

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 448
3031192

BETWEEN RACHEL CLARE FERRARI
Applicant
AND THE FLYING BEAN PETONE
LIMITED
Respondent

Member of Authority: Michele Ryan
Representatives: Barbara Bucket and Toby Cooper, counsel for Applicant
Michael Gould, counsel for Respondent
Investigation Meeting: 6 March 2019 at Wellington
Submissions Received: 6 March 2019 orally and in writing from both parties
Date of Determination: 30 July 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 11 May 2018 Ms Rachel Ferrari was dismissed from her employment with The Flying Bean Petone Ltd (Flying Bean). Her dismissal followed an investigation by the Flying Bean into a complaint received from a customer alleging her language was inappropriate.

[2] Ms Ferrari says she was unjustifiably disadvantaged in various ways by the process Flying Bean used to investigate the complaint, including that it did not act in good faith, and that her dismissal was unjustified. Ms Ferrari seeks lost wages, interest, compensation, penalties, and special and reputational damages.

[3] Flying Bean denies Ms Ferrari's claims. It says her dismissal was procedurally and substantively fair.

Relevant information leading to Ms Ferrari's dismissal

[4] Ms Ferrari was employed by Flying Bean in February 2015 to work as a barista at a coffee cart located on The Esplanade in Petone. Another barista worked when Ms Ferrari was not on shift. Each predominantly worked on her own without supervision.

[5] Mr Robert Smith and Ms Rachel Solomon-Smith are both directors of Flying Bean.

[6] Ms Ferrari's employment appears to have been largely harmonious, albeit in 2017 Ms Solomon-Smith asked Ms Ferrari to be careful about how she spoke around some clients.

[7] Ms Ferrari accepts she occasionally swore in front of customers. She says regular clientele liked their coffee served with robust social interaction, and her "friendly banter" contributed to the reason customers would keep coming back to the cart.

2018

[8] During a staff meeting held in the afternoon of Thursday, 22 February 2018 Ms Solomon-Smith made it clear to Ms Ferrari and her colleague that swearing in front of customers was to stop immediately.

[9] On Saturday 24 February 2018 a regular customer contacted Mr Smith by phone and raised three areas of concern about Ms Ferrari's behaviour. At Mr Smith's request the customer recorded these in an email on 1 March 2018.

[10] Relevant to Ms Ferrari's claim the customer alleged the following:

On many occasions (sic) Rachel has used inappropriate language example being what the fuck do you want when I come for a coffee. This I don't mind when its just me, but many times she speaks like this when other customers are there waiting for coffee or waiting to be served. Some have expressed to me that the language was a bit much.

...

[11] On 12 March 2018 Mr Smith provided Ms Ferrari was provided with a letter asking her to attend a meeting scheduled for 21 March 2017. The letter set out the customer's concerns. Two additional issues were itemised in the list of matters that directors wanted to discuss.

[12] With the exception regarding the allegation about language, the remaining issues are not relevant to Ms Ferrari's claim regarding her dismissal and it is unnecessary to detail these.

[13] The letter concluded with the advice that Flying Bean was treating the matter as possible serious misconduct and that dismissal was a possible outcome.

[14] Later that day Ms Ferrari asked if she could be advised of the identity of the complainant. Mr Smith did not reply to that query until 20 March 2018, but on balance I accept the omission was an oversight.

[15] Ms Ferrari met with the directors on the prearranged date. She was accompanied by a friend who had some experience in Human Resources and who made handwritten notes throughout the meeting. The notes were later transcribed and provided to the Authority. I shall return to the content of the meeting later in this determination.

[16] By letter dated 26 March 2018 Mr Smith advised Ms Ferrari that her explanation regarding one of the concerns had been accepted but, by her responses during the meeting, she had confirmed the remaining allegations. Amongst other things he advised "*It is also not your decision whether or not it is appropriate to swear in front of customers*". The letter went on to state Flying Bean had formed a preliminary view that Ms Ferrari's employment should be terminated for serious misconduct. She was invited to meet with Mr Smith the following day to comment on the outcome proposed.

[17] Ms Ferrari promptly sought legal advice, and a personal grievance for an unjustified disadvantage was forwarded to Flying Bean on 28 March 2018. The meeting did not go ahead.

[18] The parties attended mediation on 10 April 2018 but they were unable to resolve their differences.

[19] On 11 April 2018 counsel for Flying Bean sought comment from Ms Ferrari, as to its preliminary view to dismiss. In the meantime Ms Ferrari obtained a medical certificate advising she was unfit to work. She returned to work on 29 April 2018.

[20] Between 12 April and 8 May 2018, through their respective representatives, both parties exchanged correspondence.¹ For Ms Ferrari, it was said that the allegations had not been sufficiently particularised for her to fairly respond to them and, even if these could be substantiated (which was denied), they were insufficient to warrant dismissal. Flying Bean maintained its position that Ms Ferrari had admitted the allegations.

[21] On 11 May 2018 the solicitor for Flying Bean advised that but for the allegation concerning Ms Ferrari's communication with customers, she would have been issued with a written warning regarding the concerns. The letter advised that Flying Bean viewed Ms Ferrari's use of strong language towards customers as serious misconduct, particularly where it considered she had failed to accept her language was inappropriate. The letter concluded with advice that Ms Ferrari was dismissed with immediate effect. Flying Bean communicated directly with Ms Ferrari on that matter the following day.

The law and the issues

[22] As already noted Ms Ferrari claims she was unjustifiably dismissed. She also points to range of alleged procedural failings and raised several corresponding claims of an unjustified disadvantage as a result. The genesis to each of these claims stems from the allegation that Flying Bean did not provide sufficient information to allow her to properly respond to the allegations. As a consequence I have treated her claims for an unjustified disadvantage as one claim.

[23] At the Authority's investigation, Mr Smith, on behalf of Flying Bean, advised its decision to dismiss Ms Ferrari was because of her use of foul language with customers. He said Ms Ferrari's unwillingness to accept her communication as inappropriate led the directors to conclude she would not modify her approach in the way Flying Bean required.

[24] The Employment Relations Act 2000 (the Act) requires an employer to justify a decision to disadvantage or dismiss an employee. Section 103(A) of the Act sets out the test against which justification is measured. In this case, the Authority is required to objectively assess whether Flying Bean had reasonable grounds to dismiss Ms Ferrari, and whether the

¹ 12 & 30 April and 8 May 2018 for the applicant. 17 & 30 April and 11 May 2018 for the respondent.

process taken to reach that decision was what a fair and reasonable employer could have done in all the circumstances at the time the disadvantage and the dismissal occurred.²

[25] The Authority is therefore required to determine:

- (a) whether Flying Bean sufficiently investigated the allegation that Ms Ferrari used inappropriate language;
- (b) whether Flying Bean could fairly conclude Ms Ferrari was unwilling to abide by its instructions such that it was reasonable for it to dismiss;
- (c) if Ms Ferrari was unjustifiably dismissed did she contribute to the situation that led to her dismissal?
- (d) if Ms Ferrari was dismissed what if any remedies should she receive?

Did Flying Bean investigate the allegation that Ms Ferrari had used inappropriate language?

[26] There is no real dispute that Ms Ferrari language towards customers was full-bodied.

[27] In evidence, Mr Smith characterised Ms Ferrari as a rough diamond. He appropriately conceded that, although Flying Bean had occasionally asked Ms Ferrari to be mindful of her language, no disciplinary action had been taken on the matter before the February 2018 staff meeting. His concession leads me to conclude that Ms Ferrari's style of communication, including her use of robust language, if not condoned, had been tolerated by Flying Bean at least until the staff meeting in February 2018.

[28] It cannot be the action of a fair and reasonable employer to implement disciplinary consequences for conduct it had previously accepted. This finding leads to me to conclude that Flying Bean could only fairly take action against Ms Ferrari's communication style from that point in time in which it had informed her of its expectations, in this case on 22 February 2018.

[29] Where an employer contemplates taking disciplinary action against the employee, s 103A(3)(a) of the Act requires an employer to sufficiently investigate the concerns.

² Section 103A employment Relations Act 2000

[30] The difficulty for Flying Bean is that the customer's complaint did not specify when the behaviour complained of occurred. Mr Smith properly accepted under questioning that he did not made inquiries with the customer on this issue.

[31] The omission is significant and I find Ms Ferrari was unjustifiably disadvantaged by it. The failure to obtain sufficient detail as when the incident(s) leading to the complaint made it difficult for Ms Ferrari to answer to the allegation, a matter I shall return to.

[32] Further, the absence of that information makes it uncertain as to whether Ms Ferrari used inappropriate language with customers after the staff meeting on 22 February 2018. I note, on the evidence provided, it seems unlikely that she had opportunity to do so where she was not rostered to work at the cart between the staff meeting and two days later when Flying Bean received the customer's complaint on 24 February 2018.

[33] Flying Bean's failure to sufficiently investigate the allegations made against Ms Ferrari leads me to conclude it has not established on the balance of probabilities that Ms Ferrari used inappropriate language with customers in a period in which it could reasonably take action. It follows that it cannot have justifiably dismissed Ms Ferrari on the basis it did.

Could Flying Bean fairly conclude Ms Ferrari was unwilling to abide by its instructions?

[34] Flying Bean points to several remarks made by Ms Ferrari at the meeting on 22 March 2018 and in particular that her language towards the complainant was "*just banter*", and "*I know who I can and who I can't banter/swear with*". Although not exactly framed in the following way I understand Ms Ferrari's responses led the directors of Flying Bean to conclude they no longer had trust and confidence in her to communicate with customers in the way they required.

[35] On balance I do not accept a fair and reasonable employer could have reached that conclusion.

[36] Ms Ferrari's statements in the meeting of 21 March 2018 must be assessed against a context whereby she was required to respond to a generalised allegation about past conduct over an unspecified timeframe. Flying Bean appears to have interpreted Ms Ferrari's explanations as an admission that she had continued to communicate with customers in her usual manner after its instruction on 22 February 2018, and that she would remain doing so. But, as noted, Flying Bean had not advised Ms Ferrari, either in the letter setting out the

allegation or in the meeting itself, that its focus was on events after the staff meeting. It is not difficult to conclude that at the meeting of 21 March 2018 the parties talked at cross purposes, and Ms Ferrari's responses were more likely relevant to events prior to 22 February 2018.

[37] Ms Ferrari's statement to the directors, as recorded in the meeting notes, that "*the meeting letter make it clear [to her that language] was an issue – taken on board*" tends to undermine an inference she was unwilling to alter her language. Had Flying Bean held doubts as to whether Ms Ferrari would comply with its instructions regarding swearing in front of customers it would have been prudent put that concern squarely to her and seek her response on the matter.

[38] It may be reasonable for an employer to hold concerns about trust and confidence in an employment relationship in circumstances where it has been already established the employee had breached an employment obligation. But there is no evidence that Ms Ferrari had breached Flying Bean's direction to not swear in front of customers once it had been made, and therefore no substantive basis on which Flying Bean could fairly conclude it no longer had trust and confidence in Ms Ferrari to abide by its standards. I do not accept a fair and reasonable employer could have justifiably dismissed Ms Ferrari in the circumstances set out above.

Remedies

[39] Ms Ferrari has established her claims of unjustified disadvantage and unjustified dismissal and is entitled to remedies.

[40] The Act provides for a suite of remedies that may be available to an employee who has successfully established a personal grievance, Section 123(1)(b) provides that an employee may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee "*as a result of the grievance*". That section is qualified by s.128(2) which stipulates the Authority must order the employer to pay to the employee the lesser of the sum equal to the lost remuneration or three months' ordinary time remuneration. Section 123(1)(c)(i) allows the Authority to grant an award of compensation where an applicant establishes non-pecuniary losses as a consequence of the dismissal.

[41] The Authority must also consider the extent, if any, to which the employee's action contributed towards the situation that gave rise to the grievance, and if so to reduce remedies accordingly. In this case I am not persuaded Ms Ferrari's actions contributed to her dismissal and the following remedies require no deduction.

Lost wages

[42] Ms Ferrari seeks lost wages for the period between her dismissal and when she found permanent employment eight weeks later.

[43] Taking into account that Ms Ferrari earned \$1,448.13 (gross) from casual work she obtained over that time frame, Ms Ferrari says that her lost wages amounted to \$4,095.87. I accept her evidence on this matter. Subject to an assessment regarding contribution, Ms Ferrari is entitled to be paid \$4,095.87 for lost wages. She is entitled to interest on this sum for the period beginning 8 weeks after her dismissal to the date of the investigation meeting.

Compensation

[44] As noted Ms Ferrari was successful with her claims of an unjustified disadvantage and an unjustifiable dismissal.

[45] I have assessed her claim for compensation under each of these heads globally where the factual matrix leading to the unjustified disadvantage is central to the circumstances by which I have found her dismissal was unjustified.

[46] Ms Ferrari says she was very stressed by the allegation(s) made against her and was away from work on sick leave for several weeks.

[47] In respect of the dismissal says that she felt withdrawn and unable to engage with the world and that she went to a "*dark place*". She says she was briefly suicidal, albeit no additional information was provided as to whether she sought or obtained medical support on this issue.

[48] I accept Ms Ferrari was distressed and humiliated by the loss of her position and the process leading to that event particularly where I am satisfied that the role was an important part of her identity. I have balanced her testimony on this point alongside evidence that she obtained work within a relatively short period following her dismissal and find, subject to any issues of contribution, that \$12,000 is an appropriate award to compensate her distress.

Penalties for breach of good faith

[49] Ms Ferrari seeks a penalty of \$5,000 for breach of good faith on grounds that Flying Bean failed to comply with information requests seeking further particulars details and making findings of serious misconduct where there was no basis to do so.³

[50] I have already accepted Flying Bean was at fault not to establish when the incident(s) of the inappropriate language towards customers occurred. That failure was the central basis on which I found Ms Ferrari was unjustifiably disadvantaged during Flying Bean's investigation and that Flying Bean was then unable to establish grounds on which it could reasonably dismiss Ms Ferrari.

[51] In the absence of some special facet of the breach which would warrant punishment of the employer I do not consider it appropriate to order penalties in respect of conduct for which compensation has already been awarded.⁴ Such an approach would result in a double dipping. Ms Ferrari's claim for a penalty is declined.

Loss of benefit or special damages; and reputational damages

[52] The essence of this claim, pleaded as loss of a benefit under s 123(1)(c)(ii) of the Act or (in the alternative) special damages, concerns legal costs accrued by Ms Ferrari prior to her dismissal.

[53] I do not accept payment of legal fees by Flying Bean can be characterised as a term and condition of Ms Ferrari's employment. There is nothing in the employment agreement to suggest an agreement of this nature. It follows Ms Ferrari is unable to claim legal fees as loss of a monetary benefit pursuant to s 123(1)(c)(ii).

[54] Neither Ms Ferrari's claim for special damages or reputational damages were advanced by way of evidence before the Authority, nor was either claim quantified. Both claims are dismissed.

Arrears of wages

[55] Claims for arrears of wages were included in Ms Ferrari's written final submissions regarding Ms Ferrari's attendance at the meeting on 21 March 2018 and mediation in April

³ Statement of Problem, para 1.5

⁴ *Xu v McIntosh* [2004] 2 ERNZ 448; *Salt v Fell* [2006] 1 ERNZ 449

2018. Whilst some payslips were furnished in evidence, these were not, as the Authority understood, for the purpose of establishing wage arrears where those claims were not pleaded in the statement of problem nor referred to as a cause of action in the course of testing evidence in the investigation meeting. In any event I unable to determine from payslips alone whether wages were paid for the hours claimed. These claims are dismissed.

Summary of orders

[56] Flying Bean Petone Limited is ordered to pay to Rachel Ferrari the following:

- (a) \$4,095.87 as reimbursement of lost wages pursuant to s 123(1)(b);
- (b) Interest on lost wages calculated as \$90.08;⁵
- (c) \$12,000 pursuant to s 123(1)(c)(i) as compensation.

Costs

[57] Costs are reserved.

Note: This determination has been issued outside the timeframe set out at s 174C(3)(b). The Chief of the Authority has decided exceptional circumstances existed as providing cause for the delay.⁶

Michele Ryan
Member of the Employment Relations Authority

⁵ Accrued beginning 5 July 2018 until 6 March 2019 pursuant to Interest on Money Claims Act 2016.

⁶ Above, s 174C(4)