



[3] Work commenced for Ms Te Ahuru on Sunday, 1 October 2006. There was no proper employment agreement. Initially, Ms Te Ahuru was engaged in setting up the new shop. The business opened on Wednesday, 4 October 2006.

[4] On Saturday, 7 October 2006, Ms Te Ahuru was invited to leave the workplace early. She had been spoken to earlier that day by Mr Downie about her performance. That evening, Mr Downie and his wife, Dr Downie, were seriously assaulted. Mr Downie, in particular, sustained very serious injuries and remained in Dunedin Public Hospital for some time.

[5] His wife, Dr Downie, a Registrar at Dunedin Public Hospital, effectively had to take over the management of Identity, as well as continuing with her own full time employment.

[6] On Thursday, 12 October 2006, Dr Downie spoke with Ms Te Ahuru as a consequence of which the employment relationship came to an end. There was dispute between the parties as to whether Ms Te Ahuru resigned his position or was dismissed by Dr Downie. Ms Te Ahuru's claim for unjustified dismissal relates to the events at that meeting.

[7] Her claim for disadvantage as a result of unjustified actions by Identity revolve around the fact that she was appointed to a position in July, did not start until the beginning of October and was actually only employed for 12 days. During the period that she was waiting to commence employment, Ms Te Ahuru could have aspired to other positions but because she believed she had already won a permanent position at Identity, she did not. In the result, her contention is that she waited over three months to commence an employment which she understood to be permanent but which in fact lasted only 12 days.

### **Issues**

[8] It will be convenient to inquire into the allegation of constructive or actual dismissal first and then to return to consider the question of whether the allegation of unjustified disadvantage can be made out.

### **The termination of employment**

[9] The Downies say that they understood Identity to have an unfettered right to a trial period of employment which could be brought to an end in the employer's absolute discretion. The Downies now accept that no such right exists in New Zealand law but nonetheless gave evidence that that was their belief at the time that the arrangements were entered into with Ms Te Ahuru. They indicated to me that they thought their view about the trial period tended to corroborate their conviction that Ms Te Ahuru had resigned rather than been dismissed. I do not find the logic of that nexus particularly attractive and I take that argument no further.

[10] Of more significance is the dispute about what actually happened at the meeting between Dr Downie and Ms Te Ahuru. Dr Downie says that Ms Te Ahuru, realising that she was not *handling her job requirements well*, voluntarily resigned. Dr Downie said that she told Ms Te Ahuru, when asked, that she was not being fired but that she did raise with Ms Te Ahuru her capabilities and she indicated that Ms Te Ahuru said to her: *I don't think this job suits me. I'm not comfortable with the product. I think I should get a job with a product that I am more comfortable with.*

[11] For her part, Ms Te Ahuru denies absolutely uttering those words and is adamant that Dr Downie told her that *we don't need you any longer*.

[12] Ms Te Ahuru acknowledges that at the time that these events happened, she *accepted* the termination but she goes on to say that she *had no idea that Michelle [Dr Downie] couldn't do what she was doing. I accepted it because it never occurred to me that there was any option. Nothing like this had happened to me before. I couldn't really quite believe that I'd waited months to start this job and now I'd lost it. I didn't think I'd done anything wrong.*

[13] In the event that it is determined that there was a dismissal rather than a voluntary termination of employment by resignation, Identity alleges that Ms Te Ahuru was dismissed for incapacity. In particular, it is alleged that she misrepresented her ability to perform the work required of her and/or that she was incompetent.

[14] Identity says that Ms Te Ahuru misrepresented her abilities in her curriculum vitae by, in particular, claiming an ability to do jobs within the workplace that she was not actually capable of doing. It also says that, notwithstanding its attempts to train

her to do things that she needed to be able to do, particularly in the sales process, she would consistently fail to achieve an acceptable outcome. Examples of this latter situation included her apparent inability to use the EftPos machine and to tie shoelaces for customers trying on shoes in the shop.

[15] Identity says that its training efforts were extensive with Ms Te Ahuru and that she performed significantly less well in the shop in the short period that she was engaged than a young man who also gave evidence before the Authority Daniel Brisbane. It is the evidence of Identity that the amount of sales credited to Ms Te Ahuru during her employment, brief though it was, was a fraction of what it would have expected from an experienced salesperson and certainly a fraction of the sales credited to Mr Brisbane over the same period, notwithstanding he had no experience whatever. Obviously, this sales analysis fuelled Identity's view that Ms Te Ahuru had not accurately represented her experience and qualifications when she applied for the position and/or was not competent in the basic tasks of working as a shop assistant.

[16] From my perspective, the central issue for determination is whether Ms Te Ahuru was dismissed or whether she resigned. Identity's evidence is that she resigned; Ms Te Ahuru's evidence is that she was dismissed. Whether it is available for Identity to *repackage* the termination of Ms Te Ahuru's appointment after the event is beside the point; the evidence from Identity's own witnesses is that she resigned and in my judgment it is not available to the employer to offer an argument in the alternative that the evidence does not support.

[17] I am satisfied there was a confused discussion between Dr Downie and Ms Te Ahuru. Given Dr Downie's recent tragic experience with the assault on her and her husband, and her lack of experience in retail sales, she would be forgiven for not being at the top of her game. No doubt because of those facts, the meeting was less well conducted than it might have been.

[18] However, the fundamental issue is Ms Te Ahuru maintains that she was effectively told to go while Dr Downie equally vehemently maintains that Ms Te Ahuru volunteered her resignation on the basis that the job and the product did not suit her.

[19] Dr Downie told me in her evidence that if Ms Te Ahuru had indicated a willingness to continue working at Identity, then she would have worked with her to

get her work output up to an acceptable standard. She acknowledged this would have been a challenge but she seemed to me absolutely straightforward in her responses and, in the end, despite the stress of the occasion and no doubt the profound anxiety she would have felt for her husband, I prefer her recollection of events to that of Ms Te Ahuru.

[20] I am particularly drawn to this conclusion by the corroborating evidence of Mr Brisbane, who was in the shop at the time of the discussion between Dr Downie and Ms Te Ahuru. Mr Brisbane gave evidence of Ms Te Ahuru being relaxed after the discussion with Dr Downie, of remaining in the shop for about 30 minutes after the discussion, of giving everyone a hug before departing and of parting on good terms on the basis she would return soon to buy an item. Mr Brisbane also gave evidence of overhearing a telephone discussion with WINZ in which Dr Downie confirmed in Ms Te Ahuru's presence, that Ms Te Ahuru had not been dismissed and Mr Brisbane says that he then heard Ms Te Ahuru confirm she had not been dismissed. None of that evidence, which I accept, is consistent with dismissal.

[21] It follows that I do not think Ms Te Ahuru has made out her claim that she was constructively dismissed or indeed actually dismissed by Identity on 12 October 2006. I am satisfied, on the evidence I heard, that Ms Te Ahuru did say that she was uncomfortable with the job and the product and that that expression of view was accepted by Dr Downie on behalf of Identity.

### **The unjustified disadvantage claim**

[22] Ms Te Ahuru says that, because she was interviewed for the Identity role in July 2006, accepted the job offered by Identity a short time later, but then did not start until 1 October 2006, and was dismissed 12 days later having worked for only 10 days, that she missed out on other opportunities which would otherwise have been available to her and therefore she suffered disadvantaged by an unjustifiable action of her employer, Identity.

[23] This claim is, of course, only sustainable if there is an unjustified action by Identity. The only unjustified action pleaded is the allegation that Ms Te Ahuru was unjustifiably dismissed, either in fact or constructively, and I have found that neither of those events happened, preferring the evidence of Dr Downie that Ms Te Ahuru actually offered to leave and that offer was accepted.

[24] That being the position, it is difficult to see what other unjustified action of the employer can be relied upon. Ms Te Ahuru was interviewed for and accepted a position in July which did not have her starting work until October. That was her choice, and she cannot sheet that home to the employer. Had she wanted to start work sooner, she would have had the option of not taking that position and seeking alternative employment.

[25] Again, her decision not to go for other options in the employment field while she was waiting to start the job at Identity was a decision that she herself made and she cannot rely on the employer to, as it were, put that right when the relationship did not work out.

[26] I am satisfied that the only unjustified action there could possibly be is the allegation that Identity unjustifiably dismissed Ms Te Ahuru and, as I say, I am satisfied that Ms Te Ahuru is mistaken in her conviction that she was unjustifiably dismissed.

### **Determination**

[27] For reasons which I have enunciated above, I am not persuaded that Ms Te Ahuru has made out her claim that she has a personal grievance, either by reason of an unjustified dismissal or by reason of having suffered disadvantage as a consequence of unjustified actions perpetrated by her employer, Identity.

[28] That being the position, Ms Te Ahuru's claim fails in its entirety.

### **Costs**

[29] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority