

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 69
5366361

BETWEEN

RAEWYN OLIEDAM
Applicant

A N D

HAMILTON HARDWARE
RETAIL LIMITED trading as
MITRE TEN MEGA,
THE BASE
Respondent

Member of Authority: K J Anderson

Representatives: S McKenna, Counsel for Applicant
R Drake, Advocate for Respondent

Investigation Meeting: 29 August 2012 at Hamilton

Submissions Received: 11 September 2012 and 4 October 2012 from Respondent
21 September 2012 from Applicant

Date of Determination: 27 February 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Ms Raewyn Oliedam, claims that she was unjustifiably dismissed on 29 July 2011. Ms Oliedam asks the Authority to find that she has a personal grievance and award her the remedies of reimbursement of lost wages and compensation pursuant to s.123 of the Employment Relations Act 2000 (the Act).

[2] The respondent, Hamilton Hardware Retail Limited (the Company) denies the claims of Ms Oliedam and says that her dismissal was justifiable on the grounds of serious misconduct.

[3] The Authority received evidence from the applicant; and Ms Debbie Farrell in support. For the Company, the Authority received evidence from Mr Terry Wilson, Mrs Lynne Wilson, Mr Miles Witcher and Mr Gary Cornwall. The parties have provided an agreed bundle of documents and written submissions. All the material available has been closely considered by the Authority, albeit it may not be specifically referred to within this determination.

Background

[4] Ms Oliedam commenced her employment with the Company on 1 December 2009, as a garden team member at the Mitre 10 Mega Garden Centre (the business) located at The Base, Hamilton. Upon the resignation of the incumbent team leader, Ms Oliedam applied for that position but the role went to another applicant; Mr Lee Cloke. Ms Oliedam was subsequently appointed to a newly created position: senior salesperson. The evidence of Ms Oliedam is that the appointment to this role “elevated” her to being second in charge (2IC) of the garden team. But Mrs Lynne Wilson, the human resources manager and a shareholder of the company, says that Ms Oliedam was not 2IC of the garden team. Rather, the role of senior salesperson was created to provide support to the team leader. I accept that this is most probably correct, albeit it seems that Ms Oliedam was perceived by other staff as having some authority in the absence of Mr Cloke.

[5] Mr Terry Wilson is the founder, shareholder, director and chief executive officer of the Company. Mr Wilson’s evidence is that on 28 October 2010, he met with Ms Oliedam as a consequence of her promotion to the new role, and it seems, as a result of her failure to be appointed to the position of team leader. The evidence of Mr Wilson is that when considering Ms Oliedam for the team leader role, there were some “real concerns” about her people management skills.

[6] Mr Wilson’s evidence is that he specifically discussed with Ms Oliedam her “unfortunate manner” in regard to her interactions with other team members, including her “aggressive and overbearing manner”. Mr Wilson says that he communicated to Ms Oliedam that if she could address this area of her performance, her prospects were good but it was “imperative” that she did so if she were to progress within the business.

[7] A meeting of the garden team was held on 18 November 2010. Relevant to the matters before the Authority is that the *Record of Meeting* informs that one of the issues raised at the meeting was the communication style of Ms Oliedam to her colleagues and that it was agreed that she would: [“...take feedback on board and adjust style of communication” with her colleagues.

Attitude concerns

[8] The evidence of Mrs Wilson is that on 18 November 2010, a team member in the garden department, Mr Chris Balks, tendered his resignation; to be effective from 6 January 2011. Mrs Wilson says that Mr Balks subsequently came to see her a week later (25 November 2010) and informed that he would not stay any longer as he could not work with Ms Oliedam any more. Mr Balks reported that Ms Oliedam had spoken to him in a loud and aggressive manner and that she did not do her share of the work. Mr Balks wanted to finish work on 16 December 2010, but Mrs Wilson says that she persuaded him to continue until 28 December 2010 to help the business over the busy seasonal period.¹ The further evidence of Mrs Wilson is that she met with Ms Oliedam in mid-January 2011 to discuss the reason for the resignation of Mr Balks. Mrs Wilson produced a file note to the Authority. It records the general tenor of the discussion that took place in January 2011. The note concludes:

I [Mrs Wilson] told Rae [Ms Oliedam] that the business could not afford to have staff leave because of the way she treats people and she would be held accountable if her behaviour continues as I would not accept any more resignations because of Rae.

Performance Review

[9] On 22 February 2011, Mrs Wilson and Ms Oliedam met for the purpose of discussing Ms Oliedam’s annual performance review. Also present was the garden department team leader, Mr Lee Cloke. The notes of the meeting, produced by Mrs Wilson, record that Ms Oliedam was informed that she was very good at giving customers “excellent service” and that she had good sales skills and knowledge of plants and plant chemicals. Relevant to the matters now before the Authority, Ms Oliedam was also informed that the manner in which she communicated with and how she treated her colleagues, was unacceptable and she would need to change that behaviour. There was also some discussion about some conflict that had arisen

¹ The evidence of Mrs Wilson is that upon becoming aware of the dismissal of Ms Oliedam, Mr Balks applied for a position with the business and was employed again on 15 September 2011.

between Ms Oliedam and Mr Cloke. The evidence of Mrs Wilson and the notes of the meeting indicate that Ms Oliedam acknowledged the problems regarding her communication and the manner in which she treated people; and that she had been spoken to about this on previous occasions.

[10] The outcome of the meeting on 22 February 2011 was that Mrs Wilson agreed to organise some training for Ms Oliedam, with the intention of upskilling her in team management and communication skills. Subsequently (9 March 2011), Ms Oliedam commenced an in-house *Effective Supervisory Workshop* which ran for 15 weeks. The workshop consisted of 15 modules covering the functions of a supervisor, including communication and listening skills.

Concerns arising

[11] The evidence of Mrs Wilson is that on 18 March 2011, Mr Cloke informed that he had some concerns about Ms Oliedam's behaviour. Mr Cloke conveyed that another employee, Ms Lauren Bremner, had been observed crying because of the manner in which Ms Oliedam had behaved toward her regarding the "Zealandia order". Mrs Wilson also attests that Mr Cloke informed that Ms Oliedam had become angry towards him and also he advised that another employee (Dean), had raised concerns about the manner in which Ms Oliedam treated people when Mr Cloke had his days off. The full details of the matters referred to above were recorded by Mrs Wilson in a written report dated Friday, 18 March 2011.

[12] On 11 April 2011, Mrs Wilson received a comprehensive email from Ms Bremner. The email informed of a number of problems that Ms Bremner had encountered in regard to her working relationship with Ms Oliedam, beginning from Ms Bremner's first day of employment. Also contained in the email are a number of references regarding the negative interaction between Mr Cloke and Ms Oliedam. Ms Bremner informed that she did not feel comfortable working in the environment that prevailed.

[13] In response to the concerns raised by Ms Bremner, Mrs Wilson held a meeting with Ms Oliedam on 14 April 2011. Also present were Ms Bremner, Mr Cornwall, the retail manager for the business, Mr Cloke; and another employee whom Ms Bremner requested be present. Detailed minutes of the meeting have been produced to the Authority and it appears from the content of these that there was a general discussion

with the essential outcome being, that it was generally understood that communication needed to improve, and that everyone needed to get along with each other and behave in a professional manner.

[14] However, it seems that matters between Ms Bremner and Ms Oliedam were not resolved as Ms Bremner subsequently resigned; effective from 9 June 2011. Her exit interview records that the reason for the resignation was:

I am leaving because of the way I was treated by Rae ...

[15] Ms Bremner also records that she left because she was “always extremely stressed”. The general content of the exit interview was critical of the role of Ms Oliedam and in regard to being invited to: “*Amplify if there are any particular areas of concern*”, Ms Bremner wrote:

Constantly/daily being manipulated and undermined by Rae. Told when to take breaks, extremely closely monitoring all breaks, including toilet breaks, watching you work for long periods of time and asking you to do her jobs for her because she doesn't want to do them, or asking to serve her customers for her.

[16] On 7 June 2011, a new employee, Ms Jan Maber, commenced her employment in the garden department. But on 16 June 2011, Mrs Wilson received her resignation, asking to be released early from the contractual notice period. The evidence of Mrs Wilson is that when she enquired of Ms Maber why she was resigning, Ms Maber initially said it was because of a sore back. However, when pressed by Mrs Wilson as to whether the resignation was influenced by any problems with Ms Oliedam, Ms Maber responded: [“...let's just say Rae needs the job more than I do”].

[17] On 17 June 2011, Mrs Wilson was informed by Mr Cloke that he had discovered another garden department employee, Ms Lillian Nelson, crying in the garden shed. Mrs Wilson subsequently met with Ms Nelson later that day and was informed that some days prior, an incident had arisen whereby Ms Oliedam had shouted at her and behaved in an intimidating manner. Ms Nelson also related to a previous incident when she had been shouted at by Ms Oliedam. Ms Nelson informed that these two incidents were not isolated and that Ms Oliedam was often rude, abrupt and shouted at her. Ms Nelson also stated that Ms Oliedam had treated Ms Bremner very badly and more recently had “targeted” a new employee, Ms Maber.

[18] Mrs Wilson recorded in a written report the details of her discussion with Ms Nelson. It is also recorded that two other employees had “ganged up” on Ms Bremner prior to her resignation. Mrs Wilson attests that she was very disappointed to receive these new allegations as Ms Oliedam had only two days previously, completed the last module of the supervisory skills workshop.

Investigation

[19] As a consequence of the complaints made by Ms Bremner, Mrs Wilson met with Ms Oliedam on 20 June 2011 and informed her of the allegations. Mrs Wilson informed Ms Oliedam that an investigation meeting would be required but this would not be a disciplinary meeting. Via a letter dated 20 June 2011, Mrs Wilson confirmed a meeting for 21 June 2011 indicating that:

The purpose of the hearing is to discuss allegations of harassment which have been made against you. Specifically there are two incidents which have been reported; one on Monday 13 June 2011 and the other some days prior to that. Specifically the allegation is that you behaved in a rude and abusive manner shouting loudly at a colleague. The purpose of the investigation meeting is to present the details gathered thus far and allow you the opportunity to present information about the incident. This is not a disciplinary hearing however you may choose to be accompanied at the meeting by a work colleague and/or other support person or witness.

[20] Ms Oliedam attended the meeting on 21 June 2011 accompanied by two support people. The evidence of Ms Oliedam is that she did not have time to prepare for the meeting or get legal advice. Mrs Wilson says that Ms Oliedam never indicated this at the time and had she done so, the meeting could have been delayed, as happened at a later date to accommodate the availability of Ms Oliedam’s representative. But in any event, there is no evidence that Ms Oliedam was disadvantaged in any manner as a result of attending the meeting on 21 June at relatively short notice.

[21] The comprehensive written record of the investigation meeting records that it was largely conducted by Mr Witcher, the general manager of the business. The allegations made by Ms Bremner that Ms Oliedam had been “rude, yelling, abrasive and confrontational” were discussed but the identity of the complainant was not revealed as Ms Bremner had indicated she was “scared” of Ms Oliedam.

[22] The circumstances pertaining to other employees leaving because of the alleged behaviour of Ms Oliedam was also discussed. Ms Oliedam was informed that Mrs Wilson had asked for feedback as to how Ms Oliedam was perceived by six other employees and they had described her as being “sly, underhand, vicious and a bully”. But Ms Oliedam does not appear to have been given any specific details in regard to the individuals who gave this feedback or the context of it.

[23] Ms Oliedam explained that she had been attempting to correct her behaviour and that the supervision training had been of assistance. The details of the exit interview of Ms Bremner were also discussed and Ms Oliedam acknowledged that Ms Bremner had left the business because of her and that this situation had upset her (Ms Oliedam). The meeting concluded on the understanding that consideration would be given to what had been discussed and a decision would be made as to what further action may be required.

[24] On the same day as the meeting (21 June 2011), Mr Cloke resigned from his employment with the business. In a report of the same date, Mr Cloke records that he was relocating to Taranaki where his wife’s family lived and he intended to take up an electrical apprenticeship. Mr Cloke also informed that he needed to earn more money and that he disliked the constant conflict with Ms Oliedam. Mr Cloke informed that the behaviour of Ms Oliedam had been a problem in the garden department ever since he started and he provided some details of his fraught relationship with her. Mr Cloke also referred to the circumstances pertaining to Ms Bremner and Ms Nelson.

[25] On 27 June 2011, Mrs Wilson gave Ms Oliedam a copy of the notes taken at the meeting on 21 June 2011. Ms Oliedam was invited to take the notes away, read them and then sign them as a true and correct record of the meeting. The evidence of Ms Oliedam is that she returned the notes to Mrs Wilson on 28 June 2011 and informed that she would not be signing them. Apparently, the reluctance to sign the document was based on her wishing to obtain legal advice before doing so; albeit her two support people had already signed the notes as being a true and correct record. Ms Oliedam says that there was pressure put on her to sign the notes. While it seems reasonably clear that Ms Oliedam was requested to affix her signature on possibly two other occasions, and hence she may have felt under some pressure accordingly, I cannot find any evidence of any particular disadvantage arising. Given that Ms Oliedam has not identified anything within the notes that she particularly

disagrees with, it can be concluded that they are a fair and reasonable record of the meeting held on 21 June 2011. Further, Mrs Wilson attests that she duly accepted that Ms Oliedam did not wish to sign the notes.

[26] On 29 June 2011, Ms Oliedam along with her support person was requested to meet with Mr Cornwall, the retail manager. Ms Oliedam says that Mr Cornwall accused her of causing another employee, Jan Maber, to leave the employment of the business. Mr Cornwall denies that he made any such accusation. Rather, he says that he did talk to Ms Oliedam about her behaviour towards Ms Maber as result of Ms Oliedam discovering that Ms Maber had been offered the project of re-merchandising the giftware. It seems that Ms Oliedam was unhappy that she had not been asked about this project and had, apparently, taken it as an implied criticism of her ability to do her job.

[27] The evidence of Ms Oliedam also refers to the minutes of the meeting of 21 June 2011 being on Mr Cornwall's desk and allegedly, able to be viewed by other managers who had just attended a meeting in his office. But Mr Cornwall attests that it would not have been possible for Ms Oliedam to have seen any document he had on his desk, given the seating arrangements when they met. There is no evidence that other managers were aware of the circumstances pertaining to the investigation of Ms Oliedam's alleged behaviour at that time.

Suspension from employment

[28] On 30 June 2011, Ms Oliedam and her support person met with Mrs Wilson and Mr Whitcher. Ms Oliedam was informed that on the basis of the initial investigation into the complaint made by Ms Lillian Nelson, the company had concluded that there were grounds to move the allegation of harassment onto being a disciplinary process. The evidence of Mrs Wilson is that after some discussion, Ms Oliedam was informed that she was being stood down on full pay and a disciplinary meeting was scheduled for 5 July 2011. This was confirmed by a letter that indicated that:

The purpose of the hearing is to discuss an allegation of harassment which has been made by a team member. The disciplinary meeting is an opportunity for you to make explanation or comment.

[29] A copy of the formal letter of complaint written by Ms Nelson was also provided to Ms Oliedam.

Disciplinary meeting – 11 July 2011

[30] This meeting was originally scheduled for 5 July but was postponed. Ms Oliedam was notified of the postponement via a letter from Mrs Wilson dated 5 July 2011. This informed that:

- More information had come to hand about the allegation of harassment which indicates that the problem may be more widespread than it appeared initially.

[31] Attached to the letter was the information that Mrs Wilson had gathered to date, as a result of her investigation.

[32] A detailed written record of the proceedings of the meeting has been provided to the Authority. Among other matters, the following points were discussed (in summary):

- (a) The allegation of harassment from Lilian Nelson;
- (b) That the harassment was not isolated to Ms Nelson as revealed by statements from other employees;
- (c) The refusal by Ms Maber to work out her notice period because of “internal politics and negativity” involving Ms Oliedam toward her;
- (d) The company’s harassment policy and the application to the circumstances;
- (e) The possibility of Ms Oliedam accepting a warning and performance management involving a mentor;
- (f) That one person had resigned specifically because of Ms Oliedam and another was on the verge of resigning;
- (g) The team leader (Mr Cloke) had resigned citing personal reasons but also he cited Ms Oliedam’s attitude and behaviour as a factor;
- (h) Two other employees resigning due to the treatment they had received from Ms Oliedam;
- (i) The responsibility of the company to provide a safe working environment.

[33] Due to Ms Oliedam's representative expressing some concerns about the information the Company was relying upon, in regard to its view that disciplinary action was required, it was agreed that the meeting would be adjourned in order for the Company to continue its investigation and subsequently provide the information which Ms Oliedam's representative asserted was lacking.

Meeting 26 July 2011

[34] Via a letter dated 21 July 2011, Ms Oliedam was invited to attend a further disciplinary meeting on 26 July 2011. The letter informed Ms Oliedam that:

You are asked to attend the meeting to discuss allegations of the continued bullying and harassment of Loren Bremner leading to her resignation on 9 June 2011 and harassment and bullying towards Lillian Nelson on 13 June 2011 and Jan Maber on 27 June 2011.

[35] Enclosed was documentation detailing the events leading to the complaints of bullying and harassment and Ms Oliedam was informed that the documents had been supplied to the Company on a confidential basis, and were available to Ms Oliedam on the same understanding; that they should remain private and confidential. The letter then goes on to inform:

The behaviours which have led staff members to make allegations of bullying and harassment are shouting, tone of voice, standing over them in an aggressive manner, excessive and aggressive picking on them or finding fault and deliberate exclusion from performing a duty. These behaviours have been discussed with you on several occasions throughout your employment with the company and in signing your most recent performance review on 22 February 2011 you have acknowledged and agreed that your behaviours have been discussed with you, that they have been inappropriate and that the company required improvement. The company has supported you by providing counselling and most recently training in the form of an Effective Supervisory Workshop which you attended weekly from 9 March to 15 June 2011.

[36] Ms Oliedam was informed that the allegations were viewed seriously by the Company and that the outcome of the meeting could be disciplinary action in the form of a warning, or even termination of her employment.

[37] As evidenced by the comprehensive written record of the meeting, there was considerable discussion pertaining to the allegations against Ms Oliedam of harassing and bullying three employees: Loren Bremner, Lillian Nelson and Jan Maber. The denials and explanations of Ms Oliedam are also clearly set out and also the fact that Ms Oliedam produced emails from three colleagues, that portrayed her in a positive

manner, is mentioned. On the other hand, the Company explained that it had received a number of statements portraying the negative aspects of Ms Oliedam's behaviour and Mr Witcher offered to provide them to Ms Oliedam's representative; but it appears that he did not wish to receive these at the time, albeit Mr Witcher made it clear that the company would be relying on those statements, if required.

[38] The meeting ended on the understanding that the Company would investigate some of the things that Ms Oliedam had raised and then a decision would be made about the appropriate action to be taken.

Dismissal

[39] A decision was made to terminate the employment of Ms Oliedam. This was conveyed to her at a meeting with Mr Wilson on 29 July 2011. Ms Oliedam also received a letter dated 27 July 2011. The decision was made jointly by Mr Wilson, Mrs Wilson and Mr Witcher. The evidence of Mrs Wilson is that in arriving at the decision to dismiss Ms Oliedam, the matters considered included:

- (i) The work done with Rae over the 15 weeks of the Effective Supervisory Workshop.
- (ii) Other coaching and counselling provided to Rae to assist in addressing her behaviours up to the time of the formal complaint being received and an investigation being initiated.
- (iii) Rae's own acknowledgment that she had been spoken to by me [Mrs Wilson] about the reason for Chris Balk's resignation.
- (iv) Rae's own admission that she had been previously spoken to by management about her behaviour toward staff members including her comments at the time of her annual review, her comments in the investigation and disciplinary meetings about "pulling her head in" and "after Loren left she thought things had settled down".
- (v) The staff statements provided as supporting evidence demonstrating the widespread nature of the harassment and bullying.
- (vi) The number of staff who resigned citing Rae's behaviour as a reason or contributing factor in their decision.
- (vii) Company policy with regards to serious misconduct.
- (viii) When weighing up the complaints, the statements from other staff and Rae's history of behaviour and her acknowledgment that she was made aware of the company concern over her

behaviour on several occasions, it was determined that on the balance of probabilities the incidents with Lill and Jan did occur and the ongoing harassment and bullying of Loren had also taken place.

- (ix) Prior to making a final decision to terminate Rae's employment the company also sought legal advice to confirm that a procedurally fair process had been followed and that the decision to terminate was fair and reasonable giving the balance of evidence confirming the substance of the allegations.

[40] Mrs Wilson also referred to sanctions other than dismissal being considered including a demotion, a transfer and more training and coaching. However, it was considered that none of these were viable alternatives.

[41] The letter confirming the dismissal of Ms Oliedam informed that the reason was serious misconduct relating to the harassment of three staff members, leading to the resignation of two of them.

The submissions for Ms Oliedam

[42] Ms Oliedam challenges her dismissal on procedural and substantive grounds. In support of the argument that the dismissal was procedurally unfair, Ms Oliedam says, first, that the employer relied on irrelevant material when making the decision to dismiss. Secondly, it is submitted that Ms Oliedam was never given a real opportunity to respond to the allegations:

(a) *Irrelevant material*

[43] As part of the investigation process, Mrs Wilson spoke to 15 other employees and the statement from each of them has been produced to the Authority. It is submitted for Ms Oliedam that the Company relied on these statements. In support of this proposition, the attention of the Authority is drawn to the following extract from the dismissal letter dated 27 July 2011:

Statements taken from the Garden Department Team Leader and members of the Garden Team as part of the investigation into allegations of harassment and bullying, support the likelihood that the incidents did occur.

[44] Ms Oliedam says that only one of the 15 staff members, the garden department team leader, Mr Cloke, had any direct knowledge of any of the allegations. And even then, Mr Cloke only witnessed Lillian Nelson crying and upset after the alleged

incident. Essentially it is argued that the investigation process became a “popularity contest” whereby Mrs Wilson gathered a series of irrelevant opinions from Ms Oliedam’s work colleagues as to her reputation, personality and management style, rather than first hand observations that supported the complaints/allegations of the three employees involved.

[45] But the Company points to its obligation (and its entitlement) when conducting an investigation to inquire from other employees within the garden department, or from other departments, if they had witnessed the incident whereby Ms Nelson claimed that she had been bullied and intimidated by Ms Oliedam. In the event, the Company says only one of the 15 statements was relied upon, that of Mr Cloke, as he had direct knowledge of the incident and had personally discovered Lilian Nelson crying and upset.

[46] The Company refutes the assertion that a popularity assessment pertaining to Ms Oliedam was conducted. It is submitted that the sole objective of the investigation was to confirm whether any other employees who worked in close proximity in regard to the incident involving Ms Nelson, had any relevant information that would assist in determining whether her complaint had substance or not. In summary, the Company says that the evidence it relied upon in regard to the complaint from Lillian Nelson was that:

- (i) She stated that she had been subjected to conduct (yelling at her) from Ms Oliedam that had reduced her to tears; and
- (ii) That the team leader, Mr Cloke, found her crying in the workplace after the alleged incident had occurred.

(b) *Opportunity to respond*

[47] The submission for Ms Oliedam is that the lack of a robust investigation, that revealed the details of actual incidents, also resulted in Ms Oliedam being denied any real opportunity to provide a meaningful response to the allegations. It is argued that, with the exception of Ms Nelson’s allegations, Ms Oliedam went into the disciplinary process knowing little more than that she was accused of harassing Jan Maber and Loren Bremner. Ms Oliedam says that she was not told when she had harassed them or what she had allegedly said to them or done to them that amounted to harassment. Essentially, Ms Oliedam says that in regard to the allegations pertaining to Ms Maber and Ms Bremner, because she was not provided with specific instances of when she

made a particular comment (or comments) to these two complainants, she was unable to make any meaningful response.

[48] But the company says that Ms Oliedam was provided with full details of the allegations. They were attached to the letter of 5 July 2011 and they were also offered at the meeting on 26 July 2011 but declined by counsel for Ms Oliedam; albeit both had been informed that various statements would be relied upon when making any disciplinary decisions.

The substantive justification for the dismissal

[49] Ms Oliedam says that the dismissal was not substantially justified for two reasons. First, the alleged behaviour did not satisfy the definition of harassment. And the alleged behaviour was not serious enough to justify dismissal. The submissions for Ms Oliedam refer to the allegations pertaining to her treatment of the three employees involved. It is posited that the complaints pertaining to the behaviour attributed to Ms Oliedam do not meet the definition of harassment relied upon by the Company.

[50] The Company requires employees to “respect and abide by” a *Code of Ethics*. The Code includes:

4. HARASSMENT. Never participate in conduct exhibiting repeated and undesirable comments of an offensive, threatening, humiliating, or intimidating nature directed at any person or group of people.

[51] It is commonly accepted that the definition of harassment was expressed at the meeting that took place on 21 June 2011, whereby Mrs Wilson read from the Company’s policy, as follows:

Defined as conduct exhibiting among others, repeated and undesirable comments of an offensive, threatening, humiliating, or intimidating nature directed at a person or a group of people.

Harassment, under the terms of this policy, does not refer to management responsibilities such as instructions or requests given to team members by members of the management team.

General harassment is

- Name calling
- Mocking

- Bullying or intimidation whether verbal, physical or psychological
- Persistent degradation or humiliating comments

The above lists are by no means exhaustive.

[52] It is submitted for Ms Oliedam that the conduct attributed to her does not satisfy the above definition of harassment. It is also argued that the definition of harassment makes a specific exclusion for management responsibilities and this encompasses the staff management responsibilities (supervision) of team members, as set out in Ms Oliedam's job description (KRA Five).

[53] It is submitted that the incident regarding Lillian Nelson involved Ms Oliedam simply asking Ms Nelson to do a job and then "scolding" her when she did not do it as required. It is argued that assigning a task to a team member and monitoring the completion of the task is a management responsibility and not harassment under the company's policy.

[54] The above proposition is also applied to the incident involving Jan Maber. It is also submitted for Ms Oliedam that it is difficult to apply a definition of harassment to the behaviour that Lauren Bremner complains of.

[55] Contrary to the submissions for Ms Oliedam, the Company says that its definition of harassment does apply. This is because specific behaviours that leave another staff member crying, upset and feeling belittled are never acceptable. This is particularly so when the person engaging in such behaviour is in a position of some authority over another.

[56] On balance, I conclude that the behaviour of Ms Oliedam, more probably than not, falls within the category of verbal bullying or intimidation.

[57] The Company responds to the management responsibility argument by making a valid, and probably obvious point, that the actions of Ms Oliedam and their effect on the staff members, goes well beyond just giving reasonable and acceptable instructions.

Serious misconduct

[58] The final substantive argument for Ms Oliedam is that the actions attributed to her could not reasonably be treated as serious misconduct warranting dismissal.

Analysis and conclusions

[59] Pursuant to s.103A(2) of the Act, the question of whether a dismissal is justifiable must be determined by the Authority on an objective basis, by applying this test: Whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in the circumstances. And then in applying this test, the Authority must consider the following:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.²

[60] And then further, at s.103A(4) of the Act:

- (4) In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.

[61] Upon applying the test provided at s.103A(2), I am satisfied that the employer has appropriately met the requirements of subsection (3). That takes us to subsection (4) whereby the Authority may consider any other factors it considers appropriate; including of course, the substantive reason(s) for the dismissal.

[62] Consideration of the factors pertaining to the substantive reasons for the dismissal, requires the examination of two questions: First, was the conduct complained of capable of amounting to serious misconduct? And if so, in all the circumstances of the case, was dismissal warranted?³

² Section 103A(3) of the Act

³ *Wellington Road Transport etc IUOW (Hepi) v. Fletcher Construction Co Ltd* [1983] ACJ 653.

Was the conduct complained of capable of amounting to serious misconduct?

[63] The letter dated 27 July 2011, confirming the dismissal of Ms Oliedam, informs that the reason for the dismissal:

[... is for serious misconduct relating to the harassment of three staff members leading to the resignation of two of them.

[64] The two staff members who resigned were Jan Maber and Lillian Nelson.⁴ Ms Maber commenced her employment on 7 June 2011 and her last day working was 29 June 2011. Initially, Ms Maber gave the contractual period of notice to terminate her employment, due to the behaviour of Ms Oliedam, but subsequently asked to be excused from working out the notice; informing Mrs Wilson that she could not continue to work with Ms Oliedam treating her in [“...that bullying manner”⁵.

[65] The submissions for Ms Oliedam are critical of the investigation process adopted by Mrs Wilson in that she accumulated a number of statements (15) from staff members who were not in a position to observe the behaviour of Ms Oliedam towards Ms Maber (and/or the other two employees). That criticism would be justified if the employer had relied upon many of the statements when arriving at its decision to dismiss Ms Oliedam. But that is not what happened. In regard to the circumstances pertaining to Ms Maber, the employer had a written statement (28 June 2011) from Ms Maber and Mrs Wilson interviewed (via telephone) Ms Maber, and recorded the information in a report dated 14 July 2011. Also, Mrs Wilson had previously met with Ms Maber on 29 June 2011 and found her to be upset and tearful. And then there is the statement of Mr Cloke, the team leader. He records his observations of the behaviour and attitude of Ms Oliedam and relates to complaints he had received from Ms Maber and Ms Nelson.

[66] Ms Nelson made a formal written complaint (27 June 2011) following being reduced to tears by Ms Oliedam. When requested to by Mrs Wilson, Ms Nelson provided further details in a statement dated 11 July 2011. Ms Nelson records Ms Oliedam shouting at her, using an aggressive tone. Among other things, Ms Nelson also records that Ms Oliedam:

[... is aggressive in the way that she speaks, she shouts at me, she stands over me in a threatening manner, she stands very close to me,

⁴ The resignation of Ms Bremner also assumes considerable relevance.

⁵ As recorded in the report compiled by Mrs Wilson dated 14 July 2011.

she constantly checks up on me, coming over every 10 minutes all through the day continually finding fault in everything I do.

[67] Ms Nelson also includes in her statement, observations of how Ms Maber was treated by Ms Oliedam.

[68] The third employee involved, pertaining to the decision to dismiss Ms Oliedam, was Ms Lauren Bremner. The team leader, Mr Cloke, reported to Mrs Wilson on 18 March 2011 that Ms Bremner had been found crying as a result of the manner in which Ms Oliedam had been behaving toward her. Ms Bremner records in an email (11 April 2011) to Mrs Wilson, various complaints relating to the behaviour of Ms Oliedam. Ms Bremner subsequently left her employment after less than six months' service. The exit interview is revealing in regard to the behaviour of Ms Oliedam being a substantive influence in regard to the departure of Ms Bremner.

[69] On the basis of the evidence before the employer (and now the Authority), I am satisfied that the company was entitled to conclude that the behaviour of Ms Oliedam, toward the three employees mentioned, constituted serious misconduct for which disciplinary action was appropriate and required.

Was the dismissal of Ms Oliedam an action that a fair and reasonable employer could take in all the circumstances?

[70] The Court of Appeal has confirmed that there may be more than one correct response open to a fair and reasonable employer:

The Court [Authority] has to be satisfied that the decision to dismiss was one that a fair and reasonable employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to use this in terms of "could" rather than "would" used in the second BP Oil case [1992] ERNZ 483 (CA) at 487.⁶

[71] The evidence is that Ms Oliedam had struggled with her attitude and demeanour towards other staff members for some time. Indeed, to her credit, Ms Oliedam acknowledged such and at the initiative of her employer, she engaged in a supervision course for 15 weeks in order to obtain further training in appropriate supervision techniques.

⁶ *W&H Newspapers Ltd v. Oram* [2000] 2 ERNZ 448 at 457.

[72] Regrettably, Ms Oliedam reverted to her previous behaviour shortly after completing the course, leaving her employer with no option but to eventually take the action it did.

[73] The evidence for the Company is that it gave consideration to alternatives to dismissal, such as demotion, transfer and more training, but decided that none of those options were viable.

[74] Having closely considered all of the substantial evidence placed before the Authority, I find that the dismissal of Ms Oliedam was an action that a fair and reasonable employer could take given all the circumstances. While it is accepted that Ms Oliedam had good sales, customer relations skills and product knowledge, her recurring unacceptable behaviour and attitude towards some of her work colleagues, was such that no reasonable employer could be expected to continue the employment relationship.

Determination

[75] For the reasons set out above, I find that the dismissal of Ms Oliedam was one that a fair and reasonable employer could have taken. It follows that I find that the dismissal was justifiable and that the claims of Ms Oliedam are not successful.

Costs

[76] Costs are reserved. The parties are invited to resolve that matter if they can, taking into account the outcome and the usual daily tariff approach adopted by the Authority. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority

