

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 1
5424515

BETWEEN JOHN CHAN
 Applicant

AND S & K LIQUOR LIMITED T/A
 MIRAMAR LIQUORLAND
 Respondent

Member of Authority: Trish MacKinnon

Representatives: John Chan in person
 Michael Fennessy, Counsel for the Respondent

Investigation Meeting: 7 November 2013 at Wellington

Determination: 6 January 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Chan initially made an application to the Employment Relations Authority on 5 July 2013 claiming intimidation and abuse by his employer was jeopardising his continued employment. He sought mediation of the issue and then filed an amended statement of problem on 31 July 2013 claiming to have been unjustifiably dismissed. Mr Chan seeks compensation for the hurt and humiliation he suffered from his unjustified dismissal and from the events that preceded it. Additionally he seeks lost wages.

[2] Miramar Liquorland denies that there was any intimidating or threatening behaviour towards Mr Chan during his employment and says his dismissal was justifiable. Additionally it raises the issue of the costs it incurred as a result of Mr Chan filing proceedings in the Authority before he had raised his concerns with it. It says it was put to unnecessary expense in having to respond formally to the first

statement of problem when it would readily have agreed to mediation if Mr Chan had raised his concerns over bullying and intimidation with it.

[3] Both personal grievances were raised well within the 90 day timeframe specified by section 114 of the Employment Relations Act 2000 (the Act) by means of the Authority serving Mr Chan's statements of problem on Miramar Liquorland. The respondent acknowledges this but notes that the issue may impact on any consideration of costs.

Background

[4] Mr Chan was employed at Miramar Liquorland as a Duty Manager from April 2011 to 27 July 2013, the date he was summarily dismissed. He was a part-time employee and, in the months before his dismissal, was working weekend shifts.

[5] The first matter relevant to Mr Chan's grievances occurred on 8 June 2013. A customer emailed Mark Satherley, a director of Miramar Liquorland, to inform him of an incident involving Mr Chan that had happened within the last 30 minutes. The customer expressed disappointment and upset over her interaction with Mr Chan. She believed he had treated her rudely and asked Mr Satherley to speak with Mr Chan about his conduct. Mr Satherley raised the matter with Mr Chan that day and heard his version of events, which differed from that of the customer.

[6] A second incident occurred on 22 June 2013 on a busy Saturday evening. Mr Satherley, who was visiting Miramar Liquorland while off duty, commented to Mr Chan on the inappropriateness of the music he was playing for a Saturday evening crowd. He asked him to change the internet radio station. After a verbal altercation Mr Chan did so. Shortly after Mr Satherley had left the store, Mr Chan changed the music back to what he had originally been playing. Mr Satherley discovered this when checking the store's internet files the next day. Mr Chan called in sick that day and did not attend the store.

[7] Mr Satherley made several attempts to contact Mr Chan by telephone and text message but was able to speak to Mr Chan on only one occasion, on which he says Mr Chan swore at him. He wrote to Mr Chan on 25 June 2013 asking him to attend a formal meeting on the following Saturday, 29 June 2013. The letter set out the following key points Mr Satherley wished to discuss:

- *Your attitude and refusal towards my requests of switching of your music, and to play the radio station instead of Pandora.*
- *Ongoing attitude and response to my phone call(s), not receiving them, and telling me you don't want to talk to me, and to f... off.*
- *Customer complaints about attitude towards them, during a recent shift, we received a complaint.*
- *Telling a staff member that I could get f..... after Saturday Incident.*

[8] Mr Satherley's letter invited Mr Chan to bring a support person along to the meeting and put him on notice of the possibility that disciplinary action ranging from a warning to summary dismissal could ensue.

[9] On 27 June 2013 Mr Satherley wrote a further letter to Mr Chan enclosing copies of the customer complaint referred to in his letter of 25 June and Miramar Liquorland's House Rules. It noted the specific House Rules that Mr Chan's alleged conduct may have breached.

[10] Mr Chan submitted a medical certificate on 25 June 2013 stating that he had been unable to attend work from the 23rd of June and planned to return to work after the next weekend.

[11] On the evening of 27 June 2013 there was a brief encounter between Mr Chan and Mr Satherley in a supermarket. Each has a different account of the incident. Mr Chan claims that Mr Satherley behaved in a threatening manner towards him. Mr Satherley says he merely told Mr Chan, who was approaching him, that he did not wish to speak with him there. He says he did not do this in a threatening way.

[12] On 28 June 2013 Mr Chan emailed Mr Satherley advising that he would be unable to work on the weekend of July 13 and 14. He noted he had family plans for a trip to Gisborne that weekend. In the course of further email correspondence, in which Mr Satherley noted that Mr Chan had continued to work at his other job, and asked for confirmation of his attendance at the meeting on 29 June, Mr Chan said he didn't believe he had "*breached any regulations, or ...behaved in any way to warrant any formal caution*" and accordingly he saw "*no reason to attend any meeting to discuss any of (his) actions.*"

[13] He said his employer had made “*a number of wild accusations*” that he would address “*at the appropriate time*”. He concluded by noting that he could not confirm when he would return to work because of the stress that recent events had caused him.

[14] At 10:10pm on the evening of 28 June 2013, Mr Chan emailed the customer who had complained about him, calling her “*rude and self-important*”. The customer emailed Mr Satherley to complain about Mr Chan’s email and to inform Mr Satherley that she would not shop at Miramar Liquorland again.

[15] Further emails between Mr Chan and Mr Satherley ensued over the following weeks, including notification from Mr Satherley that Mr Chan’s email to the customer was another matter that would form part of the meeting he was still trying to arrange with Mr Chan. He reiterated that disciplinary action up to and including dismissal could follow that meeting. Mr Chan’s response was to “*emphatically deny all the allegations and claims you have made*”. He also repeated that he saw no point in attending a meeting; did not “*wish to fall victim to further intimidation*” and would “*refer the matter to the Department of Labour*”.

[16] A formal meeting finally took place on 20 July 2013. Mr Satherley took notes during the meeting, which he produced in typed form. They show that Mr Chan responded to some matters but said he did not wish to discuss the 28 June email he had sent to the customer who had complained about him. He would respond “*when the time was right*”. He also said that he would discuss the radio station incident further at mediation, which by that stage had been scheduled for late August 2013.

[17] Following the meeting, Mr Satherley wrote to Mr Chan informing him of the outcome in relation to the matters that had been discussed. Mr Satherley noted that, in relation to three of those matters, he was considering dismissing Mr Chan without notice. He also noted he had decided to take no further action in relation to an incident in which Mr Chan had sworn at him on the telephone, accepting that it had been done in the heat of the moment.

[18] Mr Satherley referred to Mr Chan’s reluctance to discuss his email of 28 June to the customer. He scheduled a further meeting with Mr Chan for 27 July, informing him that he would have the opportunity to respond to the allegations that had been put to him in the 20 July meeting and to put across his point of view. He urged Mr Chan to respond with anything he wished Mr Satherley to consider before his employer

made a decision on these matters, noting that it may be too late if Mr Chan left his responses to mediation. Mr Satherley reiterated the seriousness of the meeting on 27 July.

[19] In one of his written responses Mr Chan referred to Mr Satherley's "*repeated threats to dismiss me*" which had caused him to think he no longer had a job. He said that was the reason he responded directly to the customer, whom he referred to in a derogatory manner, when he saw her complaint. Amongst his concerns was Mr Satherley's "*persistent intimidatory behaviour*".

[20] Mr Chan attended the meeting on 27 July 2013 and put forward his views on the matters that had been raised. Following a 30 minute adjournment, Mr Satherley informed Mr Chan of his finding that the email he had sent to the customer who had complained amounted to serious misconduct. He dismissed Mr Chan without notice.

Issues

[21] The issues for the Authority to determine are:

- a. Whether Mr Chan was bullied and intimidated by his employer in the weeks leading up to his dismissal;
- b. If Mr Chan was bullied and intimidated by his employer, whether he was disadvantaged in his employment as a result.
- c. Whether Miramar Liquorland was justified in dismissing Mr Chan.

Was Mr Chan bullied and intimidated by his employer?

[22] Mr Chan claims as evidence of the bullying and intimidation his employer embarked on:

- a. Mr Satherley's behaviour in the liquor store on 22 June 2013 (the radio station incident);
- b. Mr Satherley's "*obvious coercion and coaching*" of a staff member who provided a statement relating to the 22 June incident
- c. The raising of the 8 June 2013 customer complaint in Mr Satherley's letter of 25 June 2013;

- d. the supermarket incident of 27 June 2013;
- e. two “*threatening disciplinary*” letters from Mr Satherley containing “*unfounded allegations*”;

[23] Having heard evidence from Mr Chan, Mr Satherley, and Bryson Scott, the employee who had been working in the liquor store on 22 June 2013, I am satisfied that Mr Satherley did not bully, threaten, or act in an intimidating manner towards Mr Chan. He made a reasonable request of Mr Chan to change radio stations to one with more lively music better suited to a Saturday evening. Mr Chan queried the request, did not immediately comply with it, and only did so when Mr Satherley took a step forward to change the music himself.

[24] Mr Scott was a confident witness who rejected any suggestion that he had been coerced into providing a statement, or coached as to the contents of his statement. His employer had asked him to write his account of what had happened and he had done so. He had not been instructed what to write. Mr Scott was certain that Mr Satherley had not been aggressive or threatening towards Mr Chan. He said Mr Chan had changed the station back after Mr Satherley left the store, complaining how rude and annoying it had been of him to request the change. He was positive about the words used by Mr Chan after the director had left the store when he made an obscene suggestion about what Mr Satherley could do.

[25] Mr Chan said he was furious at Mr Satherley’s raising in his letter of 25 June 2013 the 8 June 2013 incident involving a customer who complained about his conduct towards her. In his view, he had given his perspective of that incident to Mr Satherley on 10 June and that had been the end of the matter. Mr Satherley’s evidence was that he had not told Mr Chan that he was satisfied by his explanation and the matter was still on his mind when the 22 June incident occurred.

[26] I note that of the four key points listed for discussion in Mr Satherley’s letter to Mr Chan of 25 June 2013, three of the points concerned the radio station incident. The fourth matter concerned the customer complaint. Mr Chan worked only on weekends and, while 15 days had passed between Mr Satherley’s discussion with Mr Chan about the customer’s complaint, and his letter of 25 June, that represented only four working days for Mr Chan. I do not find Mr Satherley’s raising of that matter to be bullying or intimidating. As the customer in question observed in a subsequent

email to Mr Satherley, there are many liquor outlets to choose from in Wellington. I find it was reasonable for Mr Satherley to raise the complaint as one of the concerns he needed to address with Mr Chan.

[27] With regard to the supermarket incident of 27 June 2013, the common feature of the accounts of Mr Chan and Mr Satherley is that Mr Satherley conveyed to his employee that he did not wish to discuss employment matters in the supermarket. It is the manner of delivery of that message that is disputed between them. Having had the opportunity to assess both men I find it more likely than not that Mr Chan's version of the encounter with Mr Satherley is exaggerated. I find that Mr Satherley did not intimidate or bully Mr Chan in that encounter.

[28] Mr Chan has taken exception to letters from Mr Satherley which he describes as "*threatening*". The letters include those of 25 June 2013 in which Mr Chan was first called to a meeting to discuss issues of concern, and 27 June 2013, enclosing copies of the customer complaint and Miramar Liquorland's House Rules.

[29] The first letter set out the employer's request for a meeting; invited Mr Chan to bring a support person; set out the key points for the meeting; informed him of possible outcomes; and asked him to either confirm his attendance at the meeting or request an alternative day. It was clear both from Mr Chan's emails to his employer, and from his oral responses in the investigation meeting, that he saw the information about possible outcomes as threats and intimidation. The letter noted that, in the event of the allegations being proven, "*the result may be you given a warning or up to a summary dismissal*".

[30] The letter of 27 June 2013 also referred to the possibility of summary dismissal in the event of a finding of serious misconduct. Mr Chan was clearly alarmed by these references to a possible warning or dismissal. However, I find that Mr Satherley was simply ensuring Mr Chan was aware of the seriousness of the matters he wished to discuss with him, and of the range of possible consequences affecting his employment if the outcome was adverse to him.

[31] Mr Satherley was entitled to raise performance issues with his employee and it would have been remiss of him not to have notified Mr Chan of possible outcomes. I find that Mr Chan was not bullied or subject to intimidating conduct from his employer. It follows that he suffered no disadvantage in his employment.

Was Miramar Liquorland justified in dismissing Mr Chan?

[32] Whether or not an action is justifiable is to be determined on an objective basis by applying the test in s.103A of the Employment Relations Act 2000 (the Act). 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 action occurred.

[33] The Act requires the Authority to apply the test to Miramar Liquorland's dismissal of Mr Chan. The Authority is required to consider the following factors, in relation to the dismissal, as well as any other factors it considers appropriate:

- Whether the employer investigated the allegations against Mr Chan sufficiently, taking into account the resources available to it; and
- Whether it raised its concerns with Mr Chan before dismissing him; and
- Whether it gave Mr Chan a reasonable opportunity to respond to its concerns before dismissing him; and
- Whether it genuinely considered Mr Chan's explanations in relation to the allegations against him before dismissing him.¹

[34] The Act precludes the Authority from finding a dismissal to be unjustifiable solely because of defects in the employer's process if the defects were minor, and did not result in the employee being treated unfairly.²

[35] Mr Chan was dismissed for one specific event. That was the email he sent to a customer on 28 June 2013. I have already noted that, in the email, he referred to the customer as being "*rude and self-important*". I further note that the tone of Mr Chan's email was disparaging and belittling to the customer. For example, Mr Chan expressed his regret that she had left before he could attend to her because, if she had stayed, he would have asked her to leave the store. He also said he was reminded of the Aaron Gilmore controversy "*where he acted rudely and attempted to have an employee reprimanded for not immediately attending to his needs.*" Mr Chan ended his email with a post script asking the customer to forward her employer's address "*so that they too can share this moment*".

¹ Section 103A (3) (a) to (d)

² Section 103A(5)

[36] Mr Satherley, who was already trying to organise a meeting with Mr Chan to address the matters referred to in his letter of 25 June 2013, wrote to Mr Chan again adding the new matter to the agenda of "*Potential disciplinary matters*". He attached a copy of the email which the customer had forwarded to him. He sent a further copy of the House Rules to Mr Chan, identifying the particular rules he may have broken in sending the email to the customer. Mr Satherley's letter required Mr Chan's attendance at a meeting on 20 July 2013, and advised him that he could bring a support person with him.

[37] Although Mr Chan was given only two days' notice of the meeting, he had had ample time to prepare his responses to the other issues on the agenda. His employer had been trying without success to get Mr Chan to a meeting to discuss his concerns for some weeks by this time. It should have come as no surprise to Mr Chan that the customer would bring his email of 28 June to his employer's attention. He noted in the investigation meeting that he had not had sufficient time to obtain representation, but confirmed that he had not asked for an adjournment of the meeting because he "*just wanted to get on with it*".

[38] As noted above, Mr Chan refused to discuss the email he had sent to the customer at the meeting of 20 July 2013. This was noted in Mr Satherley's notes of the meeting and also recorded in his letter of 24 July 2013 to Mr Chan. Mr Chan did not contest this. He said he would respond "*when the time was right*".

[39] Mr Satherley's letter of 24 July, requiring his attendance at a further meeting on 27 July 2013, urged Mr Chan to put any matter forward that he wished to be taken into consideration before his employer made a decision. Mr Chan availed himself of that opportunity in writing on 26 July 2013. In relation to his email to the customer, Mr Chan wrote that "*After your repeated threats to dismiss me I believed that I no longer had my job – so in response to viewing Miss Piggy's complaint which you posted to me, I replied to her directly.*"

[40] Mr Satherley's notes of the meeting on 27 July 2013, again not contested by Mr Chan, record that he wished to discuss further the matter of Mr Chan's email to the customer. He also told Mr Chan that his reference to the customer as "Miss Piggy" was unwarranted and asked him to explain it. Mr Chan stated his belief that his employer had no right to bring up the customer's complaint.

[41] He said it was because he felt he had nothing to lose that he sent the email of 28 June to the customer, and that it was Mr Satherley's fault. He also said the customer had no right to make a complaint. He thought she was "*stirring things up and there is such a thing as free speech*". Following a thirty minute adjournment, Mr Satherley dismissed Mr Chan for serious misconduct.

[42] I find that Mr Satherley followed a fair process, in which he investigated the matters of concern and gave Mr Chan ample opportunity to respond to the allegations against him. Following his first formal meeting with Mr Chan, Mr Satherley informed him of his preliminary views and gave him the opportunity in a further meeting to put any additional information or explanations to him.

[43] Mr Chan did not dispute that he had sent the email for which he was dismissed and he expressed no remorse for it. He attempted to put the blame for his conduct on his employer and on the customer herself for having complained about his behaviour towards her in the first instance.

[44] I find that Mr Satherley was entitled to take that into account in arriving at his decision to dismiss Mr Chan. As Duty Manager, Mr Chan was in charge of the liquor store and in a position of significant responsibility during his weekend shifts. His employer had a right to expect that he would exercise that responsibility appropriately and respect its emphasis on customer service in a competitive industry. By challenging the customer's right to complain about his treatment of her, and blaming Mr Satherley for the intemperate email he sent to the customer, Mr Chan gave his employer no confidence that he would not repeat such conduct.

[45] Mr Chan's email on its own may have justified dismissal. Coupled with his failure to acknowledge any culpability for his action, and his blaming of everyone but himself for it, I have no hesitation in finding his employer was justified in dismissing him.

[46] In his evidence to the Authority Mr Chan expressed regret for his action in sending the email. He said he had apologised to the customer for it. He acknowledged, however, that his apology had been made after his dismissal. Regrettably for Mr Chan, that was too late.

Determination

[47] Mr Chan's application is dismissed.

Costs

[48] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority