

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 7  
5359331

BETWEEN AP & AW HUGHES LIMITED  
Applicant  
AND RACHEL JOHNSTONE  
Respondent

Member of Authority: M B Loftus  
Representatives: Werner van Harselaar, Counsel for the Applicant  
Lucia Vincent and Amy Doyle, Counsel for the Respondent  
Investigation Meeting: 17 July 2012 at Balclutha  
Submissions Received: 25 July and 8 August 2012 from Respondent  
3 August 2012 from Applicant  
Determination: 10 January 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, AP & AW Hughes Limited, contends the respondent, Ms Rachel Johnstone, owed various sums to the company upon her resignation. They sought recovery thereof.

[2] Ms Johnstone replied by advising she did not believe moneys were owing given the circumstances of cessation. Her response was accompanied by a counterclaim alleging she was unjustifiably dismissed (albeit constructively) and unjustifiably disadvantaged in her employment.

[3] Those claims are denied by the company.

**Background**

[4] AP & AW Hughes Limited is owned by Anthony (Tony) and Adrian (Wayne) Hughes. It operates a farm. Ms Johnstone sought work on the farm through her

father, Mr Jim Johnstone. Having interviewed successfully, she signed an employment agreement on 3 May 2011. She commenced on 1 June.

[5] Contained in the agreement is a standard annual holiday provision giving four weeks' leave per annum. The clause does not contemplate, or otherwise address, the issue of leave in advance. Also contained therein is a clause which provides:

*The employee authorises the employer to deduct from wages, salary, and final wages including holiday pay, any moneys owed by the employee to the employer. These moneys include, but are not limited to: ... Overpayment of wages, or annual holidays, holiday pay, sick leave or bereavement leave taken in advance.*

[6] Ms Johnstone took annual leave during the last two weeks of July. She says she was given no choice and claims she and a colleague were approached by Tony Hughes (Mr Hughes) and told they were required to take the leave. Mr Hughes accepts he approached the two and says he asked when they might commence leave given advice given during their interviews that two weeks' leave would normally be required prior to the commencing of calving in late August.

[7] On Monday, 25 July, and while at her parents' residence, Ms Johnstone had a serious asthma attack. She was taken to hospital by air ambulance and spent two days in intensive care. She was discharged on 29 July.

[8] The following day she visited the farm and told Mr Hughes what had occurred. She says:

*He (Tony) confirmed it was okay for me to take some days off and he said I could contact them by phone the following weekend in regard to when I could return to work. I also informed them that the doctor had stated it would take up to six weeks to make a full recovery.*

[9] Mr Hughes agrees a conversation occurred but is not sure whether it was on 30 or 31 July. There are two key points of difference. Mr Hughes is of the view Ms Johnstone advised she could be absent for up to six weeks but would be unable to give a certain prognosis until after she had visited her doctor later that week. He also denies the claim he demanded early advice of a return to work date. He says he simply said *keep us advised*.

[10] On Saturday 6 August Ms Johnstone phoned Mr Hughes and advised she had her doctor's permission to return to work the following Monday. She says she also asked if her work rotation (a reference to the consecutive number of days worked before a break) could be reduced until she recovered fully and claims the request was declined forthwith.

[11] Mr Hughes states he was surprised to be told of an imminent return given his understanding Ms Johnstone would be absent for six weeks but did not question it. He says the business was understaffed and his reaction was *thank goodness we've got another staff member*.

[12] Ms Johnstone returned on 8 August and worked for three days. It is clear there was some tension. She describes it as hostility. Mr Hughes denies the environment was hostile but suggests Ms Johnstone's performance was less than ideal. He says various issues were therefore discussed, albeit in a civilised and calm manner. Ms Johnstone accepts there were issues with her performance.

[13] There are other differences over what occurred over those three days.

[14] It is Ms Johnstone's position that by lunchtime on Wednesday, 10 August she felt exhausted and unable to eat. She had severe chest pain and contacted her mother who made an appointment with a doctor for 4pm that day. She says her doctor cautioned her against overworking and issued a medical certificate. It reads:

*To Whom It May Concern:*

*This is to ask for consideration for a reduction in hours of work/day to maximum 8 hrs. Rachel had a major respiratory event at the end of July which necessitated admission to Intensive Care Unit Dunedin hospital for 2 days. Post event Rachel required significant amount pain relief which she continues on. The long hours are compromising her recovery opportunity.*

[15] Ms Johnstone's father says he took the certificate to the Hughes's that evening and:

*I told Tony that Rachel was having health problems after the asthma attack and asked if she could do less hours until she was better. Tony said unfortunately it was the wrong time of the year as they were busy with calving as well as general farm work. ...*

*Tony said Rachel would have to decide what she wanted to do herself, as he had 8 emails from potential employees looking for work and could need her accommodation. ...*

*I told Tony we only lived a short distance away and Rachel would be happy to travel to work daily. He didn't respond to that.*

*I asked if there was any possibility of work and Tony did suggest relief milking.*

[16] Ms Johnstone and her father discussed the conversation when he returned. She says it was her understanding her father had requested she be allowed to work part time and the request had been rejected. She adds she understood her father had suggested she relinquish the accommodation and travel to work daily but that offer had also been rejected.

[17] She goes so far to say her understanding of the conversation was that she had effectively been dismissed and did not, therefore, report to work at 5.30am the following day as originally planned. Instead she got her mother to take her to the farm at 10.30am. She says she then commenced a discussion with Mr Hughes by apologising for the turn of events which now meant she was unable to work full time but claims she was unable to say much more. She claims Mr Hughes *instantly got angry* and commenced a tirade during which he exhibited agitated behaviour and repeatedly expressed a view she was *quitting*.

[18] Ms Johnstone closes by saying:

*He calmed down slightly and stared threateningly at me. ... He said again I was quitting. Wanting to leave because I felt frightened and worried what would happen if I stayed, I agreed.*

[19] Ms Johnstone says the discussion led her to conclude she did not wish to return. She therefore arranged for her parents and brother to remove her property from the house she occupied which they did that evening.

[20] The Hughes brothers have a very different view about what occurred and when. They say the discussion between Mr Hughes and Mr Johnstone occurred on the evening of Tuesday, 9 August and not 10 August as claimed by the Johnstones. As Mr Hughes puts it:

*At about 8.00 p.m. that night my mobile and home phone rang about three or four times. I didn't answer because we had guests but I looked at caller ID and it was Jim Johnstone.*

*Jim arrived at the farm about 8.30 p.m. and I went out to talk to him on the porch. He didn't bring anything with him and we just talked.*

*He said that Rachel was finding the hours hard and she couldn't cope. He asked about relief milking. We talked for a while about her work, attitude and health scare. I said to him that we could offer her a job involving milking only. However, I said that the role does not come with accommodation but would only need the house if we had another full time worker.*

*Rachel's parents live nearby so that was a realistic option. ...*

*Jim appeared happy with that option. I told Jim that Rachel had to make the decision and let us know.*

[21] When questioned, Mr Hughes reiterated his view Mr Johnstone had approached, told him Rachel was not coping and sought an alternate role. He says the conversation lasted 30 minutes and concluded a deal involving relief milking which would be subject to Ms Johnstones's approval.

[22] Mr Hughes goes on to say that the following day, 10 August, Ms Johnstone arrived but said nothing about the conversation he and Mr Johnstone had the previous evening. He says this surprised him and when she approached him about having to go to the doctor, he raised the issue. He says:

*Rachel asked me what I was going to do and then asked me if I was going to fire her. I didn't know what she meant and I said "no". ...*

*I told her that if she wanted to change her role then she had to make that decision. I told her that it was not my decision to make*

*I told her about the discussion that I had had with her father the night before and that I didn't understand what she was saying about firing her.*

[23] When this version was put to her Ms Johnstone said she accused Mr Hughes of firing her to which he replied *no - you're quitting*.

[24] Mr Hughes says Ms Johnstone went to the doctor and the next feedback he had was the medical certificate which he says was delivered to the farm sometime late afternoon the following day, 11 August. He says it was given to his mother as he was not present at the time.

[25] Mr Hughes also says he observed the Johnstones removing property from the house Ms Johnstone occupied that evening but given it was around 10.30pm he could not be bothered going over to ascertain exactly what was happening. He reached a conclusion, given the utterings Mr Johnstone had made about Ms Johnstone being unable to cope, that she was simply quitting. He expressed the view sudden departures were a frequent, albeit unfortunate, occurrence in the dairy industry.

[26] Notwithstanding that, the company continued to pay Ms Johnstone for another three weeks. They put this down to an oversight – namely failure to cancel a direct payment. While that was one of the sums they initially sought to recover, the claim has now been withdrawn.

### **Subsequent correspondence**

[27] Nothing further occurred until 1 September 2011. On that day the company, through the hand of Wayne Hughes, wrote to Ms Johnstone. The letter opens with:

*As you have not attended work for over three weeks and have cleaned all your possessions out of your accommodation we assume that you have decided to terminate your employment. Can you confirm this in writing.*

[28] The letter goes on to advise various amounts the company believed were either overpaid or were otherwise outstanding and requested payment.

[29] There was no response.

[30] That was followed up by a second letter dated 25 September. It advises that given the lack of response a claim had been filed in the Authority.

[31] Ms Johnstone's response, dated 6 October, raised her counterclaim. It adds:

*Due to the circumstances around my departure (my constructive dismissal), I believe I should not be required to pay four weeks notice. I did not resign, I felt I was effectively forced to leave and should therefore not be required to pay four weeks notice.*

*In regards to the two weeks holiday pay – I never asked to be paid for two weeks in advance. I was made to take time off because the farm was to be closed for two weeks. At the time I was paid the two weeks holiday pay – I had worked just under three months, and would have accrued one week annual leave. As such, I believe I was entitled to at least one week's holiday pay.*

[32] The company replied by letter dated 16 October. It denies the dismissal claim and expresses surprise Ms Johnstone had been capable of returning when she had given earlier advice she would be off for six weeks. It contains an assertion the discussion about hours arose from Ms Johnstone's view, as enunciated by her father, that she wished to go part time and decide her own hours. The company denied the holiday was enforced or that the farm had closed. The letter ends with a comment Ms Johnstone takes exception to. It is:

*As you will probably be aware not making arrangements to return these funds is classified as theft. We had hoped to avoid putting this matter in the hands of the Police but it appears that we have no option but to pursue this avenue.*

[33] That said, the Police were never involved and the matter proceeded to this hearing.

### **Determination**

[34] The parties agree that notwithstanding the initial claim from the company, the issue requiring primary determination concerns the circumstances under which Ms Johnstone left the Hughes's employ. Did she abandon as the company claims or was she constructively dismissed as she alleges. That was reflected by the order in which submissions were received.

[35] It is the Hughes contention Ms Johnstone abandoned her employment (refer initial statement of problem), though that was not pursued with vigour in closing submissions.

[36] Ms Johnstone's employment agreement provides:

- 23.1 *Where an Employee is absent from his or her workplace for a continuous period of 3 working days the Employee shall be deemed to have abandoned their employment.*
- 23.2 *The Employer acknowledges that before an Employee is deemed to have abandoned his/her employment, the Employer will take reasonable steps to (telephone and writing to the address provided by the Employee) to warn the Employee that the Employer intends to rely on this clause, in the event the Employee fails to contact or attend for work.*

[37] The evidence is the Hughes' consider Ms Johnstone abandoned her employment when she removed her belongings from the house she occupied on the evening of 11 August 2011. Mr Hughes evidence is he saw her remove her possessions but made no inquiry as to why. Indeed, the evidence is there was no communication between the parties until Wayne Hughes' letter of 1 September. That letter says the Hughes' assume Ms Johnstone had decided to terminate her employment. It does not use the word abandon and nor does the letter of 25 September. Abandonment is first mentioned in the Statement of Problem dated 3 October 2011.

[38] It is difficult to conclude Ms Johnstone has abandoned her employment in the circumstances. The employment agreement requires the employer enquire as to the employees circumstances and put the employee on notice it is considering the use of the abandonment clause before it can be applied. The evidence is it did not do so and I conclude that failure precludes it from now relying on the provision and claiming Ms Johnstone had abandoned her employment.

[39] The conclusion Ms Johnstone did not abandon her employment means I must now consider whether or not she was constructively dismissed as she claims. She is required to establish the fact of dismissal before the company can be asked to justify it.

[40] In *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965 the Court stated that for a dismissal to be constructive:

*It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.*

[41] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

c. A breach of duty by the employer causes an employee to resign.

[42] There must also be a causal link between the employers conduct and the tendering of the resignation (*Z v A* [1993] 2 ERNZ 469).

[43] While a simplistic summary of significantly more complex law, the assumption underlying the concept of constructive dismissal is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation.

[44] Given the evidence I conclude Ms Johnstone will be unable to establish the fact of dismissal.

[45] However before progressing I think it important I comment on the differences concerning dates upon which various events occurred. This need not be determined in order that the matter be decided but I note for the parties that in this regard I prefer the evidence of the Johnstones'. It remained consistent and could be aligned to other significant dates such as a daughters visit to celebrate her birthday and documentary support such as telephone records. Conversely the Hughes' exhibited some confusion with an example being uncertainty over when Ms Johnstone advised her possible return (see heading in Tony Hughes brief). In particular I find Mr Johnstone's visit to the Hughes' farm occurred on 10 August as he contends.

[46] When asked why she left Ms Johnstone said it was as a result of the conversation she had with her father after he returned from the farm and her understanding her cessation had been arranged during that conversation. Indeed, she said she actually understood she had been fired though this is at odds with her statement she had no option as she could not work the hours expected of her and the Hughes' rejection of a decrease.

[47] The view the employment ended during the discussion between Messrs Hughes' and Johnstone is unsustainable on the evidence. First there is Ms Johnstone's understanding she was actually dismissed during the conversation which, in itself, contradicts the claim of constructive dismissal. This implies an express act of dismissal by the employer yet Mr Johnstone has never suggested that occurred.

[48] His evidence, simplistically summarised, is he asked if Ms Johnstone could reduce her hours. Mr Hughes replied it was a difficult time of the year but Rachel would have to decide what she wanted to do herself before Mr Johnstone asked if

there was the possibility of other work. He says Mr Hughes suggested relief milking and, when answering questions, Mr Johnstone accepts he reacted positively to that. He went so far as to say that while there was no agreement he thought they had the makings of a deal and his daughter would no longer be performing general farm work. In such circumstances it is not surprising he conveyed the message he did to Ms Johnstone but in the absence of an actual agreement it is hard to accuse the company of repudiatory behaviour. As already said, and as conceded by Mr Johnstone, a decision was over to Rachel and a conclusion was yet to be reached.

[49] It is also difficult to consider Ms Johnstone was dismissed the following day though this is probably irrelevant as her evidence is the employment had already ended by this time. Even accepting her own evidence, Mr Hughes position during the discussion was that it was she who was opting out and not he who was bringing the arrangement to an end. Indeed, she never says she was advised she was dismissed and her position is further undermined by a claim (when answering questions) that she still expected an offer of work as a milk harvester.

[50] The evidence is discussions were incomplete when Ms Johnstone decided to leave and her decision was influenced by second hand reporting of a conversation she was not part of. In such circumstances I conclude she has failed to convince me she was the subjected to repudiatory behaviour leaving her with no option but to leave. Her claim of constructive dismissal fails.

[51] The alternate claim Ms Johnstone was disadvantaged by the same actions that were said to have caused her resignation must similarly fail. So to does a claim the Hughes were ignoring their health and safety obligations by forcing Ms Johnstone to work unsafe hours which may lead to a reoccurrence of her asthma. The conversation was never concluded.

[52] That leaves the original claim for monies owing lodged by the Hughes. Part of the original claim was withdrawn and the remaining elements relate to:

- a. repayment for the leave taken in advance but to which an entitlement was never earned by reason of Ms Johnstone's cessation; and
- b. an alleged overpayment.

[53] Ms Vincent's response is that if this was leave it must, given Ms Johnstone's short tenure, have been leave in advance. Leave in advance needs to be agreed (s.20 of the Holidays Act 2003) yet when answering questions Mr Hughes conceded that never occurred and he told Ms Johnstone she had to go. In other words the Hughes' seek recompense for something they were legally precluded from doing. That is inappropriate.

[54] I agree, especially in the absence of a contrary argument. The only mention of this in the Hughes' closing being an assertion the Authority has the power to make such an order.

[55] Similarly the claim regarding an alleged overpayment must also fail. As Ms Vincent points out the wage and time records which may confirm the claim have never been produced. There is no supporting evidence.

### **Conclusion**

[56] For the above reasons I reach the following conclusions:

- a. AP & AW Hughes Limited's claim for the return of monies allegedly overpaid fails;
- b. Ms Johnstone's counter claim she was constructively dismissed also fails.

[57] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority