

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2011] NZEmpC 127
CRC 1/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN RONALD EDWARD BISHOP and
MARGARET ELLEN BISHOP trading as
DEBTOR COMMUNICATIONS
Plaintiffs

AND CHRISTINE FLORENCE BENNET
Defendant

Hearing: 15 and 16 July 2010
(Heard at Timaru)

Appearances: R E Bishop in person and as advocate for ME Bishop
 Marieke van den Bergh, counsel for defendant

Judgment: 6 October 2011

JUDGMENT OF JUDGE A A COUCH

[1] The plaintiffs, Ron and Margaret Bishop are a married couple who live in Timaru. They had a business partnership which operated a debt collection business called Debtor Communications. The defendant, Ms Bennet, was employed to work in that business until she was summarily dismissed on 8 August 2008.

[2] Ms Bennet believed her dismissal was unjustified. She raised a personal grievance with Mr and Mrs Bishop and lodged that grievance with the Employment Relations Authority. In its determination dated 21 December 2009,¹ the Authority concluded that Ms Bennet had been unjustifiably dismissed and awarded her remedies totalling \$12,240. Mr and Mrs Bishop were also ordered to pay Ms Bennet

¹ CA 218/09

\$684.14 in unpaid wages and holiday pay. Mr and Mrs Bishop challenged the whole of that determination and the matter proceeded before me in a hearing de novo.

Facts

[3] A considerable amount of evidence was given. A good deal of that was peripheral or provided background to the critical events. On the key issues, the evidence in chief of Mr Bishop and Ms Bennet differed considerably but, after cross examination and questions from the Court, few conflicts remained. To the extent that there were outstanding issues, I have had regard to all of the evidence of both witnesses and what is set out below reflects my considered findings of fact.

[4] The business known as Debtor Communications was founded in about 1993. The proprietor of the business was the partnership comprising Mr and Mrs Bishop but, during the period involved in this case, Mr Bishop was responsible for day to day management.

[5] Ms Bennet began employment with Debtor Communications on 13 November 2006. She worked 6 hours per day, Monday to Friday and was paid \$15 per hour. Her principal duties were those of an office administrator. She reported to Mr Bishop as the manager of the business. There was no written employment agreement.

[6] In July 2007, Ms Bennet went on holiday. When she returned, she received a letter from Mr Bishop dated 1 August 2007 recording what he believed were numerous instances of dishonesty and other misconduct by Ms Bennet in the course of her work. Those allegations were the subject of a great deal of evidence. I refrain from setting out that evidence or the details of the allegations as to do so would greatly extend this judgment for no real purpose. Those allegations related to events more than a year prior to Ms Bennet's dismissal and have little or no relevance to the principal issue which is whether the dismissal in August 2008 was justifiable. I say only that the evidence left me satisfied that Ms Bennet had not behaved dishonestly.

[7] On 23 July 2008, Ms Bennet began a week's annual holiday. She and her partner, Harry Travaille, went on an ocean cruise. The ship encountered very bad weather which caused great distress to the passengers and delayed the ship's return to port. Ms Bennet arrived back in Timaru late on Saturday 2 August 2008.

[8] Ms Bennet went back to work on Monday 4 August 2008. In her absence, Mr Bishop had again formed the view that Ms Bennet had been dishonest in the course of her employment. One of his concerns was that Ms Bennet had purchased unnecessary stationery and items for herself on the business account at Warehouse Stationery. He had gathered up a number of items from Ms Bennet's workstation and placed them on the desk in his office. When Ms Bennet arrived, she noticed that things were missing and went to see Mr Bishop. He accused her of unnecessarily buying the stationery on his desk. He then said that very little new work had come in, that the business was in financial difficulty and that he objected to paying her while she was on a holiday which he could not afford. Ms Bennet became distressed. She swept the stationery off the desk onto the floor and left the premises in tears.

[9] That afternoon, Ms Bennet returned to work where there was a letter from Mr Bishop waiting for her. The text of that letter was:

Dear Christine

Your Employment

The first thing we want you to know is that we are not dissatisfied with the quality of your work however as your employer we have right to question the expenses of the business.

Every time I sit you down and express my concern about the expenses you fly off the handle and start throwing things around the room. You also give me verbal abuse because of your inability to control your emotions.

The cost of a few bits of stationery is no longer our cause for concern. Our concern is for your health. You defiantly need some counselling so that you can learn how to discuss business calmly without loosing your temper.

You must also learn to understand that with a \$27,000 tax loss over 2 years the only option left is to close the business down which is something we should of done 3 years ago. We have kept it going because we care about you and we would have of liked to have kept you in a job.

I regret to advise that Debtor Communications is not generating enough business to be able to pay you for 6 hours work a day the best we can offer you is part time hours on call when there is enough work to be done.

There are other options which may keep you more fully employed but I'm afraid I cannot discuss those options with you if you are going to continue to lose your temper and verbally abuse me.

As from today your hours will be reduced in keeping with the amount of business that we receive on a daily basis. You will come to work at an agreed time and you will leave when the work is done. You will also get my permission before spending any money on the business.

We appreciate the work you have done to date and we hope you will come to your senses and be more sympathetic to our situation and not just your own.

Kind Regards

Ron & Margaret Bishop

[10] Later that day, Ms Bennet replied by letter as follows:

Ron & Margaret Bishop

Firstly I would like to make you aware that you are shown the stationery invoices each month with all accounts for the business and any questions relating to the expenditure should be made then and not after I have just walked in the door from a fairly traumatic holiday. I consider a total of \$23.00 that appears to be the issue completely over the top and your rational thinking is clearly not there – YET AGAIN. All items were accounted for and in the office.

You showed no interest in my recent situation and am aware that you are resentful that we and I emphasise WE went on a cruise. It is no business of yours where we choose to spend our holiday break and by law am entitled to this and had not had a break since July last year and again where another incident of over dramatisation again occurred. I will not be subjected to this EVER EVER AGAIN.

I told you that you would not have much work to do as the end of the month is not the time for new instructions to come into the office and specifically scheduled our holiday at this time for the benefit of the business.

I had done a lot of letters up for you to post pre timed and also had letters in the folder for you ready to post as well. I note none of this has been done.

Considering this is your business and your system I would have thought you would know how it works but it would appear not as I have a lot of mess to correct and clear up.

In future I will give nothing to this business except in the hours that I AM REQUIRED TO WORK – whatever that means. I have an excessive workload that has accumulated while I have been absent and this will take some time to clear.

Christine

[11] The following day, Tuesday 5 August 2008, Ms Bennet went to work as usual. Some time in the morning, she had a conversation with Mr Bishop. She said that she would be looking for another job as she could not work with him any longer. She also mentioned Mr Bishop's health, suggesting that he was not a well man and

that she was taking this into account. This caused Mr Bishop to become agitated and angry. He referred again to the purchase of stationery which he thought was unnecessary and to Ms Bennet having swept items off his desk the previous day. The brief meeting ended abruptly when Mr Bishop went into his office, slamming the door.

[12] In the afternoon of that day, Ms Bennet gave Mr Bishop a personal cheque for \$50 to cover the cost of the stationery he said had been unnecessarily purchased. At the end of the day, she took those items home.

[13] During the afternoon, Mr Bishop gave Ms Bennet another letter which read:

Dear Christine

This is a final warning regarding your attitude and behaviour.

On Monday 4th July 2008 you dismissed your self from a staff meeting in my office and in doing so you used abusive language towards me.

You used physical violence by throwing things off my desk onto the floor.

You left the office in an emotionally upset state and returned to start work in the afternoon.

On Tuesday 5th July 2008 you told me you intended to leave your employment with Debtor Communications as soon as you found another job. While discussing the situation you again used abusive language towards me.

This behaviour is not to be tolerated and if I receive one more piece of physical or verbal abuse again you will be instantly dismissed.

I am well aware that you have certain financial obligations to meet which is the only reason have kept you in my employment but I'm not going to take any verbal or physical abuse from you.

If we cannot discuss our differences in a calm and rational way then any long term relationship is lost and nobody wins.

Regards.

Ron E. Bishop
General Manager

[14] Early in the morning of Wednesday 6 August 2008, Mr Bishop sent a long email to Ms Bennet. The message was timed at 6.12 am and had the subject "Honesty". In the first part of the message, Mr Bishop recounted an incident from his own early life when he had been dishonest. He then spent some time praising a

former employee, Fiona Campbell, for her honesty and characterising Ms Bennet as dishonest. Mr Bishop mentioned two specific matters of concern to him. The first was the purchase of unnecessary stationery. The other was the manner in which Ms Bennet had calculated her holiday pay. On this issue, Mr Bishop said:

The biggest shock came when I discovered that Christines last pay included holiday pay at the rate of 6 hours per day
The holidays Act states that holiday pay is to be paid at the average weekly wage for the year.
It is not to be paid based on the number of hours in a day because these can vary

[15] Under a heading, “What will we do with you Christine?”, Mr Bishop suggested replacing Ms Bennet with Ms Campbell. Mr Bishop then said:

Redemption

If you truly believe you have been completely honest in all your dealings with Margaret and I then I suggest you do this:

- I have not cashed your \$50 cheque because there is no detailed account about what it is for. You have all the invoices so why dont you write out all the items you have taken and the prices and give me a cheque for the right amount because I’m sure the exercise will make you feel better
- The next thing I want you to do is give me a detailed account of all your holidays and sick leave and work them out as per the government regulations and not your own. All the rules are on the internet.

There is no harm in making mistakes Christine after all that is what life is all about.

The crime comes when we don’t admit we have made a mistake and try to cover it over with lies.

Choices

You only really only have 2 choices Christine

1. Continue with your present attitude and make life hell for us both and our spouses
2. or admit your mistakes and attempt to put them right as I have suggested.

I believe in you enough to know that you have what it takes to take the second option

Regards
Ron B

[16] Later that day, Ms Bennet took home all the relevant invoices and wage records to prepare the calculations Mr Bishop had suggested or required.

[17] On Thursday 7 August 2008, Mr Bishop sent an email, which he described as a “press release” to several staff at the Timaru Herald newspaper. This recounted the history of the Debtor Communications business and announced that it was for sale and would be closing its Timaru office.

[18] On Friday 8 August 2008, Mr Bishop initiated a discussion with Ms Bennet in the morning. He began by apologising for upsetting Ms Bennet earlier in the week. He then told her that he wanted to employ Ms Campbell to do administration and have Ms Bennet move into a marketing role. Ms Bennet replied that she did not want to change her role and that there was insufficient business to support two employees. Mr Bishop then became annoyed and told Ms Bennet to go home and bring back the wage records and stationery invoices. She returned with those documents after lunch. She also brought a personal cheque to cover what she calculated was the value of what Mr Bishop believed she owed the business. This included the stationery items identified earlier in the week together with an additional \$2 for envelopes Ms Bennet had used for personal correspondence. It also accounted for an overpayment of wages Mr Bishop suggested had occurred. Ms Bennet made a deduction for items she had provided for use at work. The net amount was \$70.65. This payment was accompanied by a note explaining how it had been calculated. Ms Bennet had also written a letter on behalf of a business she ran with her son requesting a refund of money paid for advertising in a business directory published by Mr Bishop.

[19] Meanwhile, Mr Bishop drafted a letter of dismissal to Ms Bennet. At lunch time, he went home to speak with his wife about it. They agreed to dismiss Ms Bennet.

[20] When Mr Bishop and Ms Bennet returned to the workplace after lunch, they met. Ms Bennet gave Mr Bishop the documents she had assembled. Mr Bishop gave Ms Bennet the dismissal letter. There was little or no discussion. The letter read as follows:

8 August 2008

Dear Christine

Thank you for your services over the last couple of years however we regret to inform you that you have left us with no alternative but to dismiss you immediately from our employment.

We are dismissing you on the grounds that we have several reasons to believe you have been dishonest in some of your dealings with us.

You have also displayed verbal and physical abuse whenever I have questioned you about these matters.

I gave you a written warning but your attitude towards me has not changed.

You have been reluctant to talk to me about any of these matters or discuss your future role with Debtor Communications.

Under the circumstances I feel I can no longer work with you or trust you so it is best for all parties concerned if you left our employment today.

We wish you Gods Blessing for your future

Ron and Margaret Bishop

[21] In accordance with the letter, Ms Bennet finished work that day.

Issues

[22] In deciding this case, I must answer the following questions:

- (a) Was Ms Bennet's dismissal unjustifiable?
- (b) If so, what remedies ought she to be awarded?
- (c) To what extent, if any, should those remedies be reduced on account of Ms Bennet's contribution to the situation giving rise to her personal grievance?

Was the dismissal justifiable?

[23] In assessing whether Ms Bennet's dismissal was justifiable, I must apply the test in s 103A of the Employment Relations Act 2000 (the Act) as it was at the time of the dismissal:

103A Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was 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 or action occurred

[24] To apply this test, I need to identify the reasons for Ms Bennet's dismissal and how Mr Bishop reached the decision to dismiss. The starting point must be Mr Bishop's letter of 8 August 2008. That recorded four broad reasons for the dismissal:

- (a) "We are dismissing you on the grounds that we have several reasons to believe that you have been dishonest in some of your dealings with us."
- (b) "You have also displayed verbal and physical abuse whenever I have questioned you about these matters."
- (c) "I gave you a written warning but your attitude towards me has not changed."
- (d) "You have been reluctant to talk to me about any of these matters or discuss your future role with Debtor Communications."

Honesty

[25] As a witness, Mr Bishop was asked to identify the "dealings" in which he had said Ms Bennet was dishonest. He replied that he was referring to the events in 2007 and to the purchase of stationery. He divided the purchase of stationery into items the business did not need and items he believed Ms Bennet had purchased for her own use on the business account.

[26] In his submissions, Mr Bishop placed most emphasis on the concerns he had in 2007 about Ms Bennet's honesty. I do not doubt that Mr Bishop sincerely held the views he expressed but they cannot be relied on to justify Ms Bennet's dismissal in August 2008. That is for several reasons.

[27] It is a fundamental aspect of fairness that no adverse conclusions are drawn without a proper investigation which must include an informed opportunity for the employee to respond to the employer's concerns. In August 2007, Mr Bishop wrote a lengthy letter to Ms Bennet which was a combination of statements and questions. It concluded with an invitation to Ms Bennet to tell her side of the story. Mr Bishop also wrote another letter to Ms Bennet around the same time asking 16 numbered

questions. It was not suggested in either letter, however, that any disciplinary action was being contemplated and there was no evidence that Mr Bishop communicated this to Ms Bennet by other means. Possibly for that reason, Ms Bennet did not reply to the letters and there was never a proper investigation in 2007 of Mr Bishop's concerns. The significance of that was demonstrated during the hearing before the Court. When Mr Bishop's concerns were properly examined in evidence, there was little substance to them. The explanations given by Ms Bennet, supported by the contemporary documents, were convincing and, in cross examination, Mr Bishop had to concede that several of his concerns had been answered. As noted earlier, I found that the evidence did not establish that Ms Bennet was dishonest at all.

[28] Whatever Mr Bishop's concerns were in 2007, he took no disciplinary action against Ms Bennet then. In his evidence, Mr Bishop disputed this, saying that he regarded one of his August 2007 letters as a warning. That letter consisted solely of questions and was clearly not a warning. To be effective, a warning should identify the conduct of the employee which is unacceptable, describe how and when the employee is expected to change his or her behaviour and say what the potential consequences of failing to improve may be.

[29] By the time Ms Bennet was dismissed in August 2008, the issues Mr Bishop raised in 2007 were a year old. The evidence of both Mr Bishop and Ms Bennet was that, during that year, no more was said about those issues. That being so, Ms Bennet was entitled to regard them as closed. It was both unfair and unreasonable for Mr Bishop to rely on them again in deciding to dismiss Ms Bennet. It was even more unfair for Mr Bishop to rely on those concerns without telling Ms Bennet explicitly what they were and that her employment was at risk as a result. The only mention of concern about Ms Bennet's honesty was in Mr Bishop's email of 6 August 2008 when he mentioned only the stationery purchases and how holiday pay had been calculated.

[30] The proposition that Ms Bennet was dishonest in dealing with stationery was unsupportable. Mr Bishop agreed that he knew Ms Bennet was purchasing stationery for the business and that he accepted this was part of her role. Each month, Ms Bennet showed the stationery invoices to Mr Bishop and got his approval

before paying them. To the extent that Ms Bennet may have purchased items that Mr Bishop would not have purchased himself, that was a difference of opinion, not dishonesty. Mr Bishop's unreasonable view was epitomised in his conclusion that, when Ms Bennet took home the stationery items he said were unnecessary and attempted to pay for them, she had stolen them.

[31] Mr Bishop also referred to "personal items" he said Ms Bennet had bought for her own use on the business stationery account. When asked to explain what he meant, Mr Bishop said that Ms Bennet had purchased four packs of tissues in the space of four months. Although it emerged that these tissues had remained in the workplace, Mr Bishop regarded her purchase of them as dishonest. This attitude was unreasonable to the point of being irrational.

[32] Although Mr Bishop did not include the holiday pay issue in his reasons for the dismissal, it was raised in his email of 6 August 2008 and should be dealt with. Mr Bishop's concern about the method used by Ms Bennet to calculate her holiday pay reflected an incomplete understanding of the Holidays Act 2003. When she took an annual holiday in July and August 2008, Ms Bennet had been employed for more than a year. Her right to annual holidays had therefore accrued and her annual holiday pay had to be calculated according to s 21 of the Holidays Act:

21 Calculation of annual holiday pay

- (1) If an employee takes an annual holiday after the employee's entitlement to the holiday has arisen, the employer must calculate the employee's annual holiday pay in accordance with subsection (2).
- (2) Annual holiday pay must be—
 - (a) for the agreed portion of the annual holidays entitlement; and
 - (b) at a rate that is based on the greater of—
 - (i) the employee's ordinary weekly pay as at the beginning of the annual holiday; or
 - (ii) the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

[33] Ms Bennet calculated her holiday pay on the basis of her ordinary weekly pay which was for 30 hours per week. The payments Ms Bennet had occasionally received for doing work additional to her usual 6 hours per day might have resulted

in a greater rate of pay had the averaging formula in s 21(2)(b)(ii) been used but it certainly would not have been less. By calculating her holiday pay at the lower of the two statutory alternatives, Ms Bennet was being generous to her employer and plainly not dishonest. Mr Bishop's view that she was dishonest in this regard was entirely unreasonable.

[34] I find on the evidence that there was no proper basis for Mr Bishop to believe that Ms Bennet had been dishonest in the employment relationship. A fair and reasonable employer would not have reached such a conclusion.

“Physical and verbal abuse”

[35] In the dismissal letter, Mr Bishop said “You have also displayed verbal and physical abuse whenever I have questioned you about these matters.” Use of the word “whenever” suggested that Mr Bishop was referring to multiple occasions of what he regarded as abuse. When he was asked about this in evidence, Mr Bishop said he was referring only to the incident on 4 August 2008. He confirmed that the only physical action involved was Ms Bennet sweeping items of stationery off the desk. He never elaborated on what he meant by “verbal abuse” other than to say she used “foul language that is not to be used in my office”.

[36] Ms Bennet accepted that she did sweep the stationery items off the table. That was inappropriate behaviour but must be seen in context. It was Ms Bennet's first day back at work after returning home less than two days before from a traumatic experience on board ship. Mr Bishop took her by surprise with the range and nature of the issues he raised. His comment about Ms Bennet taking a cruise he could not afford was inappropriate and provocative. These events reduced Ms Bennet to tears and it was when she was in this emotional state that she swept the stationery onto the floor. It was common ground that Mr Bishop and Ms Bennet had enjoyed a harmonious working relationship for the previous year so that this event was clearly uncharacteristic.

[37] Mr Bishop exaggerated the extent and importance of this outburst by Ms Bennet. It ought not to have occurred and the ultimate responsibility lay with Ms

Bennet but Mr Bishop contributed to the situation by his insensitive behaviour. At the time, it was an isolated event and, while Mr Bishop was entitled to expect Ms Bennet not to repeat such behaviour, it did not warrant a final warning with a threat of dismissal.

Attitude

[38] Mr Bishop gave Ms Bennet the warning letter on Tuesday 5 August 2008. In the dismissal letter of Friday 8 August 2008, he said that her attitude had not changed. When asked to explain the basis for that statement, Mr Bishop referred to events not dealt with in his evidence in chief.

[39] While working for Mr Bishop, Ms Bennet had personally provided a number of items for the workplace. These included detergent for washing dishes, liquid soap for washing hands and a calendar. In response to Mr Bishop confronting her about stationery on Monday 4 August 2008, Ms Bennet took these items home and suggested that replacement items be purchased by the business. Mr Bishop said he thought this was unreasonable and felt it undermined their relationship. He said he expected there to be “give and take” in a small workplace such as theirs. This was ironic given Mr Bishop’s view about the tissues and the great weight he placed on the purchase of stationery.

[40] As Mr Bishop accepted in evidence, Ms Bennet was not obliged to provide her own personal things for use in the business. It was therefore unreasonable for Mr Bishop to hold it against her when she was no longer willing to do so.

Communication

[41] The fourth reason for dismissal given in Mr Bishop’s letter of 8 August 2008 was that Ms Bennet had been reluctant to talk to him about matters of concern or to discuss her future role in the business. In the answers Mr Bishop gave to some questions I put to him at the end of his evidence, this factor assumed additional importance. That exchange included the following:

- Q. I suppose the question I have at the end of the day is this. You'd given her the warning on the Tuesday. What was it between the Tuesday and the Friday that really made up your mind to dismiss her when you weren't going to dismiss her on the Tuesday?
- A. Do you really want to know why?
- Q. Yes.
- A. Because she would not communicate. She switched off. Her whole attitude changed. She wouldn't sit down and talk to me. You know there was no way we were going to be able to communicate. So that's what made me think I can't work like this.
- Q. Did you consider getting some outside assistance? Did you consider for example mediation?
- A. Ms Bennet told me when her partner was made redundant. She had come to me one day and she said "My partner has been made redundant. Can I go home and be with him?" I said "Sure, go and have a yarn to him and come back." Then she started telling me that they were going to take a personal grievance claim against the company, being made redundant, but she was already scheming about a personal grievance claim and I thought this is no good, I don't want this.
- Q. Are you saying that is the sort of thing that influenced your thinking?
- A. It did a bit.

[42] There is no doubt that Ms Bennet's attitude towards Mr Bishop did change in the final week of her employment. Given Mr Bishop's actions, I find that was understandable and far from surprising. The way he tried to initiate discussion with her on the Monday was insensitive and inappropriate. It frustrated and offended Ms Bennet that Mr Bishop had apparently concluded that she was dishonest, that he seemed to misunderstand how the business worked and that he had failed to do any of the tasks she had arranged for him to do in her absence. She also felt hurt by his insensitive attitude towards her holiday. Most importantly, Mr Bishop had reduced Ms Bennet's hours of work and made her income uncertain. Given the pattern of work which had been established over the previous year and more, that was not a change Mr Bishop could properly make unilaterally. It appears, however, that he assumed he could and did not seek Ms Bennet's agreement. The combination of these factors prompted Ms Bennet's decision to look for alternative employment and to complain about the way Mr Bishop had behaved in her letter to him later that day. That was hardly surprising.

[43] In the days that followed, Ms Bennet had reason to be further aggrieved and concerned by what Mr Bishop did. The warning contained in his letter of 5 August 2008 was unwarranted and his discursive email with religious overtones sent in the early hours of the following morning gave her good reason to be cautious. That was followed by the suggestion by Mr Bishop that Ms Campbell take over her job and a public announcement that the business was to close.

[44] Inevitably, the quality of communication between the two suffered as a result but I find on the evidence that Mr Bishop was wrong to say that communication had stopped. Rather, Ms Bennet was exercising her rights and saying things Mr Bishop did not want to hear. These included her suggestion that the business purchase items to replace the personal property she had taken home and her refusal to accept a change in her role. These were things Ms Bennet was entitled to say and do.

[45] It is equally understandable that Mr Bishop felt frustrated and annoyed that Ms Bennet was no longer prepared to be as congenial and agreeable as she had been previously. The appropriate response was not to dismiss Ms Bennet but to work at restoring their former good working relationship. Mediation may have assisted. Researching or taking advice about the rights and obligations of the parties to an employment relationship may also have helped Mr Bishop to respond to Ms Bennet's changed attitude more appropriately.

[46] Mr Bishop's reluctance to work at restoring a good relationship with Ms Bennet because he feared a personal grievance was a self defeating attitude. It led him to make a hasty and ill-considered decision to dismiss Ms Bennet and effectively guaranteed that she would have a valid personal grievance.

Conclusion

[47] Ms Bennet's dismissal was plainly unjustifiable. In the hearing before the Court, the concerns that Mr and Mrs Bishop had were thoroughly investigated. The result was that they had little or no foundation. There was certainly no good reason to dismiss Ms Bennet. The evidence also established that the process by which Mr and Mrs Bishop reached their decision to dismiss Ms Bennet was seriously flawed

and could not support any valid decision. While I accept that Mr and Mrs Bishop were sincere and that the views they expressed were genuinely held, their conduct fell well short of what a fair and reasonable employer would have done in all the circumstances.

Personal grievance remedies

[48] As Mr and Mrs Bishop's challenge was to the whole of the Authority's determination, I must make my own decision about the appropriate remedies. With respect to her personal grievance, Ms Bennet sought reimbursement of wages lost as a result of her dismissal and compensation for the distress she suffered.

Reimbursement of lost wages

[49] Ms Bennet's evidence was that, following her summary dismissal on 8 August 2008, she made sustained efforts to find alternative employment which she finally obtained on 6 October 2008. On that basis, she claims reimbursement of \$3,600 being 8 weeks' wages at \$450 per week. This claim was supported by 11 letters from prospective employers to whom Ms Bennet had applied for a position. She said that, in total, she applied for between 15 and 20 jobs.

[50] In resisting this claim, Mr Bishop submitted that Ms Bennet continued to receive income from other sources after her dismissal and that this ought to be offset against her claim. I do not accept that submission. The evidence was that, during the period before and after her dismissal, Ms Bennet was engaged in selling life insurance and that she received commissions for the sales she made. She also had an interest in a bar operated by her son. Both of those business interests were separate from her employment by Mr and Mrs Bishop. There was no evidence that she devoted greater time to either alternative business following her dismissal or, more importantly, that she derived any greater income from them after her dismissal than she had done prior to it.

[51] The claim for reimbursement of lost wages is made under s 123(1)(b) of the Act which provides for "the reimbursement to the employee of 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". Ms Bennet's grievance was that she had been unjustifiably dismissed. As a result of that dismissal, she lost the wages she had been earning. She did not earn any greater amount from any other source than she would have had she not been dismissed. It follows that she is entitled to the whole amount of wages she would have earned during the period in question had she not been dismissed. That sum is \$3,600.

Compensation for distress

[52] Ms Bennet claimed \$15,000 compensation for humiliation, loss of dignity and injury to her feelings suffered as a result of her dismissal. In support of this claim, she gave detailed evidence which was supported by evidence from Mr Travaille. On the basis of that evidence, I am satisfied that Ms Bennet suffered significant distress during the week leading up to her dismissal and that the immediate effects of the dismissal were equally distressing. In particular, she was distressed by the repeated challenges to her honesty and integrity which I have found were unwarranted. She is entitled to a substantial award of compensation for that distress.

[53] Where the evidence becomes somewhat more problematic is that Ms Bennet also sought compensation for other aspects of Mr Bishop's conduct after her dismissal which caused her additional distress. These included:

- (a) A complaint to the police that Ms Bennet and her son were guilty of theft. This resulted in the police unexpectedly calling Ms Bennet on 22 August 2008.
- (b) A letter Mr Bishop wrote to Inland Revenue on 17 December 2008 in which he suggested that Ms Bennet had been dishonest. Inland Revenue did not contact Ms Bennet as a result and it appears she only became aware of the letter in the course of these proceedings.

- (c) Mr Bishop told a debt collection agency that Ms Bennet was responsible for a debt of more than \$4,000 by Debtor Communications owing to Compass Communications Ltd. As a result, the agency contacted Ms Bennet in March 2009 demanding payment. It was established that Mr Bishop had personally signed the agreement with Compass Communications Ltd incurring the debt in the name of Debtor Communications.

[54] Each of these actions by Mr Bishop was based on allegations about Ms Bennet's conduct during her employment. On that basis, they are relevant but, in the circumstances, I find that they warrant only a small increase in the compensation for distress I have already said should be made. Although the complaint to the police was based on an unreasonable interpretation of events, I accept it was made in the genuine belief that offences may have been committed. The letter to Inland Revenue did not result in any contact with Ms Bennet and appears to have only come to her attention well after the event. Mr Bishop's actions with respect to the Compass Communications Ltd debt are more significant. The natural inference from the evidence is that Mr Bishop attempted to place responsibility on Ms Bennet for a debt he knew was properly that of his business. I accept that Ms Bennet was distressed by this but, as it occurred well after she was established in alternative employment, I give it only limited weight.

[55] Having regard to all of the evidence, an appropriate award of compensation is \$10,000.

Contribution

[56] Having found that Ms Bennet was unjustifiably dismissed, I must assess the extent, if any, to which she contributed to the situation giving rise to her grievance and adjust the remedies awarded accordingly. The only aspect of Ms Bennet's conduct which may fairly be criticised is her outburst at the meeting with Mr Bishop shortly after her return to work on Monday, 4 August 2008. For the reasons I have given earlier, both she and Mr Bishop could have handled that meeting better. I find Ms Bennet's role in that meeting did contribute to the situation which later that week

resulted in her dismissal but that her contribution was small. I take it into account by reducing the award of compensation to her to \$9,000.

Arrears of wages

[57] Ms Bennet made a claim for \$684.14 being arrears of wages and holiday pay which she said was outstanding from the period of her employment by Mr and Mrs Bishop. Details of that claim were set out in her evidence and were effectively unchallenged by Mr Bishop. He gave evidence that he had tendered a cheque for \$632.55 in satisfaction of this claim in March 2009 but that it was not accepted. That was his only concern about the claim. I find that Ms Bennet is entitled to be paid the full amount of \$684.14 claimed.

Interest

[58] Although I have awarded remedies almost identical to those awarded by the Authority, the effect of the challenge has been that the benefit of those remedies to Ms Bennet has been delayed considerably. In the meantime, Mr and Mrs Bishop have had the use of the money which would otherwise have had to be paid to Ms Bennet long ago. That can and should be remedied to an extent by awarding interest. For the reasons I gave in *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands*,², interest may be awarded on reimbursement of lost wages but not on compensation for distress. In this case, I order that interest be paid on the sum of \$3,600 at the rate of 5 percent per annum from 8 September 2008, being half way through the period for which reimbursement is ordered, down to the date of payment. Interest at the same rate is to be paid on the sum of \$684.14 arrears of wages from 8 August 2008 down to the date of payment.

Authority costs determination

[59] On 18 February 2010, the Authority issued a supplementary costs determination.³ It ordered Mr and Mrs Bishop to pay Ms Bennet \$4,800 for costs.

² [2006] ERNZ 449 at [126] – [136].

³ CA 35/10

That determination was not challenged but, in his evidence, Mr Bishop complained that the award made by the Authority was excessive and unsupported by appropriate information from Ms Bennet's solicitors. While I received that evidence, I am in no position to comment on costs in the Authority. As the costs determination was not challenged, that aspect of the matter was not before the Court.

Summary

[60] In summary, my judgment is:

- (a) Ms Bennet was unjustifiably dismissed by Mr and Mrs Bishop on 8 August 2008.
- (b) Mr and Mrs Bishop are ordered to pay Ms Bennet \$3,600 as reimbursement for wages lost as a result of her dismissal together with interest on that sum at the rate of 5 percent per annum from 8 September 2008 down to the date of payment.
- (c) Mr and Mrs Bishop are ordered to pay Ms Bennet \$9,000 as compensation for humiliation, loss of dignity and injury to her feelings.
- (d) Mr and Mrs Bishop are ordered to pay Ms Bennet \$684.14 as arrears of wages and holiday pay together with interest on that sum at the rate of 5 percent per annum from 8 August 2008 down to the date of payment.

[61] Pursuant to s 183(2) of the Act, the Authority's substantive determination is set aside and this decision stands in its place.

[62] The Authority's costs determination remains in effect.

Comments

[63] After proceedings were commenced in the Authority, Mr Bishop increasingly engaged in public criticism of Ms Bennet on the basis that she was dishonest. In response to Mr and Mrs Bishop's challenge, Ms Bennet attempted to pursue a further claim based on that public comment. As the claim was effectively for defamation and therefore outside this Court's jurisdiction, it was subsequently withdrawn but references to it were made during the hearing. Now that the challenge has been decided and I have found that Ms Bennet was not dishonest, any further public criticism of her would be inappropriate.

[64] In the interlocutory phases of this proceeding and in the hearing, Mr Bishop complained about the difficulty he had in obtaining legal representation, the conduct of the police and the state of employment law in New Zealand. He attempted to pursue those complaints in an amended statement of claim naming 14 additional defendants. After hearing the parties, I issued a minute recording that all of the proposed new causes of action were outside this Court's jurisdiction and directing the registrar not to accept that document for filing.

[65] This judgment is being delivered long after the hearing. That delay, and the resulting inconvenience to the parties, is regrettable. The principal reason for the delay is the Christchurch earthquakes, which have impacted heavily on the Court's resources and on my availability to devote the time necessary to complete this judgment.

Costs

[66] Costs are reserved. Unless there is some factor of which I am unaware, Ms Bennet is entitled to a reasonable contribution to the costs she has incurred in resisting the challenge. In the first instance, I invite the parties to agree on costs if possible. If they are unable to do so, a memorandum on behalf of Ms Bennet should be filed and served within 20 working days after the date of this judgment. Mr and

Mrs Bishop will then have a further 20 working days in which to file and serve a memorandum in response.

AA Couch
Judge

Signed at 3.30 pm on 6 October 2011.