

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 96
3001451

BETWEEN RAEENA NAIKER
 Applicant

AND PORIRUA SUPERMARKET
 (1997) LIMITED t/a PAK'N'SAVE
 PORIRUA
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Gayaal Iddamalgoda, Counsel for Applicant
 Darren Mitchell, Advocate for Respondent

Investigation Meeting: 7 and 8 June 2017 at Wellington

Submissions Received: 8 June 2017 orally and in writing from both parties

Determination: 29 September 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Raeena Naiker was employed by Porirua Supermarket (1997) Limited t/a Pak'n'Save Porirua (Pak'n'Save Porirua or the company) as a seafood assistant from September 2013 until she was summarily dismissed on 16 March 2016. Ms Naiker claims her dismissal was unjustifiable and seeks remedies including compensation and lost wages. Ms Naiker originally sought reinstatement but withdrew that claim at the commencement of the Authority's investigation meeting.

[2] Pak'n'Save Porirua denies Ms Naiker's claims and says her dismissal was procedurally and substantively justified. It says Ms Naiker was dismissed on the grounds of serious misconduct relating to her behaviour in relation to a conversation

she had had with another employee in the company's staff tearoom. In arriving at the decision to dismiss her, the company took into account Ms Naiker's work record throughout her employment with it.

[3] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief of the Authority this would occur he decided, as he is permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174(3) of the Act.

The employment and events leading up to Ms Naiker's dismissal

[4] In the course of her 2½ years of employment with Pak'n'Save Porirua, Ms Naiker had a problematic relationship with her immediate manager, by whom she claimed to have been bullied. That manager did not attend the Authority's investigation and, as I do not find it necessary to name her, I will refer to her as "JPD". Ms Naiker made a formal complaint about JPD in 2015 which her employer had investigated. Ms Naiker expressed to the Authority her belief that this background was relevant in the context for her dismissal.

[5] In 2016, Ms Naiker developed a health issue and received medical advice that she required two weeks off work for the problem to resolve itself. As she had insufficient sick leave, she contacted JPD and asked if she could take the time off as annual leave. Her manager, after speaking with the Fresh Food Manager, Daniel McKissock, informed Ms Naiker her request had been refused.

[6] Ms Naiker asked her union for assistance and Richie Morris, FIRST Union organiser, contacted Mr McKissock to ask why he had declined her request to use annual leave for the period of sick leave she required. Mr Morris' evidence was that Mr McKissock told him it was due to affordability and that the company was not required to approve the request and so it did not.

[7] After that phone call from Mr Morris to Mr McKissock, JPD asked Ms Naiker to attend a meeting with herself and Mr McKissock. Ms Naiker declined to do so unless her union representative could be there. Mr McKissock then telephoned her and, according to Ms Naiker, lost his temper and said:

Raeena, you are not in trouble, this is an informal meeting. But if you don't get into the office right now you will be.

[8] Mr McKissock acknowledges the first sentence but denies telling Ms Naiker she would be in trouble if she did not go to his office right then. A meeting eventually took place on 18 February 2016 between Mr McKissock, JPD, Ms Naiker and Mr Morris.¹ Ms Naiker wished to discuss the issue of her employer not agreeing to allow her to use annual leave to cover her period of sick leave. Mr McKissock raised another issue in the course of the meeting which Ms Naiker believed she and JPD had resolved two weeks earlier. At the conclusion of the meeting, Mr McKissock handed Mr Morris a letter of instruction addressed to Ms Naiker, concerning the issue she believed had previously been resolved.

[9] Ms Naiker says she was stressed and upset at this point because she believed her employer was being unfair in its decision not to allow her to take annual leave to cover the period of sick leave she required to resolve her health issue. After the meeting ended she went to the staff tearoom and embarked on what she regarded as a private conversation with a person she regarded as a close friend, Sialuga Talo. Ms Talo worked as a supervisor in a different department of Pak'n'Save Porirua.

[10] Ms Naiker says she complained to Ms Talo about JPD's behaviour, describing it as bullying, and also about her employer's failure to do anything about that behaviour when she had previously raised concerns over it. She expressed her view that the company had acted unfairly towards her in giving her a letter of instruction and in the events that led to her receiving that letter.

[11] It was Ms Talo's evidence that she heard Ms Naiker out without advising her she was uncomfortable with her comments or how she was expressing herself. Following the conversation Ms Naiker left the tea room and resumed work.

[12] Shortly afterwards Ms Talo reported the incident to Mr McKissock who subsequently asked her to write out a statement of the incident. He also requested another employee, Jarrod Gardiner, who had been present in the tea room, to do the same.

¹ There was some disagreement between the parties about whether JPD had been present. However, as the notice of the meeting that was given to Ms Naiker referred to JPD being present, I find it more likely than not she was present.

[13] In Ms Talo's written statement of 25 February 2016 she included the following:

Called (JPD) a Bitch because of how she was sick and (JPD) wouldn't listen to her.

Angry about not being fair with others allowed to take leave in the department.

In her words: F... man other staff are allowed to take leave but not me, "bitch"

[14] Mr Gardiner's written statement about the incident noted that he "*was not really listening to the details*" and "*wasn't all too interested*" but that Ms Naiker had been talking about the meeting she had just come from and about how "*she was finding her situation unfair in some aspects*". He said she was complaining about Mr McKissock and JPD being unfair "*and even going to lengths of direct swearing towards them*". He noted that he found the situation "*very awkward and uncomfortable*". In the bottom right hand corner of his written statement Mr Gardiner had written "*Swearing = F...ing Bitch*". Under questioning he said he had added this after Mr McKissock asked him to write the words he had heard.

Disciplinary Action

[15] Following the events of 18 February Ms Naiker heard nothing further until a little over a week later when, on 26 February 2016, she received a Notice of Formal Meeting requiring her to attend a formal meeting to respond to allegations of misconduct. These were itemised as:

- Swearing in front of staff members, Thursday 18 Feb

- Malicious gossip or damaging gossip, towards senior management and department manager, name calling department manager in a disrespectful manner, and with bad language.

[16] The Notice listed the policy or work rule that had been breached as "*serious misconduct*" and referred to breaches of rules 36 and 37 of the company's Work Rules. The rules are as follows:

36. Use of abusive language, including bad language or foul expressions, whether in tone or in context, to a person while on duty or on Company premises.

37. Malicious or damaging gossip directed at or to any member of the public, staff or any other company personnel.

[17] The Notice of Formal Meeting informed Ms Naiker that, if the allegations were found to have substance, her actions may result in disciplinary action being taken against her up to and including dismissal.

[18] Ms Naiker attended a disciplinary meeting on 3 March 2016 and was represented by Mr Morris and FIRST Union's legal officer, Gayaal Iddamalgoda. Pak'n'Save Porirua was represented by Martin Fryer who was the Compliance and Social Media Manager and David Docherty, Manager of the store. In the course of the meeting, representations were made on behalf of Ms Naiker to the effect that:

- There was no misconduct or serious misconduct;
- Ms Naiker did not recall the comments attributed to her;
- Ms Naiker apologised for any offence caused inadvertently;
- The process was not free of irrelevant considerations;
- Dismissal would cause an unjustifiable disparity in treatment;
- The alleged comments were isolated; and
- Those circumstances were mitigated by the context of a private discussion and circumstances that related to a sense of unjustifiable disadvantage.

[19] It was Mr Morris' evidence that the company representatives were dismissive of Ms Naiker's and the Union's representations. In his view they had clearly predetermined the outcome. He said Mr Fryer was not genuinely considering Ms Naiker's explanation and did not take proper notes of the meeting. In his evidence, the meeting was three hours long and yet, when the Union asked for and obtained the notes Mr Fryer had taken, they consisted of approximately 10 lines of text.

[20] Mr Fryer's evidence was that he had a good recollection of the meeting and did not need to take extensive notes. The day after that meeting, on 4 March 2016, he emailed Mr Morris with his preliminary decision. He had determined that Ms Naiker's behaviour amounted to serious misconduct, "*namely use of abusive language, including bad language or foul expressions, whether in tone or in context,*

to a person while on duty or on company premises". He conveyed his preliminary decision which was to dismiss Ms Naiker summarily. Mr Fryer invited Mr Morris, if he wished to submit his comments in regard to this decision, to respond by email by 5pm on 9 March 2016. That deadline was extended at the Union's request and Mr Iddamalgoda replied in writing on 11 March 2016.

[21] In his response, Mr Iddamalgoda noted a number of matters Mr Fryer had omitted from his summary of representations made by the Union on behalf of Ms Naiker and his neglect of several important matters which were afforded no weight in Mr Fryer's analysis. Among the points Mr Iddamalgoda raised were Ms Naiker's apology for inadvertently causing any offence; the length of time between the incident on 18 February and it being brought to her attention by way of the notice of a formal meeting on 26 February; and the fact that the comment the company regarded as amounting to serious misconduct was not spoken at the individual but was mentioned in the context of a private conversation.

[22] Mr Iddamalgoda stated the Union's view that the company had not conducted a sufficient investigation to justify any disciplinary outcome. He took issue with Mr Fryer's view that the comments made by Ms Naiker in the staff tearoom to another staff member were not private. Mr Iddamalgoda also raised an issue of disparity of treatment regarding Mr Fryer's own experience of facing a disciplinary process for an act of misconduct analogous to that which was alleged against Ms Naiker. Mr Fryer had retained his employment after that incident.

[23] Mr Iddamalgoda further raised a concern over the company relying on Ms Naiker's work history and its reference to a final written warning that had been issued in November 2014. He noted that warning was not relevant to the current disciplinary matter and related to an incident and set of circumstances far removed in time. He stated Ms Naiker had never been known to breach the policy provisions that were relevant to the current disciplinary matter.

[24] A further disciplinary meeting was held on 16 March 2016 at which Mr Fryer read from notes prepared for him earlier by his adviser, a copy of which was provided to the Authority. Mr Fryer rejected the criticisms made of the process by the Union and confirmed his preliminary decision to dismiss Ms Naiker summarily as of that day.

[25] The notes prepared for him referred to the statements from Ms Talo and Mr Gardiner as being "*more persuasive than (Ms Naiker's) failure to recollect saying "f...ing bitch".* They also referred to the incident being "*potentially serious misconduct and based on (Ms Naiker's) employment record, it was appropriate for the matter to go to a disciplinary process rather than counselling*". Mr Fryer's prepared notes referred to Work Rules 36 and 37 and reminded Mr Fryer to read those rules out in the meeting.

[26] Mr Fryer confirmed in writing his decision to dismiss Ms Naiker by letter of 18 March 2016. In that letter Mr Fryer stated the company's decision regarding the incident in the Staff Room on 18 February was that it constituted serious misconduct, citing both Work Rule 36 and 37.

Issues

[27] The primary issue for determination is whether Pak'n'Save Porirua's dismissal of Ms Naiker was justifiable. If her claim to have been unjustifiably dismissed succeeds, issues of contribution and remedies will also need to be determined.

[28] The determination of the primary issue entails an objective consideration of whether the company's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time as specified in s. 103A of the Employment Relations Act 2000 (the Act).

[29] The Act sets out a number of factors to be considered and constrains the Authority from determining a dismissal or an action to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly. They include a consideration of whether, before dismissing the employee, the employer:

- a. sufficiently investigated the allegations against the employee, having regard to the resources available to it;
- b. raised its concerns with the employee;
- c. gave the employee a reasonable opportunity to respond to those concerns; and

- d. genuinely considered the employee's explanation.²

Discussion

[30] Pak'n'Save Porirua's letter of 18 March 2016 to Ms Naiker confirming her dismissal referred to the incident in the staff room amounting to serious misconduct and cited Work Rules 36 and 37. However, in oral evidence Mr Fryer said Work Rule 37 was mistakenly included in the letter and that only Work Rule 36 should have been referred to. He said he had agreed with the Union's submission on 3 March on behalf of Ms Naiker that what she had said on 18 February 2016 had not constituted malicious gossip.

[31] Mr Fryer also confirmed in oral evidence that his decision to dismiss her was based on his acceptance of Mr Gardiner's evidence that Ms Naiker had referred to her department manager as a "*f...ing bitch*". He said the word "*bitch*" on its own did not hold the same weight and it was the two words together that persuaded him of Ms Naiker's serious misconduct. He did not accept the conversation between Ms Naiker and Ms Talo in the staff tea room was private.

[32] Nor did he accept Ms Naiker's submission that, even if she had said the words, which she did not recall, she did not use abusive language *to* an employee as envisaged by clause 36 of the policy. Her view was that she was having a private conversation with a colleague in which she vented her frustration about treatment she had received from a manager in a meeting that had just taken place.

[33] While Mr Fryer accepted employees had the right to vent when feeling aggrieved, he said it was different when the language they used was abusive. Although Ms Naiker had not used abusive language directly to her department manager, in his view those words could have got back to that person. For that reason he regarded the words he believed she had used as a breach of Work Rule 36.

[34] Mr Mitchell submitted on behalf of Pak'n'Save Porirua that Ms Naiker's comments of 18 February 2016 were not made in a private context and that the language she used was inappropriate and malicious. In his submission, her comments were made in a way that had the potential to undermine that manager.

² Section 103A (3)

[35] He submitted Ms Naiker did not have a reasonable expectation of privacy when she made the comments. He referred to her making those comments in a loud manner and in a tea room that was frequented by employees, contractors and visitors to Pak'n'Save Porirua. In his view she would have had grounds to consider her conversation to be private if she had made the comments in a bathroom, outside the workplace, or via a private telephone call.

[36] I do not accept the submission that Ms Naiker's comments had no reasonable expectation of privacy in the staff tea room when she was talking with Ms Talo, or that her comments were not made as part of a private conversation. The company justified its description of the tea room as a public place by referring to non-employees who sometimes accessed the room. I do not accept that the occasional use of the tea room by non-employees makes that room a public place or that it is not possible for an employee to have a private conversation in the room.

[37] In any event, at the time Ms Naiker was venting her frustration to Ms Talo there is no suggestion any non-employee was present. The evidence suggested only one or, at most, two employees other than Ms Naiker and Ms Talo were in the tearoom at the time. One was Mr Gardiner, who was the other employee Mr McKissock had asked to supply a written statement. Ms Naiker was aware he was wearing headphones at the time and she was not addressing her comments to him or about him. There was a suggestion one other female employee may have been present at some stage while Ms Naiker was talking. However, the evidence was vague and, if the person had been in the tearoom, there was agreement she was sitting some distance from Ms Naiker and the other two employees.

[38] Ms Talo's written evidence was that Ms Naiker had been angry when speaking about the meeting she had just attended and had spoken loudly. She said she had been shocked when she heard Ms Naiker describe her manager as a "*bitch*" and remembered her "*using the f-word too.*" In oral evidence Ms Talo said Ms Naiker had described her manager as a "*f...ing bitch*". When asked why she had not recorded that in her written witness statement, Ms Talo had no explanation for the omission.

[39] I am not persuaded that Ms Naiker did use those two words in the manner described by Ms Talo. I find it more likely that Ms Talo's written statement was more accurate than her oral evidence given 16 months later. In making that finding I also

note that, in oral evidence to the Authority, Ms Talo claimed Ms Naiker had said she intended to "*pay Dan back*". She then acknowledged under questioning that Ms Naiker had not said that.

[40] Mr Gardiner's evidence was that, while he was in the tearoom on 18 February 2016, he had headphones on and was listening to music. He said he was not interested in work matters while on his break and did not wish to take part in any conversation but was aware that Ms Naiker was distraught and distressed and he was half listening to what she was saying to Ms Talo. Mr Gardiner said he would not have complained about Ms Naiker's words but was quizzed by Mr McKissock some days later over what he had heard and was asked to make a statement.

[41] In that statement Mr Gardiner said he found the situation "*very awkward and uncomfortable*". As noted above Mr Gardiner had written at the bottom of his statement, after signing his name, the following note: "*Swearing = f...ing bitch*". When questioned about the note, and why he had not included the words in his statement, Mr Gardiner said he tries not to swear and did not even like writing swear words but Mr McKissock had told him he really needed to know what Ms Naiker had said.

[42] Mr Fryer, whose decision it was to dismiss Ms Naiker, confirmed his view that her comments to Ms Talo, which were overheard by Mr Gardiner, constituted a breach of Rule 36. In his view, while her comments were not made "to" Ms Naiker's manager or to Mr McKissock, they could get back to those personnel and this brought the comments within the framework of the rule.

[43] Ms Naiker's conversation with Ms Talo was not private in Mr Fryer's view. He also expressed the view that he had no problem with an employee venting when feeling aggrieved or upset but that it was a different matter when the employee's language became abusive.

[44] Mr Fryer said he would not have reached the decision to dismiss Ms Naiker if she had described her manager as a "*bitch*". It was the description of her as a "*f...ing bitch*" that resulted in Ms Naiker's dismissal. He also said that, if she had not had a "*poor work history*" with the company, he would have considered a lesser sanction such as a warning. That work history was described by the company as comprising a

final warning in November 2014, three letters of instruction issued in 2015 and 2016, and "a background of conflict" with her manager.

[45] Mr Fryer accepted the note written at the end of Mr Gardiner's statement as sufficient evidence that she had used those two words, and did appear to question the discrepancy between it and the statement Ms Talo had ascribed to Ms Naiker in her written statement. I find that to have been a defect in his investigation. Nor am I persuaded that Ms Naiker did say those words. Neither Ms Talo nor Mr Gardiner had originally ascribed them to her in their written statements about the incident. As noted above, Ms Talo had no explanation for the inconsistency between her written statement and her oral evidence. Mr Gardiner gave an explanation of being particularly sensitive to swear words at the time he had written his statement which I do not find convincing.

[46] I find it more likely than not that Ms Naiker's comment was accurately recorded in the written statement Ms Talo prepared at Mr McKissock's request: "*F... man other staff are allowed to take leave but not me, 'bitch'*". As such, by Mr Fryer's reasoning, there was no reason for the company to dismiss Ms Naiker.

[47] While the language was robust and forcefully expressed, it is not uncommon language in the workplace. Mr Gardiner, under questioning, acknowledged that swearing was normal and commonplace in his work group. It was not directed towards Ms Talo, in whom Ms Naiker was confiding her frustration, but was an expression of anger and frustration over what seemed to Ms Naiker to have been unfair treatment.

[48] Even if Ms Naiker had used the two words in combination, which I find she did not, it was in the context of a private conversation she was having with a fellow employee she believed, mistakenly as it eventuated, to have been a friend. The conversation was not intended for broadcasting to a wider audience and was not intended to be heard or conveyed to the persons she was speaking about. In those circumstances I find it was not the action of a fair and reasonable employer to dismiss Ms Naiker.

[49] I note also Mr Gardiner's acknowledgement that he would have considered a lesser sanction had it not been for Ms Naiker's work history, which he said he had knowledge of from reviewing her personnel file. The November 2014 warning Ms

Naiker had received related to a specific performance issue and was approximately 16 months old at the time of her dismissal.

[50] None of the three letters of instruction she received in 2015 concerned use of abusive language. My questioning of the company's use of such letters elicited the information that they were for the purpose of guidance and clarification rather than being disciplinary tools.

[51] It therefore appears unfair to use those letters as a part justification for dismissal. With regard to the conflict with her manager, I have already referred to Ms Naiker's belief that she suffered bullying from that person and had complained about her in 2015. Mr McKissoch investigated her complaint and his evidence was that, while he did not find bullying, he noted some fault with the manager's communication to Ms Naiker which was dealt with by the company.

[52] Taking all these factors into account, I find the employer's investigation to have been defective and its decision to dismiss Ms Naiker to have been an action that a fair and reasonable employer could not have taken in all the circumstances at the time.

Remedies and contribution

[53] Having determined Ms Naiker's dismissal to be unjustifiable, I must now consider what remedies are appropriate and whether she contributed to the situation that led to her dismissal.

[54] Ms Naiker seeks reimbursement of wages lost as a result of her dismissal; compensation and costs. Her evidence is that she began seeking alternative employment shortly after her dismissal but was not successful until 31 January 2017. She provided some evidence of applications she had made. I note many of the applications were made some months after her dismissal and I am not persuaded an award greater than three months' wages as provided for by s. 128 of the Act is justified.

[55] Ms Naiker was clearly upset over her dismissal and the time that has elapsed since it occurred has not diminished the distress she felt. She acknowledged she still shops at Pak'n'Save Porirua, and Mr Mitchell submits that concession lessens her claim to have been humiliated by her dismissal. I do not accept that submission as it

takes no account of the valid reasons, including fiscal, for a person's choice of supermarket. I accept Ms Naiker's evidence that she was humiliated by her dismissal and, subject to any finding on contribution, find an award of compensation of \$6,000 to be appropriate in the circumstances.

[56] I have considered the parties submissions on contribution and conclude Ms Naiker did not contribute to the situation that led to her grievance. She was angry and upset after the meeting on 18 February 2016 and expressed her feelings to a fellow employer whom she regarded as a friend. The decision maker acknowledged she would not have been dismissed for that, if she had not used language, in particular the combination of two words as referred to earlier in this determination.

[57] I am not persuaded Ms Naiker used that combination of words. Even if she had, I have found her to have been engaged in a private conversation at the time in which she was venting frustration over a recent meeting. In these circumstances I do not attribute any contribution to her.

Determination and orders

[58] Ms Naiker's dismissal was unjustifiable and Pak'n'Save Porirua is ordered to pay her the following amounts:

- a. Three months' wages in the sum of \$6,739.20 gross³ pursuant to s. 128 of the Act; and
- b. Compensation of \$6,000 without deduction pursuant to s.123(1)(c)(i) of the Act.

Costs

[59] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority

³ Based on Ms Naiker's hourly rate of \$16.20 at the date of dismissal multiplied by her weekly hours (32) for thirteen weeks