IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 102
5560359

	BETWEEN	RAQUEL DE KATER Applicant
	AND	STREAMLINE FREIGHT A DIVISION OF STREAMLINE CARTAGE AND STORAGE LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Rupert Gillies and Nadine Ward for Applicant John Shingleton for Respondent
Investigation Meeting:	3 February 2016
Submissions Received:	17 and 29 February 2016 from Applicant 24 February 2016 from Respondent
Determination:	4 April 2016

DETERMINATION OF THE AUTHORITY

A. Ms de Kater was unjustifiably disadvantaged in her employment.

B. Ms de Kater was unjustifiably dismissed from her employment.

C. Streamline Freight, a division of Streamline Cartage and Storage Limited is ordered to pay to Ms de Kater the sum of $10,000 within 28 days of the date of this determination.

D. The application for the imposition of a penalty is declined.

E. Costs are reserved.

Employment relationship problem

[1] Ms Raquel de Kater claims she was unjustifiably disadvantaged then unjustifiably dismissed from her employment with Streamline Freight, a division of Streamline Cartage and Storage Limited (Streamline). Ms de Kater also claims Streamline has breached its statutory obligations of good faith. Streamline denies the claims.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms de Kater and Streamline but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[3] Streamline is a cartage and storage company operating throughout New Zealand. Ms de Kater is a qualified accountant and commenced employment with Streamline as an Office Administrator on 9 March 2015. The terms and conditions of Ms de Kater's employment were set out in an individual employment agreement dated 9 March 2015.

[4] Ms de Kater was employed on the understanding that she would be working on a part time basis three days per week and filling in for other administrative staff when they were absent on leave. The position was to job share with Ms Sharon Stirling whose role was to administer the accounts payable. The intention, following an approximate 3 month training period, was for Ms Stirling and Ms de Kater to each work three days per week.

[5] As Ms de Kater would also be offered the opportunity to provide relief cover for administrative staff while they were on leave, Ms de Kater was required to undergo an extensive training period. During this training period Ms de Kater was expected to, and did, work full time hours.

[6] On or about 6 May 2015 Ms de Kater approached Mr Bowley and requested Streamline's intervention between herself, Ms Stirling and Ms Dale Searle, Credit Controller, in an attempt to reconcile the relationships between them. Mr Bowley declined to intervene.

[7] On 8 May 2015 Ms Stirling made a formal written complaint to Steamline that she and two other employees had been subject to bullying by Ms de Kater since the commencement of Ms de Kater's employment. Ms Stirling advised Streamline that if Ms de Kater stayed in her role she would resign.

[8] On 19 May 2015 Mr Gavin Bowley, General Manager, wrote to Ms de Kater inviting her to attend a meeting at 11.00am on 20 May 2015 regarding an investigation into the negative and disharmonious work place environment. Attached to the letter was the written complaint from Ms Stirling dated 8 May 2015, which set out various allegations of bullying conduct by Ms de Kater and an undated and unsigned document setting out further compliants. At the investigation meeting it was established that the second document was drafted by Ms Searle.

[9] Ms de Kater was advised that a possible outcome of its investigation was the termination of her employment. At the same time Mr Bowley suspended Ms de Kater from her employment.

[10] Ms de Kater attended a meeting on 26 May 2015. The meeting was to discuss the allegations that Ms de Kater had caused disharmony in the workplace. During this meeting Ms de Kater requested to return to work the following day, 27 May 2015. This request was declined. The reason for not allowing Ms de Kater to work was notified to her on 28 May 2015 and was stated to be because it was impractical and would inflame an already tense situation in the workplace.

[11] In an email dated 27 May 2015 Mr Bowley provided to Ms de Kater responses from Ms Sterling and Ms Searle to the written explanations provided by Ms de Kater on 26 May 2015. Mr Bowley invited Ms de Kater to respond by email while confirming their meeting the following morning.

[12] On 28 May 2015 Ms de Kater attended a second meeting at which Mr Bowley read from a pre-prepared document giving notice to Ms de Kater of the termination of her employment. The reason for Ms de Kater's dismissal was "…*disharmony in the workplace*."

Issues

[13] The issues for determination are:

a) whether one or more conditions of Ms de Kater's employment was affected to her disadvantage by unjustifiable actions of Streamline; and/or

b) whether Ms de Kater was unjustifiably dismissed;

c) if the answer to either or both of the first issues is yes, what, if any, remedies should be awarded;

d) whether Streamline breached its statutory duties of good faith and if so what, if any, penalty should be imposed.

The legal framework

[14] The statutory test of justification is contained in section 103A of the Act. That section provides that the question of whether an action was justifiable must be determined on an objective basis, having regard to whether the employer's action, 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.

[15] In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in section 103A(3):

> (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
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> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
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> (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
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> (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.

[16] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be

unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.[1]

[17] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[18] As a full Court observed in *Angus v Ports of Auckland Ltd*[2]

> A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

Unjustified disadvantage

[19] Ms de Kater claims one or more conditions of her employment were affected to her disadvantage when she was suspended from her employment on 19 May 2015.

[20] The individual employment agreement provides for suspension in the following terms:

> 18.1 The employer may suspend the Employee from his or her duties whilst the Employer conducts an investigation in relation to any matter that may concern the Employee (including whether the Employee is suffering from or carrying an infectious disease) if in all the circumstances the Employer considers it appropriate. The Employer will seek the Employees input before suspension. Suspension will be on full pay. [my emphasis]

[21] The clause expressly required Mr Bowley to seek Ms de Kater's input into the proposal to suspend her from her employment. As acknowledged by Mr Bowley at the investigation meeting this did not happen.

[22] As noted by the Court of Appeal (Richardson J) in *Birss v Secretary for Justice*[3]:

> Suspension is a drastic measure which if more than momentary must have a devastating effect on the officer concerned. The prejudice occasioned the officer by a suspension can never be assuaged even if he is ultimately vindicated at the disciplinary hearing and is then restored to office and paid his arrears of salary.

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[1] Employment Relations Act 2000, section 103A(5).
[2] [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].
[3] [1984] 1 NZLR 513 (CA) at [521].

[23] The failure to adhere to its own contractual terms with respect to the suspension of Ms de Kater was an action an employer acting reasonably and fairly could not take. Ms de Kater has established a personal grievance for unjustified disadvantage and she is entitled to a consideration of remedies.

Unjustified dismissal

[24] Ms de Kater was dismissed on 28 May 2015 because of negativity and disharmony in the workplace. Ms de Kater claims the dismissal was unjustified, that the decision to dismiss was predetermined and the reasons for her dismissal were minor and involved disagreement between herself and two other office employees which related to allegations of bullying raised by Ms de Kater.

[25] An employee can be dismissed for incompatibility but the dismissal needs to be preceded by a fair process which includes warning an employee that their position is at risk if they do not address the relationship issues. Without such a process or indeed any process the Authority cannot say the dismissal is what a fair and reasonable employer could have done in all the circumstances.

[26] In *Mabry v West Auckland Living Skills Home Trust Board (Inc)*[4] the Court held that the essential issues going to justification in an incompatibility case could be encapsulated as:

a) The employer must have reasonably concluded that the employment relationship was irreparable;

b) If so, the employer must include, on reasonable grounds, that the irreconcilable breakdown was attributable wholly or substantially to the employee to be dismissed; and

c) The employer must effect the dismissal in a fair manner.

[27] It is unlikely there will be single or multiple incidents of related misconduct but rather evidence of a snowballing effect in respect to incompatibility issues over a

[4] (2002) 6 NZELC 96,573.

reasonable period of time. The circumstances need to be entirely convincing to uphold a decision to dismiss for incompatibility. Such cases will be unusual and rare.[5]

Events giving rise to the dismissal

[28] Mr Bowley gave evidence that about a month after Ms de Kater had started work he began getting feedback from Ms Stirling and Ms de Kater that they were struggling to get along.

[29] Mr Bowley told me that Ms Stirling had advised him Ms de Kater was impossible to work with. In response Mr Bowley told Ms Stirling that she had to try and work things out and to try and get on. Mr Bowley told me he was surprised at Ms Stirling's response that she had no interest in trying to work with Ms de Kater and that matters had reached the point where she simply could not work with her.

[30] Mr Bowley discussed matters with Ms de Kater, but rather than advising Ms de Kater of the extent of unhappiness expressed by Ms Stirling he told Ms de Kater that "…*there seemed to be some tension*…" and asked if there were any specific problems. Ms de Kater, who did not know of the seriousness of the concerns raised by Ms Stirling, denied there were any specific problems and told Mr Bowley she didn't understand why there were any problems.

[31] After receiving further feedback from Ms Searle, Mr Bowley met again separately with Ms de Kater and Ms Stirling. No notes were made of those meetings and Mr Bowley was not concerned at that stage that the two employees were incompatible. It was agreed that Ms de Kater would continue with her work, keep her head down and hopefully things would work themselves out.

[32] This approach by Mr Bowley is remarkable. He was receiving clear feedback that there was a problem in the office and chose to do nothing formally to address the issues to resolve them. Ms de Kater had appropriately suggested that she and Ms Stirling meet to discuss and attempt to resolve the issues they had. This suggestion was not taken up by Mr Bowley.

[33] On 6 May 2015 Mr Bowley was told by Ms Stirling and Ms Searle that the disharmony in the workplace had become such that Mr Bowley decided to take more

[5] [1999] 1 ERNZ 104 (CA) at [107]..

formal action. Ms Stirling wrote a formal complaint dated 8 May 2015. Ms Stirling complained that Ms de Kater:

a) was unwilling to learn the current systems;
b) was trying to implement new processes which created conflict;
c) chose to ignore explanations and training; and
d) was bullying the other three employees in the office through the use of appalling behaviour verbally.

[34] Ms Stirling threatened to resign if Ms de Kater remained in her employment.

[35] Ms Searle complained that Ms de Kater:

a) had walked with her to her car park and told her she [Ms de Kater] did not like the way Ms Searle was asking questions alleging she had been rude and aggressive;

b) had been rude and abrupt in the way work was done;

c) appeared disinterested in doing anything different to what she is used to;

d) wanted to change things to her way;

e) had ordered Ms Stirling to order a stationary item that had not been authorised.

[36] On the basis of the two written complaints and without any further discussion with Ms de Kater, Mr Bowley suspended Ms de Kater and initiated a formal disciplinary process. I have already found that suspension to be an unjustified action resulting in Ms de Kater's disadvantage.

[37] In answer to questions at the investigation meeting Mr Bowley was unable to tell me what the changes were that Ms de Kater was attempting to implement or how they affected Ms Stirling in undertaking her role. At a meeting held with the other members of the office team, except Ms de Kater, Ms Stirling had advised Mr Bowley that Ms de Kater had been obstructive in her behaviour towards Ms Stirling's training of her. No specific examples were provided of the obstructive behaviour.

[38] On 19 May 2015 Ms de Kater received a letter inviting her to attend a disciplinary meeting the following day to enable Ms de Kater to respond to the written complaints from Ms Stirling and Ms Searle. Ms de Kater was told the outcome could affect her employment and she should consider the assistance of a lawyer or support person.

[39] Ms de Kater consulted with Mr Gillies who advised Mr Bowley on 20 May 2015 that he was representing Ms de Kater and raised some concerns about the lack of specificity contained in the two letters of complaint. Mr Bowley then requested and received a further letter from Ms Stirling dated 20 May 2015 reiterating much of her earlier complaint and included a further allegation that Ms de Kater had attempted to change the creditors filing system and had intimidated her when Ms de Kater raised with her concerns about how Ms Stirling had approached her the previous Friday.

[40] Mr Bowley provided Mr Gillies with the additional letter from Ms Stirling and advised that it was not just the written statements of Ms Stirling and Ms Searle that he was taking into account but also comments made by two other employees. The comments made by the other two employees were not provided to Ms de Kater for her response.

[41] The disciplinary meeting took place on 26 May 2015. Ms de Kater spoke to the matters set out in the written complaints and also provided a written response. The meeting ended with Ms de Kater still hopeful that they would be able to find a way to move forward including the possibility of attending some form of mediation.

[42] On 27 May 2015 Ms de Kater was invited to attend a second meeting on 28 May 2015. Ms Stirling and Ms Searle provide written statements made in response to Ms de Kater's written responses tabled at the 26 May 2015 disciplinary meeting. These were provided to Ms de Kater.

[43] Mr Gillies responded by urging the company to change its approach and to meet with the purpose of discussing a way forward. Mr Gillies reiterated his suggestion that Streamline consider some form of independent reconciliation as the next step.

[44] Mr Bowley refused to consider the option of reconciliation on the basis that he had already attempted a process himself in a manner appropriate to the situation. In his written evidence to the Authority Mr Bowley stated that some sort of "…*artificial reconciliation meeting would be quite counterproductive and most probably cause both Sharon and Dale to resign*". Ms Searle had made no statements in any of her written complaints that if Ms de Kater continued to work for Streamline that she would resign. The only person who was seeking to have Ms de Kater removed from the workplace was Ms Stirling.

[45] The meeting set down for 28 May 2015 went ahead as scheduled. At the commencement of the meeting and without further discussion Mr Bowley read from a pre-prepared letter advising Ms de Kater that her employment would terminate.

Conclusions

[46] For the following reasons I find Ms de Kater's dismissal to be unjustified.

[47] I am not satisfied Mr Bowley could have reasonably concluded that the employment relationship was irreparable. Ms de Kater had suggested to Mr Bowley when he first raised concerns with her, that he set up a meeting with herself and Ms Stirling to meet and discuss and resolve the issues. In his written evidence Mr Bowley concedes that if he had conducted a more thorough investigation early on he "…*most probably would have stepped in and dealt with the problem more formally at an earlier stage*".

[48] If Mr Bowley had completed a more thorough investigation he would have discovered, as I did during the investigation meeting, that the changes Ms Stirling was consistently complaining about were:

a) a change regarding how invoices were dealt with and which was agreed to by Mr Bowley at a team meeting;

b) a change to using an excel spreadsheet to capture the bank reconciliation information and which was acknowledged by Ms Stirling as resulting in a more efficient system; and

c) a change suggested by Ms de Kater regarding a filing system that was never implemented or forced upon Ms Stirling.

[49] The remaining allegations levelled at Ms de Kater were around working relationships and how people interacted. Such relationships can be repaired if the issues are dealt with as early in the relationship as possible. Mr Bowley was receiving negative feedback about Ms Stirling and Ms de Kater's relationship within a month of Ms de Kater starting work. The complaints were not one sided and involved both ladies complaining about each other. It was Mr Bowley's responsibility to take action to assist the women to set boundaries and expectations around working with each other. Instead he chose to do nothing and advised Ms de Kater to simply, keep her head down.

[50] Ms Stirling told me at the investigation meeting that she also would have been open to resolving matters if it had been suggested to her at the beginning but that by the time Mr Bowley asked her if she would meet with Ms de Kater, Ms de Kater had already been suspended and by then it was too late.

[51] I am not satisfied that Mr Bowley could conclude on reasonable grounds, that the disharmony in the working relationship was attributable wholly or substantially to Ms de Kater. Ms Stirling accepted at the investigation meeting that she was also at fault.

[52] The dismissal itself was carried out in an unfair manner. In the letter of dismissal Mr Bowley refers to having taken statements from four staff members. If this was the case, he was obliged to provide these to Ms de Kater for her comment. Mr Bowley provided statements from only two employees during the disciplinary process.

[53] It is not clear when Mr Bowley did so, but according to the letter of dismissal Mr Bowley had discussed the matter "…*at length*…" with the Board of Directors and no alternatives to dismissal were deemed practicable. The decision to dismiss was made prior to the final meeting taking place and without providing Ms de Kater with the opportunity to discuss the proposed penalty.

[54] Streamline's decision to dismiss Ms de Kater for causing significant disharmony in the workplace was not a decision an employer acting fairly and

reasonably in all the circumstances of this case could have made. Ms de Kater is entitled to a consideration of remedies for her unjustified dismissal.

Remedies

[55] When this matter was lodged in the Authority, Ms de Kater originally claimed interim and permanent reinstatement as remedies. Ms de Kater commenced full time employment on 11 June 2015 for a new employer and is no longer seeking reinstatement. That leaves claims for lost wages and compensation for humiliation and distress.

Lost wages

[56] Ms de Kater was paid two week's pay in lieu of notice on 28 May 2015. That means any lost wages arises from 15 June 2015. Ms de Kater says her average earnings in her new employment are $288.82 per week less than her average earnings at Streamline.

[57] Ms de Kater's claim for lost wages is based on the premise that she would have continued working fulltime hours for Streamline after the initial training period. I am not satisfied that she has established that is the case. The agreed basis of Ms de Kater's employment following the initial training period was three days each week. Based on an eight hour day that is 24 hours each week.

[58] The training period was to end on or about 9 June 2015 which is three months from starting work. At the end of the training period Ms de Kater was to revert to the part time position she had accepted.

[59] Ms de Kater worked quickly to mitigate her loss. Taking into account the two weeks wages in lieu of notice, Ms de Kater has not established that she has suffered a loss of wages as a result of her dismissal and no award will be made.

Compensation

[60] Ms de Kater has claimed compensation of $20,000 as a global award which is an appropriate approach.

[61] Ms de Kater gave compelling evidence of the impact the dismissal has had on her. This includes that she sought medical attention on 20 October 2015 and has had the assistance of a psychologist in November 2015.

[62] The dismissal occurred on 28 May 2015 and Ms de Kater started a new job two weeks later. Ms de Kater has provided a medical certificate confirming the assistance she has sought from her general practitioner. There is no evidence that Ms de Kater required ongoing medical treatment in the intervening five month period.

[63] An award of $10,000 is appropriate in all the circumstances of this case and that is the amount Streamline is ordered to pay within 28 days of the date of this dismissal.

Contribution

[64] I am required to consider the extent to which Ms de Kater's actions contributed towards the situation giving rise to her personal grievances. If I consider her actions so require I must reduce her remedies accordingly. [6]

[65] Ms de Kater experienced difficulties in her working relationships early on in her employment and raised her concerns directly with her manager. Ms Stirling did likewise. Ms de Kater made a sensible suggestion that the two ladies sit down with each other and discuss their concerns and resolve their difficulties. It was Mr Bowley's decision not to follow this course of action. Instead Mr Bowley waited until matters became so untenable more formal intervention was seen as necessary.

[66] I am not satisfied Ms de Kater contributed to Mr Bowley's failures to manage the workplace relations to ensure Ms de Kater and Ms Stirling could work in harmony together. There is no evidence to demonstrate that if matters had been handled differently at the time concerns were first being raised, that Ms de Kater's employment relationship would have terminated.

[67] Ms de Kater's remedies will not be reduced for contributory conduct.

[6] Employment Relations Act 2000 section 124.

Breach of good faith

[68] In addition to the claims for unjustified disadvantage and unjustified dismissal Ms de Kater claims Streamline has breached its statutory obligations of good faith and seeks the imposition of penalties. The statutory obligations are mirrored in the employment agreement in the following terms:

> *22.1 The parties to this agreement shall deal with each other in good faith. They shall be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amount other things, responsive, communicative, supportive, cooperative, transparent and honest. This is an obligation which binds both the Employee and the Employer. The parties must comply with the provisions of the Employment Relations Act 2000.*

[69] The maximum penalty for a company is $20,000.[7] Ms de Kater asks the Authority to order the whole of the penalty be paid to her.[8]

[70] The facts relied on by Ms de Kater in her claim for penalties are the same facts as relied on for the unjustified disadvantage and unjustified dismissal claims. By claiming that any penalties be paid to her, Ms de Kater is seeking to increase the payment of compensation which she has already been awarded.

[71] The Court in *Xu v McIntosh*[9] referred to a risk of doubling up of penalties if they correspond exactly with the grounds of the grievance. It was stated in Xu that a penalty is not a mechanism for topping up the compensation and that there is a need to look at whether there are special facets of the breaches calling for punishment on top of compensation.

[72] I do not find there are special facets of the breaches calling for punishment on top of the compensation already ordered.

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[7] Ibid at section 135(2)(b).
[8] Ibid at section 126(2).
[9] [2004] 2 ERNZ 448 at [43] – [45].

Costs

[73] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms de Kater shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Streamline shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[74] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards

Vicki Campbell
Member of the Employment Relations Authority