IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 100
5437698

	BETWEEN	KENT WYLIE Applicant
	AND	ROBBIES HANMER LIMITED Respondent
Member of Authority:	Christine Hickey	
Representatives:	Jeff Goldstein and Carolyn Davies, Counsel for Applicant Alan Roberts for the Respondent	
Investigation Meeting:	23 May 2014	
Determination:	4 July 2014	

DETERMINATION OF THE AUTHORITY

A. Kent Wylie was unjustifiably disadvantaged by Robbies Hanmer Limited.

B. Robbies Hanmer Limited must pay Kent Wylie $2,000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Employment relationship problem

[1] Kent Wylie claims that he was unjustifiably disadvantaged in his employment when he was issued with a written warning on 23 September 2013 without the process set out in his individual employment agreement being followed.

[2] By way of remedy he claims compensation for humiliation, loss of dignity and injury to his feelings. Alternatively, Mr Wylie claims damages for breach of his employment agreement and a penalty for breach of his employment agreement, payable to him.

[3] Robbie Hanmer Limited (Robbies) denies that Mr Wylie was unjustifiably disadvantaged and denies that he should be compensated. It says that the warning was justified because of his continued non-performance.

Issues

[4] The issues the Authority needs to determine are:

(i) Whether the written warning was issued in breach of the employment agreement and/or s 103A(3) of the Employment Relations Act 2000 (the Act); and

(ii) If so, what remedies and/or penalties should be awarded or imposed.

Determination

[5] I heard evidence, either affirmed or sworn, from Mr Wylie, Alan and Neroli Roberts, Aroha Soper and Michaela Algar. Mr and Mrs Roberts, Ms Soper and Ms Algar are directors of the company. Ms Soper and Ms Algar are the managers of the business.

[6] Mr Wylie was employed in December 2012 and in January 2013 was promoted to assistant manager. In March 2013 there was a change of management and in June 2013 a new company took over management of the business.

[7] Ms Algar and Ms Soper became the managers of the business in March 2013.

[8] There is a conflict of evidence about whether Mr Wylie was asked to sign a new employment agreement. However, he did not do so and I conclude he remained employed in the same role under his existing individual employment agreement.

[9] Mr Wylie's employment agreement provided the following in relation to disciplinary procedures:

> ***4.0 Disciplinary procedures***
> *The procedures set out in this clause are to be followed in circumstances where the matter(s) causing concern is/are not of sufficient seriousness to warrant summary dismissal.*
> *4.1 The employee must be advised:*
> *(a) Of her/his right of assistance and/or representation at any stage;*
> *(b) Of the specific matter(s) causing concern and given an opportunity to state any reason(s) or explanation;*
> *(c) Of the corrective actions required to remedy the situation.*
> *4.2 Under normal circumstances the first instance would entail a verbal warning, a second instance a written warning and the third instance could entail dismissal with or without notice.*
> *4.3 The employee must always be given sufficient time to take the necessary corrective action(s).*

[10] The employment relationship between Mr Wylie and his employer began reasonably well. However, towards the middle of 2013 Ms Algar and Ms Soper began to have concerns about Mr Wylie's performance.

[11] On 5 July 2013 Ms Algar and Ms Soper wrote to Mr Wylie inviting him to a meeting to investigate why he left work during his shift on 4 July 2013. He was informed of his right to have a support person and was told that the result of the meeting may be a formal written warning. At the meeting on 8 July 2013 Mr Wylie was given a verbal warning.

[12] On 10 September 2013 Ms Algar and Ms Soper again wrote to Mr Wylie inviting him to a disciplinary meeting on 13 September 2013 to discuss *hospo off of staff meals.* This referred to what was considered to be a breach by Mr Wylie of the rule that staff meals are limited to a value of $20. In addition, employees working less than an 8 hour shift were not entitled to a free staff meal. Mr Wylie was alleged to have had a meal worth more than $20 and also allowed another staff member working only a 5 hour shift to have a free staff meal. Mr Wylie was informed of his right to have a support person and was told that the result of the meeting would be a first written warning. The letter also says:

> *If this behaviour continues your position of employment will be put under review by the owners.*

[13] After the meeting no warning was given and no other disciplinary outcome occurred.

[14] However, Ms Algar and Ms Soper continued to observe Mr Wylie and his performance closely. They wrote a letter to Mr Roberts reporting a number of concerns and understood that he had instructed them to give Mr Wylie a written warning. Mr Roberts denies that he told them to issue a warning and says he would have said that *if things getting to a head we'd have to formalise the process and go through the process of formal warnings.*

[15] On 23 September Ms Algar and Ms Soper wrote to Mr Wylie informing him that the letter was a first written warning for *Insubordination, Your Staff Meals, Your Staff Tab and a General lack of accountability.* They specifically referred to:

- On 21 September having been instructed to bring the open signs in at 9pm Mr Wylie failed to do so;
- On 21 September despite having been spoke to about staff meals on 13 September he adjusted his meal docket and received the equivalent of two meals not one;
- His staff tab remained unpaid and he had until 29 September to pay it or it would be taken out of his wages;
- On 15 September he allowed customers to leave when not all of the table's bill had been paid; and
- On 21 September he allowed customers to leave when one glass of wine was not paid for.

[16] The last sentence of the letter reads:

> *If this behaviour continues your position of employment will be put under review by all 4 owners.*

Was Mr Wylie unjustifiably disadvantaged?

[17] Section 103A of the Act provides that when assessing whether an employer's action was justified the Authority must use the following test and consider on an objective basis:

> *... whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[18] In order to prove unjustified disadvantage Mr Wylie needs to prove that the process and/or Robbies' action of issuing the written warning has disadvantaged him in his employment. He also needs to prove that the actions were unjustified, that is, not what a fair and reasonable employer could have done in all the circumstances.

[19] Robbies submitted that Mr Wylie's performance did not improve after the meeting on 13 September and that it was reasonable for Robbies to be concerned about the four aspects of his work he was warned about. It was also reasonable to convey those concerns to Mr Wylie by way of a written warning. Robbies also says that Mr Wylie's employment was at no time under threat. Instead the owners *wanted the position to be corrected and we tried very hard to get it corrected.*

[20] I have no doubt that the first written warning amounted to a disadvantage in Mr Wylie's employment because it rendered his employment less secure. Robbies says that too much should not have been read into the last sentence of the warning letter and that it did not necessarily mean that any future similar behaviour could put Mr Wylie's continued employment in jeopardy. Mr Wylie said he thought it meant he would get demoted. That is a clear disadvantage to Mr Wylie. Mr Wylie's evidence is that as a result of the written warning he started to look for other work.

[21] However, in order for a finding of *unjustified* disadvantage I need to examine whether Robbies' actions in issuing the warning and how it reached the decision to issue the warning were carried out. Setting aside for now the question of whether or not the warning was justified I consider the process of issuing the warning.

[22] Mr Wylie's employment agreement set out the process by which Robbies' concerns had to be dealt with. The agreed contractual process had been followed in July and earlier in September when the concerns were raised by way of letter, Mr Wylie was invited to meetings, given the opportunity of assistance or representation and had a chance to make his explanations to Ms Soper and Ms Algar. These requirements reflect the statutory mandatory minimum requirements of a fair process set out in s 103A(3) of the Act – that an employer investigate allegations, raise its concerns with an employee, give the employee a reasonable opportunity to

respond to the employer's concerns and genuinely consider the employee's explanation before taking action against the employee.

[23] Those steps did not occur before the written warning was issued and on that basis the process appears unfair. However, s 103A(5) of the Act says that the Authority must not determine an action unjustifiable solely because of procedural defects if the defects were minor and did not result in the employee being treated unfairly.

[24] Ms Algar said that when she tried to talk to Mr Wylie on 21 September he became abusive and she wasn't comfortable having another meeting with him in case it led to abuse.

[25] In effect Robbies' submission is that the written warning was amply justified and that any finding of unjustified disadvantage would be based on a legal technicality and so there should be no such finding. Ms Algar also says that Mr Wylie had been spoken to at the time of the events on 15 and 21 September to answer Robbies' concerns and so had an opportunity to answer Robbies' concerns.

[26] However, Mr Wylie did not have an opportunity to explain with the knowledge that disciplinary action was being considered. And when he gave explanations at the time of the events he was not accompanied by an adviser or a representative as his employment agreement provides he was entitled to be.

[27] The decision that Mr Wylie's actions set out in the warning letter amounted to insubordination and a general lack of accountability, for example, were made without any formal input by Mr Wylie. The lack of a fair process goes to the very heart of fairness – particularly the lack of a formal opportunity for Mr Wylie to be heard and give his explanations. The lack of the safeguards in Mr Wylie's employment agreement and in s 103A(3) of the Act renders the decision to issue the written warning unfair. The procedural defects were not minor and resulted in Mr Wylie being treated unfairly.

[28] It was clear that at least prior to July 2013 there had been a relatively positive employment relationship. Mrs Roberts gave evidence that early in Mr Wylie's employment she had been impressed by him particularly with the assistance he gave

Robbies in building up the craft beer part of its business. Mr Wylie feels hurt about how he was treated and the owners of Robbies feel affronted that they have faced legal action for what they consider was a justified warning.

[29] A fair process would have taken more time but it may have meant that the issuing of a written warning, while of disadvantage to Mr Wylie, was nonetheless justified. However, in the absence of that fair process it is impossible to find it justified.

[30] The issuing of the written warning was not an action that a fair and reasonable employer could have taken in all the circumstances at the time.

Remedies

Compensation

[31] Mr Wylie claims between $5,000 and $10,000 by way of compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to his feelings.

[32] Robbies submits that Mr Wylie has not suffered any humiliation and says that rather than anyone from Robbies telling people about the written warning Mr Wylie told a number of people.

[33] Mr Wylie says that as a result of his warning he was so worried he could not sleep or eat properly and felt *unfairly victimised by the Managers.* He says he had difficulty functioning at work as he felt a *level of resentment* from the managers. He says he felt *worthless and that I had a constant spotlight on me.*

[34] As an alternative to an award of compensation under s.123(1)(c)(i) Mr Goldstein submitted that I should consider awarding general damages against Robbies for breaching clause 4 of Mr Wylie's employment agreement. He submits that Mr Wylie lost enjoyment of life after receiving the warning.

[35] I consider that this is a more appropriate case for statutory compensation for humiliation etc. than for general damages for breach of contract. Compensation awards for unjustified dismissal in the Authority are often in the range of $5,000 to $10,000.

[36] Any unjustified disadvantage by way of a written warning has a less severe impact on an employee generally than an unjustified dismissal. Having taken into account Mr Wylie's evidence set out above I do not consider his level of humiliation and distress was so great to warrant an award of up to $5,000. I consider an award of $2,000 to be sufficient and reasonable compensation.

Contribution

[37] Having determined Mr Wylie has a personal grievance s.124 of the Act requires me to consider whether he contributed to the situation which gave rise to his dismissal and if so reduce remedies accordingly.

[38] Robbies' reasons for issuing Mr Wylie's warning were because of dissatisfaction with his performance and his failure to adhere to policies. I accept that Robbies was dissatisfied with Mr Wylie's performance. However, an employee will not usually be found to have contributed to a disadvantage without an earlier fair process. I do not find contribution by Mr Wylie as a result of issues about his performance.

[39] Even Mr Wylie's admission that he may have told Ms Algar on 21 September that what she was concerned about was *bullshit* does not amount to blameworthy conduct that contributed to the situation leading to his personal grievance. If a formal meeting had been held I am satisfied that Mr Wylie's behaviour would not have been like that on 21 September which was at the end of a shift when both parties were tired and frustrated.

[40] Therefore, the compensation should not be reduced for contribution.

Penalty

[41] Mr Goldstein asks for a penalty to be imposed on Robbies for breaching clause 4 of the employment agreement and for the amount of the penalty to be paid directly to Mr Wylie.

[42] Section 134 of the Act provides that any party that breaches an employment agreement is liable to a penalty under the Act. Section 135 provides that a company can be liable for a penalty of up to $20,000.

[43] In the recent Employment Court case of *Tan v Yang*[1] Judge Inglis wrote:

> *It is ... generally accepted that a penalty should only be imposed for the purpose of punishment and should not be used as an alternative route for increasing compensation.*[2]

[44] Robbies' evidence is that the issuing of the warning without following the contractual process set out in clause 4 arose from Ms Algar and Ms Soper's relative inexperience as employers. I accept that is the case and that there was no intention to breach Mr Wylie's employment agreement. There also seemed to be a basic misunderstanding that because of the change in the ownership structure Mr Wylie's employment agreement no longer applied.

[45] In this case a penalty would be awarded for essentially the same breach that has led to an award of compensation and if it was awarded to Mr Wylie it would represent a doubling up, which is not desirable.

[46] In all the circumstances I do not consider that this is the kind of case where a penalty is necessary to punish Robbies for its failure to comply with clause 4 of Mr Wylie's employment agreement. This is not the kind of breach of an employment agreement that requires a penalty to be imposed to deter other employers. I am confident that this kind of mistake by Robbies will not happen again.

Costs

[47] Costs are reserved. Generally the successful party can expect a contribution towards their reasonable legal costs. The Authority usually awards costs on a daily tariff approach of $3,500 for a full day of hearing. This hearing took half a day and so would usually attract a contribution of $1,750 in legal costs plus reimbursement of the filing fee of $71.56 Mr Wylie paid. I invite the parties to reach agreement on costs. Otherwise any party wishing to claim costs should file a memorandum with the

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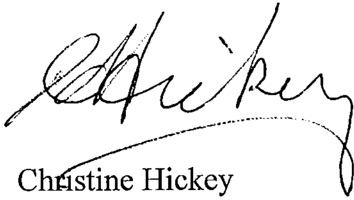
[1] [2014] NZEmpC 65.
[2] Ibid at paragraph 31, and following *Xu v McIntosh* [2004] 2 ERNZ 448.

Authority within 28 days of this determination and the other party should file a memorandum in response within a further 14 days.



Christine Hickey
Member of the Employment Relations Authority