

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 220
5301496

BETWEEN KARYN CUMMING
Applicant

A N D ABSOLUTE INSURANCE
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Steven Zindel and Heather Mckinnon, Counsel for
Applicant
Scott Fairclough, Counsel for Respondent

Investigation meeting: 21 and 22 August 2012 at Nelson

Date of Determination: 12 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Cumming) commenced employment with the respondent (Absolute) on 6 May 2008 as a telemarketer. There was a written employment agreement dated 12 May 2008 which is expressed to be a casual employment contract. It is nothing of the kind; it is plain from the nature and extent of the engagement that Ms Cumming was a full time permanent employee.

[2] Ms Cumming was dismissed on 12 January 2010 for serious misconduct. There had been an altercation between Ms Cumming and her supervisor, Chantelle Boon. Although there is some dispute as to the terms of the argument, it seems common ground that Ms Boon yelled at Ms Cumming and Ms Cumming responded but in the course of doing so said that if Ms Boon did not shut her mouth, Ms Cumming was going to “smash her”. Ms Cumming frankly acknowledged that

she had made this comment or something like it when she gave her evidence to the Authority.

[3] Ms Cumming's evidence is that the workplace offered by Absolute was stressful (partly because of the nature of the business of telemarketing) and that the erratic supervision of Absolute together with factors such as the earlier dismissal of her partner by Absolute, all contributed to a rise in her stress levels and thus the outburst that led to her dismissal.

[4] While it is clear that a personal grievance was raised within time in respect of the alleged unjustified dismissal, the position is otherwise with respect to various claims under the general heading of unjustified action causing disadvantage. As to that latter group of claims, it is accepted between the parties that those matters were not raised as grievances within time and Ms Cumming has quite properly withdrawn them from contention, Absolute making clear that it did not consent to those matters proceeding.

[5] This is an unusual case in the sense that here, Absolute freely acknowledges that the dismissal is an unjustified one in all the circumstances, and accordingly, the Authority's focus must be on the question of relief, and the extent if any of contribution.

Issues

[6] In the unusual circumstances of this case, it is not necessary for the Authority to investigate Ms Cumming's extant personal grievance because Absolute concedes that Ms Cumming has a viable grievance for unjustified dismissal.

[7] It follows that the only investigation the Authority is put to is in respect of issues of remedy and contribution.

[8] That being the position, it will be convenient if the Authority considers the following questions:

- (a) Is Ms Cumming entitled to a contribution to lost wages; and
- (b) What compensation should apply; and

- (c) Has Ms Cumming contributed to the circumstances giving rise to her dismissal?

Is Ms Cumming due wages?

[9] The Authority is satisfied that the factual matrix in the present case does not disclose an entitlement to a contribution to wages from Absolute. This is because the Authority's considered view of the evidence is that Ms Cumming made a conscious decision after the employment ended to return to tertiary study and requalify. As a consequence, she was in receipt of a student allowance at the relevant time and this is effectively what she lived on during her period of study.

[10] It follows that while Ms Cumming was studying, she could not be in gainful employment and there is no evidence before the Authority that she took any steps to obtain work after the employment with Absolute ended.

[11] Having said that, the Authority does not mean to be in any way critical of Ms Cumming; her desire to seek further qualifications is laudable and the fact that she was subsequently employed by a new employer at a remarkably increased hourly rate from that which she enjoyed at Absolute is a credit to her.

[12] However, the Authority is obligated to apply the law and there cannot be a contribution to lost wages post an unjustified dismissal where wages were not, as a matter of fact, actually lost.

[13] As the Authority observes, Ms Cumming could not be said to have lost wages in circumstances where she was not available for and ready to perform work. The factual position as disclosed by Ms Cumming during the investigation meeting was that she was in a course of study from 8 February 2010 until 1 December 2010. As a consequence of her retraining, Ms Cumming was able to obtain fresh employment at a significantly higher rate of pay than she enjoyed at Absolute.

[14] The dismissal took place on 12 January 2010 but Ms Cumming had been on sick leave from 29 December 2009 down to 8 February 2010. The Authority is satisfied that during that period also, Ms Cumming cannot look to Absolute to contribute to her wages because she was on a sickness benefit as a consequence of being unable to work and if she was unable to work, then, as with the training regime,

she cannot look to her former employer to contribute to wages allegedly lost when, on the facts, she was not ready or able to work.

[15] Ms Cumming relies on the decision of Chief Judge Goddard in *Chief Executive of Department of Corrections v. Dodds* (unreported) CEC8/02, 4 March 2003. Absolute suggests that the *Dodds* case can be distinguished from the present matter and the Authority agrees. In *Dodds*, it was clear that the former employee, a probation officer employed by the Department of Corrections at Invercargill, was precluded from work again for the government because “*the reason given for her dismissal precluded her employment by the government and she sought to limit her loss by going to university for retraining*” per Goddard CJ at para.[35].

[16] His Honour goes on to make clear that Ms Dodds was prepared to relinquish her university course entirely, or limit or postpone it, if any work, including part time work, came to hand. Plainly this is not the situation that Ms Cumming was in. The reason for the dismissal would not have precluded her from other employment because she was not in the slightly rarefied atmosphere that employment in the public service may sometimes create. Furthermore, there is no evidence before the Authority that Ms Cumming took any steps at all to seek employment during the relevant period or indeed was even prepared to contemplate such employment.

[17] In the Authority’s view, the effect of s.128 of the Employment Relations Act 2000 (the Act) is to require the Authority to order reimbursement where “*the employee has lost remuneration as a result of the personal grievance*”: s.128(1)(b) of the Act. As a matter of logic, a person who is not able to work as a consequence of being otherwise engaged (either because of ill health or because of study commitments), cannot be said to have lost remuneration because such a person is not in a position to accept the work that would otherwise produce the remuneration.

Is Ms Cumming entitled to compensation?

[18] There can be no doubt that Ms Cumming is entitled to an award of compensation for the wrong done to her in the unjustified dismissal by Absolute. Absolute quite properly concedes the point in its submissions, and indeed made it clear at the investigation meeting that there was no argument that the dismissal was indeed an unjustified one.

[19] Immediately after the incident on which Absolute bases its decision to dismiss, there was a meeting between Ms Cumming, her manager Ms Paton and Ms Boon. Ms Boon was Ms Cumming's supervisor and was the person who Ms Cumming had threatened to assault. Ms Cumming sought to discuss the matter with her manager but her evidence is that she wanted a support person and had arranged for that person to be available. She says that Ms Paton precluded the engagement of the support person in that discussion. Ms Paton denies that, but the factual position is that Ms Cumming had the meeting with Ms Paton, the manager, and with Ms Boon, the victim of the threatened assault, without a support person. Clearly, given the seriousness of the allegation faced by Ms Cumming and the immediacy of the meeting after the confrontation between the two women, a good and fair employer would have insisted that Ms Cumming have some support.

[20] After that meeting, but some significant time afterwards, Ms Paton spoke to one of the directors of the employer, Mr Hudgell. Given the time of year (it was rapidly approaching Christmas), the Authority makes no issue of the delay in Ms Paton reporting the matter to Mr Hudgell.

[21] What Mr Hudgell did was consider what he had been told and then ask Ms Paton to set up a meeting with Ms Cumming. But by this stage, Ms Cumming was on sick leave and was therefore neither willing nor able to attend a disciplinary meeting.

[22] The evidence is clear that Mr Hudgell made the decision to dismiss Ms Cumming without giving her the opportunity to be heard. Mr Hudgell told the Authority that he made that decision because he considered that there was imminent danger if Ms Cumming returned to the workplace after her sick leave with the threat, in effect, still not responded to. In effect, Mr Hudgell told the Authority that the threat of violence outweighed all other considerations.

[23] Plainly, this is an unjustified dismissal; both parties accept that the failure to give Ms Cumming the opportunity to be heard is fatal to any prospect of justifying the grievance.

[24] The Authority thinks the proper course of action for it to adopt in considering the quantum of compensation is to reflect not just on the circumstances of the dismissal itself but also on the earlier meeting where, in the Authority's opinion, a

good and fair employer would have wanted to ensure that, particularly so soon after the alleged wrongdoing, a meeting between the manager and the grievant would have included a support person for the grievant. Furthermore, it is plain on the evidence that Ms Cumming took a period of sick leave from shortly after the events complained of down to early February in the following year, a period of some seven weeks. Ms Cumming contends that that sick leave was occasioned by the stress of the workplace and therefore should be sheeted home to Absolute.

[25] Moreover, Ms Cumming notes that, when she got her personal file provided to her for review some two weeks after the threatened assault on 1 December 2009, she was surprised to see that there were notes of the exchange between her and Ms Paton and Ms Boon. She had understood that this was an informal discussion which was designed to resolve the matter and yet notes were taken of the meeting without her knowledge and apparently subsequently provided to the decision-maker.

[26] It is clear to the Authority then that it must take into account in assessing compensation the following breaches by the employer:

- (a) The failure to allow a support person in such an important meeting;
- (b) The apparent misrepresentation of the nature of that meeting (Ms Cumming imagining that it was a meeting to resolve matters and in fact the employer using it as an investigatory meeting);
- (c) The recording of the notes of that meeting and the providing of them to the decision-maker without Ms Cumming being aware of that or subsequently being given an opportunity to comment on the accuracy or otherwise of those minutes;
- (d) The failure by Absolute to give Ms Cumming the opportunity to be heard before dismissal.

[27] In all the circumstances, and save for the issue of contribution which the Authority considers next, the Authority's considered view is that compensation of \$10,000 would be appropriate.

Did Ms Cumming contribute to the circumstances giving rise to her dismissal?

[28] The Authority has no hesitation in concluding that Ms Cumming did contribute to the circumstances giving rise to her personal grievance. In terms of s.124 of the Act, the Authority is obligated to consider whether the circumstances giving rise to the grievance were contributed to in any way by the grievant.

[29] The Authority considers that Ms Cumming's contribution can be identified in two particulars.

[30] The first aspect is that Ms Cumming was dismissed for quite egregious wrong doing namely the threat of violence directed at a co-worker. It follows that her personal grievance was to a significant extent contributed to by her entirely inappropriate action.

[31] The second particular is that an apology extracted from Ms Cumming in the post-incident meeting with Ms Paton and Ms Boon was not willingly given. It is plain on the facts that the apology was grudging, that it was given because it was sought, and that it was immediately followed with an intimation from Ms Cumming that if Ms Boon "*got in her face again*", there would be further difficulties. Such an apology is, in the Authority's view, no apology at all.

[32] Indeed, there is absolutely no evidence before the Authority to suggest that Ms Cumming was in any way remorseful about what she threatened to do to Ms Boon. This was not a situation where there was some verbal abuse, as is suggested on Ms Cumming's behalf. This is a situation where an employee threatened violence against another employee. The question of whether Ms Boon was a superior or a co-worker is not, in the Authority's view, especially material here; the fact is there was a threat of bodily violence and no apparent indication of subsequent remorse.

[33] The position would have been otherwise if Ms Cumming had immediately withdrawn and fulsomely apologised for her behaviour, but effectively all that could be said in her defence is that she maintained the claim throughout the proceeding that the reason that she behaved in the way that she did was because of the stress and strain of the workplace.

[34] There is some modest support for that contention in the evidence the Authority heard about Ms Cumming's medical issues at the end of the employment and the sick leave that she was on at the time of the dismissal.

[35] The Authority also heard a significant amount of evidence about the alleged failures of Absolute to provide a good healthy workplace and the alleged impact that had on Ms Cumming. But Absolute rejected those contentions absolutely and as to the prosecution of Ms Cumming's case, the claims that were originally allegations of disadvantage grievances in effect were not proceeded with because they were well out of time. However, the evidence was heard by the Authority for context purposes.

[36] In all the circumstances, the Authority thinks that the proper course is to apply a factor of 50% to identify Ms Cumming's contribution to the circumstances giving rise to her personal grievance. In effect, what the Authority is saying is that Ms Cumming cannot expect to profit by way of compensation from her completely unacceptable threat of violence and her subsequent failure to offer a fulsome withdrawal and apology in relation to the threat made to Ms Boon.

[37] Quite clearly, this was a serious threat and is not to be treated lightly; Absolute's response to the matter, if it had adopted a proper process, might well have been an entirely successful one. Certainly the Authority cannot be critical of Absolute for taking a threat of physical violence seriously and for emphasising the primacy of a safe workplace in its consideration.

Determination

[38] In all the circumstances, the Authority has decided that by reason of the personal grievance for unjustified dismissal suffered by Ms Cumming, she, but for issues of contribution, would have been entitled to compensation in the sum of \$10,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 but that because of the effect of s.124 of the Act, the Authority is required to write down that compensatory sum to a net figure of \$5,000.

[39] In addition, the Authority directs that Absolute is to pay to Ms Cumming the filing fee that she incurred of \$71.56.

Costs

[40] Costs are reserved.

James Crichton
Member of the Employment Relations Authority