

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 283
5301780

BETWEEN

HEATHER GILES
Applicant

A N D

A B C DEVELOPMENTAL
LEARNING CENTRE NZ
LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Robert Thompson, Advocate for Applicant
Jo Douglas, Counsel for Respondent

Investigation meeting: 6 and 7 December 2011 at Christchurch

Submissions Received: At the investigation meeting

Date of Determination: 20 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Heather Giles, claims she was unjustifiably dismissed by the respondent, ABC Developmental Learning Centre NZ Limited (ABC), on 16 December 2009.

[2] She also contends she was unjustifiably disadvantaged in her employment through the issuing of unjust and unwarranted warnings.

[3] ABC accepts it dismissed Ms Giles but contends the decision was justified by her poor performance. Similarly, it contends it can justify the warnings.

Background

[4] ABC owns and operates a college for potential early childcare teachers. Ms Giles was employed at the college, which at the time was under different ownership, in early 2007. She was engaged as tutor. She says she may have a direct and/or assertive manner but claims her approach has never been aggressive and/or intimidating which is, essentially, the allegation that led to her dismissal. She says she is a firm yet fair teacher who requires a high standard from her students.

[5] In December 2007 ownership of the college changed and ABC acquired control. Ms Giles accepted an offer under which she transferred her employment to ABC (though the process had been an on-going one which had commenced some months earlier). It is, however, clear there were already issues with Ms Giles's employment records indicating she and her employer had already discussed concerns about her performance and, in particular, her communication style.

[6] On 29 April 2008 ABC received a complaint about the manner in which Ms Giles had responded to three students who approached her for assistance. That led to a couple of meetings between Ms Giles and her managers which culminated in a request Ms Giles meet with the college's manager, Mr Andrew Walker. The meeting occurred on 27 June 2008 and resulted in the issue of a written warning. Ms Giles has a number of complaints about the conduct of the meeting and its outcome which, while they would appear to have some legitimacy, were not raised at the time.

[7] On 10 July 2008 Ms Giles wrote to Mr Walker acknowledging receipt of the warning. Whilst there is an element of rebuke in the letter Ms Giles does say *I fully understand my position as it now stands and will act accordingly* before undertaking to address her interaction with students. The letter also asks that the college provide examples of the inadequate conduct to which the warning applied, but a response was never furnished.

[8] On 31 July 2009 there was a further complaint. While written in the singular it was countersigned by a multiplicity of students. Amongst other things it asserts:

... a majority of the class has had enough of the negativity that goes on in the class in regards to this teacher ... I am scared to ask for help in assignments as she is unapproachable, rude and most people in the class feel this way too. People break down

in this class; she needs to be making us feel welcome, like we can talk to her.

[9] That was followed by a meeting between a group of students, Ms Tui Summers, the Academic Manager, and Ms Debbie Ryder, the Manager of the Leadership Programme. Ms Giles takes issue with this and claims such a meeting is contrary to the provisions of the college's complaints procedure. She says she only found out about the meeting when a mature student approached her and advised she wished to distance herself from what was occurring.

[10] Ms Giles attributes the discontent to the fact she was a tutor who expected her class follow the college's rules with no eating, no cell phones and no chewing gum. She goes on to say

a group of students in this class objected to my expectations of professionalism so, I believe, I was made their target. Significantly, of the approximately 26 students who started the class in that year, only approximately 8 graduated at the end of the year, most having left because they either could not cope with the work or were not really interested in training to be early childhood teachers.

[11] The complaint led to a request Ms Giles attend a formal disciplinary meeting, though that did not occur for some time.

[12] In the interim Ms Giles had undertaken a regular staff appraisal. This occurred on 25 August 2009 and contains observations such as:

There have been a number of instances again this year where concerns have been raised by students regarding responses that they have received from you

...

Student feedback regarding support they received is that this is problematic.

[13] The letter formally advising Ms Giles of the complaint and summoning her to a meeting to discuss it was dated 16 September 2009. It records the complaint is about Ms Giles's treatment of her students and, in particular, that she makes them feel inadequate, uncomfortable and disrespected. It claims they are scared to approach her and her manner is unprofessional and rude. The letter goes on to say:

These complaints follow a formal written warning on these very issues, and a performance appraisal which specifically identified student feedback as problematic and requiring significant change from you.

From the complaints received, it is evidence that little or no change has been made. You have previously been advised that if the necessary improvement is not achieved, further disciplinary action may be required, including the potential for termination of your employment.

[14] The letter requires Ms Giles attend a formal meeting on Friday 18 September to discuss the allegations.

[15] The meeting occurred as scheduled and resulted in the issuing of a final written warning dated 25 September 2009.

[16] About the meeting Ms Giles says:

The process was unfair; I was not given a reasonable opportunity to comment on the information held by the Respondent. I had asked to see the letter of complaint from the students and was emphatically told by Andy Walker that I couldn't. Tui Summers was present when he said that. I eventually saw that letter when the Teachers Council forwarded this information to me in relation to the complaint that was levelled against me. I did not receive this information until some months after my dismissal. This final written warning was on reliance of a warning that was issued on 27 June 2008, one year and one month later. I believe that the respondent's reliance on the first written warning is unjustified and should not have occurred.

[17] On 17 November 2009 ABC received another student complaint about Ms Giles's conduct. The college followed up by asking that the student meet with Mr Walker and Ms Summers. The meeting occurred on 24 November 2009.

[18] That was closely followed by another complaint, though this one came from a fellow staff member, Mr Michael Campbell. He sent a file note dated 25 November which alleges he overheard what he considered inappropriate comments from Ms Giles to one of her students. He says he raised this with Ms Giles and she *agreed that she would not speak to a student in this way again.*

[19] On 27 November Mr Walker wrote to Ms Giles. The letter is headed "Outcome of Disciplinary Meeting – Final Warning". It discusses the fact a final written warning was issued in September before going on to advise:

It was therefore with great concern I received a formal complaint from a student and memo from a colleague on matters directly reflective of the improvements required of you. I have attached the letter of complaint written by Nicolle Sendall and the memo prepared by Michael Campbell. In both of these you have appeared to:

- *Make unreasonable demands on these students;*
- *Have spoken to them in a manner unfitting of a tutor;*
- *Left both students feeling unduly upset and intimidated.*

In the letter of 25 September 2009 you were advised that the letter constituted a formal written warning and that should any further concerns in respect of your performance as a teacher arise, this will be treated as serious misconduct and may result in dismissal.

[20] The letter goes on to tell Ms Giles she was to attend a meeting on 2 December. The letter advises the purpose was to discuss the complaint and allow an opportunity to respond, before closing with the admonition there was a potential for dismissal.

[21] Ms Giles provided a written response that day (27 November).

[22] The meeting occurred as scheduled on 2 December. It was attended by Mr Walker, Ms Summers and Ms Giles. The meeting resulted in Ms Giles dismissal which was advised by letter dated 16 December 2009. During the intervening period Mr Walker conducted further investigations by interviewing staff but the information gleaned was never put to Ms Giles for comment.

[23] The letter of 16 December was signed by Mr Walker. It notes they met on 2 December to discuss various complaints and allegations about Ms Giles's treatment of her students. It goes on to say:

I am satisfied that in respect of these latest incidents, there is validity in the complaints.

Since that time I have discussed this situation with senior staff, sought legal advice, and carefully reflected over the considerable and repeated documentation covering numerous complaints from students and staff in respect of your behaviour over the past two years.

I am satisfied that despite these meetings, coaching and requirements to change your behaviour, clearly you are unwilling or unable to do so. In summary:

- *Your teaching style does not reflect the college's expectations and philosophy of guidance, assessment and positive interactive relationships with students*
- *Your treatment of some students is unfair, unjust and unreasonable*

- *Your manner when interacting with students and colleagues is often aggressive and brisk.*
- *Students feel bullied and intimidated by your actions.*

It is therefore with great sadness I must advise you that your employment with the College will be terminated with effect from today ...

[24] Ms Giles subsequently had her conduct investigated by the Teachers Council who must be advised whenever a teacher is dismissed. The Council concluded no action need be taken against Ms Giles and reconfirmed her registration.

Determination

[25] Ms Giles claims to have been unjustifiably disadvantaged by the issuing of two warnings. She also claims to have been unjustifiably dismissed.

[26] It is well established an employee can be considered to have been unjustifiably disadvantaged in their employment if they are given an inappropriate or unjust warning (see for example *Van der Sluis v Health Waikato* [1996] 1 ERNZ 514).

[27] The question is whether the action of the employer was unjust – that is to say not in accordance with justice or fairness (*Auckland City Council v Hennessey* (1982) ERNZ Sel Cas (CA) at 9. In essence the requirements are the same as those which apply when deciding to dismiss. The concerns must be properly investigated and the decision fully and properly informed.

[28] I take a possible grievance in respect to the first warning no further. The warning was issued in June 2008. Its validity was not challenged at the time. Indeed nothing formally occurred until after the dismissal. That is some 18 months later and well beyond the 90 day period prescribed for the raising of a grievance. There is no application for a grievance to be raised out of time and no relevant evidence or submission.

[29] That said, I conclude the warning was unfair. The evidence is Mr Walker refused to allow Ms Giles access to the complaint until she was in the meeting. That is a major deficiency. It means she was not fully apprised of the allegations and therefore deprived of an opportunity to prepare. Furthermore the meeting notes record Mr Walker advised he would issue the warning during his introductory comments. This was before Ms Giles had an opportunity to comment and therefore

meant Mr Walker simply could not have considered the explanation – none had been tendered.

[30] The relevance of this is that the existence of a formal warning is one of the factors relied upon in deciding to issue a final warning in September 2009. The fact the warning is unfair means such reliance is invalid though I have to say the intervening period of 15 months without formal warning is also an issue.

[31] The 90 day impediment does not apply to the second warning. It was issued on 25 September and the grievance raised on 22 December.

[32] Once again I conclude the warning was unfair. Aside from the fact it relies upon an invalid earlier warning there are other issues. Ms Giles wrote asking for information about the standards expected of her. It is accepted the college never replied. The college can counter by arguing there were numerous discussions at which their expectations were discussed. That is correct but the evidence falls short of establishing they were anything more than general in nature. When an employee requests specifics, especially after having received a warning, there is an obligation to answer and make the rules abundantly clear.

[33] Furthermore there was the meeting with the students. It is clear this was an opportunity for them to air their grievances and those grievances formed part of the alleged concerns which led to the issuing of the warning yet there is no evidence Ms Giles was apprised of what was said. Again, she can not answer allegations that are not put in their entirety.

[34] There is then the colleges' complaints process. It requires a complaint be resolved within 21 days. The complaint was received on 31 July. The meeting with students did not occur till early September and the warning, which essentially completed the process, was not issued until 25 September. That is well beyond the specified 21 days. It is well established that when an employer fails to follow its own procedure any resulting action must be unjustified (*Nutter v Telecom NZ Ltd* [2003] 2 ERNZ 234 and *Goodman Fielder NZ Ltd v Ali* [2003] 2 ERNZ 565).

[35] For the above reasons I conclude ABC has failed to discharge the onus it carries of showing its decision to issue the warning was fair.

[36] Turning to the dismissal. As already said, ABC admits it dismissed Ms Giles. It therefore accepts it must justify its decision.

[37] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least used to state, that the question of whether a dismissal is justifiable

... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[38] The above test is used as the cause of action arose prior to the present s.103A coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless they specifically provide otherwise. As there is no suggestion in the Act the new s.103A has retrospective effect, the earlier test must apply.

[39] Having just said the test of justification applicable as of 1 April 2011 is not to be applied here, I believe it appropriate it be referred to. I do so as its content, or at least subsections (b) to (d) inclusive, succinctly codify that which case law has, for many years, considered the basic requirements of a fair process. The test now requires that:

(3) In applying the test in subsection (2), the Authority or the court must consider—

...

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

(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

(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.

[40] In other words an employer must put its concerns, listen to any explanting and consider them with an open mind. I conclude ABC has failed to do that.

[41] Mr Walker accepts he continued to gather evidence against Ms Giles after the meeting of 2 December. Ms Giles was never advised of those discussions and never

had an opportunity to comment on the evidence gathered. That would, in itself, render the dismissal invalid.

[42] There is then Mr Walkers admission he discussed the issue with the wider leadership team and they contributed to the decision. Again it is well established an accused employee must be allowed to face the decision makers. A failure to allow this will again render any subsequent dismissal unjust (*Irvines Freightlines Ltd v Cross* [1993] 1 ERNZ 424).

[43] Finally there is the fact the warnings ABC relies upon to justify the decision to dismiss are invalid. Their removal as valid stepping stones toward dismissal will also render the decision to dismiss unjustified .

Remedies

[44] The conclusion the dismissal was unjustified raises the question of remedies.

[45] Ms Giles Bain seeks lost wages and at least \$10,000 as compensation for hurt and humiliation. The compensation claim is a global one and applies to both the unjustified warning and the dismissal.

[46] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration though a larger sum may be awarded at the discretion of the Authority.

[47] Ms Giles received a months notice. She obtained replacement employment almost exactly three months later and her loss \$15,965.01.

[48] I concluded that amount should be paid in full. I do so given the statutory provision and the fact there is no issue about mitigation as she was effectively precluded for obtaining a teaching job until the teachers Council completed its process. Once that occurred she gained employment with alacrity.

[49] Next there is the issue of compensation pursuant to s.123(1)(c)(i). Ms Giles supported her claim with evidence that clearly shows she was hurt and humiliated. That evidence went largely unchallenged. She also had to undergo the Teachers Council investigation and the evidence is the college was slow in playing its part. That further aggravated the hurt Ms Giles felt Having considered the evidence I conclude the relatively high amount of \$10,000 to be appropriate.

[50] The conclusion remedies accrue means I must, as required by s.124 of the Act, address whether not Ms Giles contributed to her demise in a significant way. The answer must, I conclude, be no. While there is evidence her conduct was not to the standard required by ABC, the company's deficiencies are so great there is no evidence supporting a conclusion she contributed or allowing a computation of the extent if she did.

Conclusion and Orders

[51] For the above reasons I conclude Ms Giles has a personal grievance in that she has been both unjustifiably disadvantaged by the issuing of an unfair warning and unjustifiably dismissed. As a result the respondent, ABC Developmental Learning Centre NZ Limited, is ordered to pay the applicant, Ms Heather Giles, the following:

- i. \$15,965.01 (fifteen thousand, nine hundred and sixty five dollars and one cent) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[52] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority