telephoned Ms Pigou and left a message for her to return the call, and they had subsequently met outside a superette in Massey Road, Auckland.

[13] Ms Pigou said that Ms Bristowe-Murray had asked her when she had registered HIE, to which she had responded that it had been in either February or March 2012.

[14] Ms Bristowe-Murray said that when Ms Pigou confirmed that she had registered HIE, she had reminded her that she was an employee of Jada, and Ms Pigou had said to her: "*Larm, if you can't trust me I quit now*", to which she had replied: "*Sweet by me.*"

[15] Ms Pigou said that Ms Bristowe-Murray had then suggested that she could prove her loyalty by accompanying her to the bank and signing an authorisation to allow Jada to utilise her own Letter of Credit facility.

[16] Ms Bristowe-Murray said when she had asked Ms Pigou to allow Jada to utilise her Letter of Credit facility, Ms Pigou had asked why she should allow it to do so if it did not trust her.

[17] Ms Pigou said that Ms Bristowe-Murray had been abusive towards her during the altercation. Ms Bristowe-Murray, who stated that she had been angry as she considered that Ms Pigou had taken monetary advantage of her, agreed that she may have used coarse language in her discussion with Ms Pigou.

[18] Ms Bristowe-Murray said she had then asked for the return of certain products belonging to Jada which were in Ms Pigou's car; however Ms Pigou had driven off before she could retrieve them.

[19] Ms Bristowe-Murray said she had followed Ms Pigou in her car, and when Ms Pigou stopped she had retrieved the Jada products from Ms Pigou's car. Ms Pigou stated that Ms Bristowe-Murray had then told her that she was 'fired'.

[20] Mr Chand said he had observed the incident between Ms Pigou and Ms Bristowe-Murray, both of whom he knew, from his superette. Mr Chand said that, although he had not been able to hear what had occurred, he had observed that Ms Bristowe-Murray appeared to be very angry and had seen her remove products from Ms Pigou's car.

[21] When questioned at the Investigation Meeting, Ms Bristowe-Murray agreed that Ms Pigou would have believed her employment had been terminated.

[22] The following day, 24 May 2012, Ms Pigou had sent an email to Ms Bristowe-Murray stating that she was disappointed by her (Ms Bristowe-Murray's) reaction the previous day, and that she had not been given an opportunity to explain. The email concluded:

Anyway when you are a better person and not angry I would like to see you. We have to sort out a lot of things and if you think you can intimidate me by your personal Threat I'am not although I'am taking it seriously just to let you know.

[23] Ms Bristowe-Murray said she had seen no value in meeting with Ms Pigou, and had responded that same day by email stating

J&D Investments Ltd are seeking legal advice currently & have been advised on process in this matter. We restrict you from having any & all contact with any & all of J&D Investments Ltd suppliers & customers. We will be advising clients direct of your steps forward.

[24] On 29 May 2012 Ms Pigou emailed Ms Bristowe-Murray asking that she be paid all outstanding monies to which she was entitled, however Ms Pigou said she had not received a response or payment of unpaid wages or of accrued annual holiday entitlement.

[25] On 9 July 2012 Ms Pigou filed a Statement of Problem with the Authority.

Determination

[26] Ms Bristow-Murray had been angry at the time she had met with Ms Pigou on 23 May 2012 and confirmed that Ms Pigou would have understood that her employment with Jada had been terminated. I find this evidence establishes that Ms Bristow-Murray summarily terminated Ms Pigou's employment with Jada on 23 May 2012.

[27] The test of justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

- i. 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 applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[28] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Jada must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[29] In accordance with s 103A (3) of the Act the Authority must also consider whether:

- (a) ... the employer sufficiently investigated the allegations against the employee ...*
- (b) ... the employer raised the concerns that the employer had with the employee ...*
- (c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...*
- (d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...*

[30] Whilst I accept that Jada was a small employer and as such lacked the resources normally available to a larger employer when dealing with disciplinary matters, I consider that there were major rather than minor flaws in the procedure adopted by Jada in

terminating Ms Pigou's employment which cannot be explained merely by the fact that Jada was a smaller employer. Specifically:

1. There was virtually no investigation of any matters relating to Ms Pigou's conduct as an employee of Jada: Ms Bristowe-Murray had based her belief of what had occurred on a conversation with the son of Mr Chand and a copy of an invoice in the name of HIE;
2. Ms Pigou was not advised in advance of the disciplinary nature of the allegations against her, nor provided with the details of the allegations against her, or told that she could have a support person with her at a disciplinary meeting;
3. Ms Pigou was not invited to a scheduled meeting, nor was she provided with a meaningful opportunity to offer any explanation;
4. There was no consideration given to a possible explanation which could have been made by Ms Pigou prior to the announcement of the decision to terminate her employment, because no opportunity to offer one had been provided.

[31] I find that Jada at the time of making the decision to terminate Ms Pigou's employment did not comply with either the basic tenets of natural justice or with the statutory good faith obligations. The decision by Jada to dismiss Ms Pigou on 23 May 2012 was not a decision an employer acting fairly and reasonably could have made in all the circumstances.

[32] I determine that Ms Pigou has been unjustifiably dismissed by Jada.

Remedies

[33] Ms Pigou has been unjustifiably dismissed and is entitled to remedies.

Lost Wages

[34] Ms Pigou is to be reimbursed for lost earnings for a period of 3 months pursuant to s 128(2) of the Act. From this amount is to be deducted any monies earned by Ms Pigou in the way of paid employment or private work during that period which commenced on 24 May 2012, and, if applicable, any WINZ benefit. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

Outstanding wages and Annual Leave Entitlement

[35] Ms Pigou is to be paid all wages and annual leave entitlement outstanding at 23 May 2012. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

Interest

[36] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum¹.

[37] I order that Jada pay interest in accordance with clause 11 of the Second Schedule of the Act on the amount awarded to Ms Pigou as lost wages, and unpaid wages and annual leave.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[38] Ms Pigou is also entitled to compensation for humiliation and distress. I find that Ms Pigou suffered distress as a result of the public nature of the altercation between the parties.

[39] Jada is to pay Ms Pigou the sum of \$3,000.00, pursuant to s 123(1) (c) (i).

Contribution

[40] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[41] Whilst in the employment of Jada, Ms Pigou had established a business, HIE, and had invoiced a customer in respect of plastic utensils which were products Jada had been in the process of adding, on her recommendation, to its supply list.

[42] Ms Pigou confirmed at the Investigation Meeting that she had read and understood clause a) of the section of the Employment Agreement headed: “**Duties and Obligations**”.

[43] I find that Ms Pigou had acted in breach of clause a) of the Employment Agreement. I find the actions of Ms Pigou to have been blameworthy and causative of the outcome².

¹ Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

² *Goodfellow v Building Connection Ltd t/a ITM Building Centre* [2010] NZEmpC 82

[44] I find contributory fault on the part of Ms Pigou and reduce the remedies awarded by 75%, other than the amounts due in respect of outstanding wages and annual leave entitlement.

Penalty

[45] It is a statutory requirement that an employer keeps wages and time records pursuant to s 130 of the Act. A party who fails to do so: “*is liable to a penalty imposed by the Authority.*” Pursuant to s 130 (4) of the Act.

[46] Many small employers do manage to keep and maintain accurate records of the monies owed and paid to employees and it is important that employees have access to that information. It is not acceptable that employers should be able to flaunt their statutory duties and not be able to produce that information to employees and the Authority upon request.

[47] Jada is ordered to pay a penalty of \$1,500.00 to the Crown for the non-provision of wage and time records.

Costs

[48] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave

Eleanor Robinson
Member of the Employment Relations Authority