

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 556
3117401

BETWEEN

MARIA ALAMEDA
Applicant

A N D

MARKET GARDENERS LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Adam Mapu, advocate for the Applicant
Jeff Goldstein, counsel for the Respondent

Investigation Meeting: 1 and 2 June 2021

Submissions Received: 2 June 2021 from the Applicant
2 June 2021 from the Respondent

Date of Determination: 14 December 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Maria Alameda was employed by Market Gardeners Limited (MG) as a data entry administrator from August 2012.

[2] For the first few years of her employment Ms Alameda worked well in her role and there were no issues.

[3] In 2017 Ms Alameda's hours were reduced and it appears that as a result of this there was some resentment from her toward MG, with Ms Alameda becoming negative, rude and disruptive at work. This was managed by MG through a performance improvement process

and despite Ms Alameda not accepting that she had done anything wrong or that her behaviour at work was problematic she responded to the performance improvement process.

[4] In 2019 further issues arose with Ms Alameda's attitude and manner at work, with particular concerns arising over following instructions and adhering to MG policies. As a result Ms Alameda received two written warnings, a first written warning on 11 April 2019 and a second written warning on 24 July 2019. Another performance improvement process was also put in place.

[5] In January 2020 MG continued to have issues with Ms Alameda's attitude and manner at work; a final written warning was issued to her and a third performance improvement process was put in place.

[6] When a final issue arose in terms of Ms Alameda complying with MG policies in February 2020, MG decided to dismiss Ms Alameda.

[7] Ms Alameda says all three written warnings issued to her were unjustified and her dismissal was also unjustified. Ms Alameda's complaints centre on alleged failures by MG to follow a fair process in relation to these matters, primarily in relation to providing details of the matters in issue and that the sanctions imposed (warnings and then dismissal) were not substantively justified.

[8] MG says that in relation to all disciplinary action with Ms Alameda it followed fair processes and its conclusions on sanction were justified. It says overall Ms Alameda could not, and still cannot, accept that MG was right to act as it did and was right in reaching the conclusions it did; and it says her inability to accept what occurred and the outcomes does not mean it acted unjustifiably.

The Authority's investigation

[9] The parties were unable to resolve Ms Alameda's complaints about her warnings and dismissal and Ms Alameda lodged a statement of problem in the Authority. The statement of problem had claims for breach of Ms Alameda's employment agreement, personal grievances for unjustifiable action causing disadvantage and a personal grievance for unjustified dismissal.

[10] MG responded to the statement of problem raising issues with the unjustifiable disadvantage claims saying the personal grievances were not raised in time so far as those claims related to the first and second warnings. For the balance of the claims it denied liability asserting that its actions were justifiable.

[11] After some discussion about the scope of the claims, Ms Alameda's advocate agreed the unjustifiable disadvantage personal grievance claims relating to the first and second written warnings were not raised in time but he advanced a claim in relation to the second warning that it was in breach of Ms Alameda's employment agreement.

[12] So, the claims that I investigated are:

- (a) A breach of Ms Alameda's employment agreement in relation to the second written warning issued to her on 24 July 2019. The claim being that MG did not follow its disciplinary process set out in the staff handbook, in particular that it did not properly investigate the complaint which gave rise to the disciplinary process and sanction.
- (b) A personal grievance for unjustifiable action causing disadvantage relating to the final written warning issued to Ms Alameda on 9 January 2020. The claim being that MG failed to investigate the complaint and it failed to provide sufficient information for Ms Alameda to respond. And, that overall a final written warning was not substantively justified.
- (c) A personal grievance for unjustified dismissal, which is primarily based on dismissal not being an appropriate sanction in all of the circumstances. Whilst Ms Alameda had some concerns about the disciplinary process, she did admit the conduct complained of so did not advance procedural fairness as a basis for her claim.

[13] I investigated these claims by receiving written evidence and documents, holding an investigation meeting on 1 and 2 June 2021 and assessing the oral and written submissions of the parties' representatives.

[14] I received witness statements from Ms Alameda, Ray Hedges, Jeff Neumann, Emma Thomas and Tania Hirini. In my investigation meeting, under oath or affirmation, these

witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[15] As permitted by s174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

[16] 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 s174D(3) 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 s174D(2) of the Act.

Breach of Ms Alameda's employment agreement

What happened?

[17] On 17 July 2019 Tania Hirini, Administration Manager at MG, received a complaint from an MG employee who supervised Ms Alameda. Ms Hirini forwarded the complaint on to Jeff Neumann, Christchurch Branch Manager for MG. Mr Neumann and Ms Hirini discussed the complaint and then Mr Neumann gathered further evidence from the employee who had complained.

[18] On 18 July 2019 Mr Neumann invited Ms Alameda to a meeting advising her that he had received a complaint about her conduct at work, that complaint being that she had bullied, belittled and disrespected another employee. Mr Neumann invited Ms Alameda to a meeting on 19 July 2019 to discuss the issues.

[19] It is important to note that there were two sets of concerns at play for MG:

- (a) The specific complaint of bullying, made by Ms Alameda's supervisor; and
- (b) Generalised concerns about Ms Alameda's behaviour and conduct at work, such as bullying in general by being aggressive towards others and hassling them, not communicating with colleagues effectively, not being a team player

and helping colleagues and interfering with processes and work by challenging her supervisor's instructions.

[20] In the meeting on 19 July 2019, Ms Alameda was provided with further detail about the complaint and the concerns MG had with her conduct. This included having the complaint and concerns explained to her and providing her with a copy of the written statement. Ms Alameda was then invited to a further meeting on 24 July 2019, with that being an opportunity to respond to the complaint and MG's concerns.

[21] Mr Neumann and Ms Alameda's supervisor attended the meeting with Ms Alameda on 24 July 2019. In that meeting Ms Alameda responded to the complaint, reading from a written statement she had prepared and then there was a lengthy discussion around Ms Alameda's response including traversing some of the detail of the complaint and the general concerns raised about Ms Alameda's behaviour.

[22] After the meeting, having reflected on what was discussed Mr Neumann issued a second written warning to Ms Alameda.

Issues

[23] The MG employee handbook states that in relation to allegations of misconduct, the matter will be fully investigated by way of a prompt and thorough formal investigation with the staff member alleged to have committed the misconduct being given the opportunity to explain, after the allegations have been described.

[24] The MG employee handbook is incorporated into the employment agreement so I am satisfied that for the purposes of the disciplinary process that resulted in the second written warning being issued to Ms Alameda, MG was obliged to meet the requirements set out in the handbook for the investigation of misconduct.

[25] On this basis the issues for the claim based on an alleged breach of Ms Alameda's employment agreement are:

- (a) Did MG promptly and thoroughly investigate the complaint giving rise to the misconduct allegation?

(b) Did MG set out the complaint and issues arising as misconduct and give Ms Alameda an opportunity to explain?

Analysis

[26] I am satisfied that Mr Neumann investigated the complaint and MG's concerns promptly and thoroughly.

[27] I am also satisfied that Mr Neumann set out the complaint and MG's general concerns and gave Ms Alameda an opportunity to respond. In coming to this conclusion I have reviewed the evidence of what was provided in writing prior to the meetings, the witness evidence of what was discussed in the meetings, the written response from Ms Alameda and a transcript of the 24 July 2019 meeting – it is clear that Ms Alameda knew what was being complained about and was able to address the concerns raised.

[28] On this basis MG did not breach Ms Alameda's employment agreement as alleged.

Unjustified action causing disadvantage

What happened?

[29] On 1 November 2019 Ms Alameda had a verbal altercation with a colleague. Another employee complained about this to Mr Neumann stating that she had heard Ms Alameda swear at the colleague.

[30] Mr Neumann investigated the complaint and obtained written statements about what had occurred from three employees – the colleague who had been sworn at, the employee who had complained and Ms Hirini who had overheard the altercation.

[31] Mr Neumann then wrote to Ms Alameda inviting her to a disciplinary meeting, setting out the allegation and concern and providing relevant information including the statements and the MG Code of Conduct, Misconduct Policy as that related to potential serious misconduct.

[32] Again, there were two aspects to MG's concerns – the specific instance of swearing and that this was evidence of continued problems with Ms Alameda's attitude, manner, ability

to follow instructions and interactions with others with these issues being part of the ongoing performance improvement process that was in place.

[33] Ms Alameda attended the meeting on 17 December 2019 and responded to the concerns. She then set out her response fully in writing on 19 December 2019 and provided that to Mr Neumann. Ms Alameda did not deny swearing at her colleague but set out the circumstances giving rise to the altercation and more generally some context around swearing at MG.

[34] Mr Neumann considered all of the information he had received including Ms Alameda's responses and decided that Ms Alameda had sworn at her colleague, that this was a breach of MG's Code of Conduct, Misconduct Policy and he issued Ms Alameda with a final written warning. Mr Neumann also noted in the written warning that MG expected an immediate improvement in Ms Alameda's behaviour at work as that related to the wider issues which were being addressed in the performance improvement process.

Issues

[35] Section 103(1)(b) of the Act sets out that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[36] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

- (a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?
- (b) If so, did the employer's actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions justifiable?

[37] The test for whether an employer's actions are justified is set out in s 103A(2) of the Act; whether the employer's actions were what a fair and reasonable employer could have done in all of the circumstances. This test is considered in two parts – the process by which

the employer came to a decision to act as it did and the substantive justification for the decision.

[38] A fair process is governed by s 4(1A) and s 103A(3) of the Act. Based on these sections, the assessment of whether MG carried out a fair disciplinary turns on the following questions:

- (a) Did MG sufficiently investigate what occurred in terms of the concerns it had about Ms Alameda's conduct?
- (b) Did MG set out these concerns, provide relevant information and explain the possible implications of an adverse finding, for Ms Alameda so that she could consider all of this and respond?
- (c) Did MG give Ms Alameda a reasonable opportunity to respond to these concerns, before it made its decision on what had occurred and what sanction should be imposed?
- (d) Did MG genuinely consider the explanations given by Ms Alameda before it made its decision on what sanction should be imposed?

[39] Substantive justification for issuing the final written warning is assessed by considering:

- (a) Were MG's decisions as to what occurred ones that a fair and reasonable employer could come to in all of the circumstances?
- (b) Based on MG's decisions about what occurred was the decision to issue a final written warning one that a fair and reasonable employer could come to in all of the circumstances?

Analysis

[40] For the unjustifiable action causing disadvantage claim, the first and second questions are reasonably straightforward; the action complained of is the disciplinary process and outcome, which did occur and this did cause a disadvantage to a term or condition of Ms Alameda's employment.

[41] It is the third question, whether MG's actions in conducting the disciplinary process and deciding to issue a warning were justifiable, that needs to be assessed. And, in assessing this question I need to determine if MG acted justifiably in carrying out the disciplinary process and there was a substantive basis for MG's decisions.

[42] I am satisfied that MG investigated the concerns it had, provided information about those concerns to Ms Alameda, gave Ms Alameda an opportunity to respond and considered Ms Alameda's response before making its decision.

[43] I am satisfied that a fair and reasonable employer could conclude that Ms Alameda swore at her colleague and that this amounted to misconduct. I am also satisfied that in all of the circumstances a fair and reasonable employer could have decided a final written warning was the appropriate sanction, particularly in light of the prior warnings and nature of the misconduct.

[44] MG acted in a justifiable manner in carrying out the disciplinary process and issuing a final written warning and Ms Alameda's claim for unjustified action causing disadvantage does not succeed.

Unjustified dismissal

What happened?

[45] On 31 January 2020, Ms Hirini forwarded a complaint from an employee about Ms Alameda to Mr Neumann. The employee's complaint was that Ms Alameda had copied confidential MG documents and taken them out of the office and in doing this she had made the employee get the documents out of secure storage for her so she could copy them.

[46] Mr Neumann spoke to the employee who had made the complaint and obtained a written statement. Mr Neumann then sent a letter to Ms Alameda dated 4 February 2020 inviting her to a disciplinary meeting. In that letter he set out the allegation, MG's concern that this might be in breach of Ms Alameda's employment agreement and amount to misconduct and that it was also evidence of behaviour that was contrary to the work being done in her performance improvement process. Mr Neumann included relevant documents with the letter; two statements regarding the events and copies of the three written warnings Ms Alameda had received.

[47] A meeting was held on 5 February 2020 and Ms Alameda gave her response to the allegations, including her responses in writing – Ms Alameda did not deny removing confidential information, rather she explained why she had.

[48] Mr Neumann considered Ms Alameda's responses and decided Ms Alameda had removed confidential information and had made a colleague assist her with this. Mr Neumann met with Ms Alameda a second time on 10 February 2020 to discuss the outcome and after giving Ms Alameda an opportunity to comment on whether dismissal was an appropriate sanction in the circumstances he confirmed that MG was dismissing Ms Alameda on notice, albeit with notice paid in lieu of Ms Alameda working.

Issues

[49] The question of whether a dismissal is justified is assessed in the same two parts as the unjustifiable disadvantage grievance claim. Did MG carry out a fair process in coming to the decision to dismiss Ms Alameda and was the decision to dismiss substantively justified?

[50] For completeness then that means in terms of process for Ms Alameda's dismissal the questions are:

- (a) Did MG sufficiently investigate what occurred in terms of the concerns it had about Ms Alameda's conduct?
- (b) Did MG set out these concerns, provide relevant information and explain the possible implications of an adverse finding, for Ms Alameda so that she could consider all of this and respond?
- (c) Did MG give Ms Alameda a reasonable opportunity to respond to these concerns before it made its decision on what had occurred and whether dismissal was an appropriate sanction?
- (d) Did MG genuinely consider the explanations given by Ms Alameda before it made its decision on whether dismissal was the appropriate sanction?

[51] And for the substantive justification for dismissal the questions are:

- (a) Were MG's decisions as to what occurred ones that a fair and reasonable employer could come to in all of the circumstances?
- (b) Based on MG's decisions about what occurred was the decision to dismiss a decision that a fair and reasonable employer could come to in all of the circumstances?

Analysis

[52] As with the previous disciplinary process, I am satisfied that MG investigated the concerns it had, then provided relevant information about those concerns to Ms Alameda, gave Ms Alameda an opportunity to respond to its concerns and then considered Ms Alameda's response before making its decision. I am satisfied that Ms Alameda knew what the concerns were, had time to consider her response and was given a full opportunity to respond.

[53] It is clear that Ms Alameda did remove confidential information from MG premises and there are aggravating circumstances in that she coerced a colleague into helping her with this and she removed the documents for her own personal use; so she could challenge aspects of her performance improvement plan. A fair and reasonable employer could have come to these conclusions based on the process undertaken.

[54] I am satisfied that based on these conclusions an fair and reasonable employer could conclude that dismissal was appropriate for two reasons:

- (a) This was the fourth disciplinary event for which a sanction was imposed. The three prior written warnings involved breaches of MG codes of conduct or obligations, so whilst this behaviour was different in that it was not related to altercations or interactions with employees, it was similar in that Ms Alameda showed disregard for MG policies.
- (b) The conduct and the way Ms Alameda responded to it was a continuation of the behaviour that was part of the ongoing concerns MG had about Ms Alameda's conduct in the workplace. That is, she acted as she thought fit

regardless of what she was instructed, or what the process was or what her obligations might be – this behaviour manifesting in confrontations, hostile interactions, non-cooperative behaviour and not working well in her team. Then when confronted with this behaviour, Ms Alameda would not accept responsibility for her wrongdoing but rather sought to justify her position. And this was obstructive to what MG was trying to achieve through the performance improvement processes.

[55] Overall, I am satisfied that MG acted in a justified manner in carrying out the disciplinary process and then dismissing Ms Alameda. Ms Alameda's claim for unjustified dismissal does not succeed.

Conclusion

[56] All of Ms Alameda's claims are dismissed.

Costs

[57] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[58] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 28 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority