

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 259  
5424974

BETWEEN CAROL SUSANNE BAKER  
Applicant

A N D HAURAKI RAIL TRAIL  
LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Geraldine Whiteford, Counsel for the Applicant  
Peter Maynard, Advocate for the Respondent

Investigation Meeting: 13 August 2015 at Auckland

Date of Determination: 26 August 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] By statement of problem filed in the Authority on 10 July 2013 the applicant (Ms Baker) alleged that she had been unjustifiably dismissed from her employment by the respondent (Hauraki Rail Trail Limited) when its manager Mr Peter Maynard assaulted her on 22 June 2012.

[2] In the alternative, Ms Baker claims to have been constructively dismissed in reliance on the same event and further, claims to have been unjustifiably disadvantaged by Hauraki Rail Trail's failure to provide her with a safe work place, and that the same events constituted a breach of good faith, and that there was a further ground for unjustified disadvantage in the allegation that Mr Peter Maynard had broken into Ms Baker's home to remove property belonging to Hauraki Rail Trail.

[3] Hauraki Rail Trail denies all of those allegations in its statement in reply dated 19 July 2013.

[4] However, there has been significant water under the bridge since the exchange of the original pleadings. Amongst other things, Ms Baker obtained a protection order against Mr Maynard and Mr Maynard was prosecuted for the assault and found guilty of it by a jury trial. However, he was found not guilty of breaking into her home.

[5] As I was at pains to point out to the parties during the investigation meeting, I was not about to depart from findings of fact made by either the Family Court in respect to the protection order matter or the District Court in respect of the criminal matter and I told the parties that I proposed to take judicial notice of those findings and was not interested in having them re-litigated in my investigation.

[6] Despite the obvious challenges for the parties in dealing with each other given the previous history between them, it is proper that I record that they treated each other respectfully throughout the investigation meeting and I was able to conduct my investigation appropriately and without any of the challenges which might have made it difficult for me to establish just exactly what had happened.

[7] Ms Baker commenced employment with Hauraki Rail Trail on or about 30 January 2012 in the roll of marketing manager. It is common cause that she obtained that position because she was in a romantic relationship with Mr Peter Maynard who was then the Governing Director of Hauraki Rail Trail, at that point a reasonably new start up business.

[8] Ms Baker's evidence is that the couple began living together at around the time that she commenced her employment but that within a relatively short period of time, she had formed the view that she did not want to continue with the personal relationship although she wanted to retain the employment. She says that she left the personal relationship at the beginning of June 2012 and moved back to her own property but that the employment continued.

[9] On the weekend of 16-17 June 2012 Ms Baker says that she was telephoned by Mr Maynard who sought access to her home in order to recover property belonging to the employer. She alleges that he subsequently broke into her home in order to take that property (which it is common cause, belonged to Hauraki Rail Trail) while

Mr Maynard is equally adamant that he had no need to break in because he had access to a key to the property.

[10] For the sake of completeness I note that Ms Baker laid an information with Police about the alleged break in by Mr Maynard, that this was subsequently one of the allegations that Mr Maynard faced in the criminal court and that he was found not guilty of.

[11] Matters came to a head on 22 June 2012 when it is common ground that the principal protagonists travelled together to Ms Baker's home. It was early evening and Mr Maynard wanted to collect some tools which he had left at Ms Baker's property. For her part, she sought to remove from the work vehicle some papers and she says that in the course of doing that Mr Maynard assaulted her.

[12] As I have already made clear, it is not necessary for me to investigate the allegation of whether or not there was an assault; Mr Maynard was charged with assault and found guilty of assault by a jury. Moreover, the Family Court, in considering Ms Baker's application for a final protection order found as a fact that there had been an assault by Mr Maynard on Ms Baker.

[13] As I have already intimated, Ms Baker's position is that the effect of the assault, whether directly or indirectly, brought the employment relationship to an end.

[14] Ms Baker says that after the incident just described, Mr Maynard said something to the effect that she would never have to see him again because she had lost her job. She relies on that of course as evidence for the termination of the employment.

[15] However, it is apparent on the facts that payment by Hauraki Rail Trail of Ms Baker's wages continued after 22 June 2012 and that is the case even on Ms Baker's evidence. Mr Maynard told me in evidence for Hauraki Rail Trail that they did not regard the employment as having come to an end until about the time they got Ms Baker's personal grievance letter. That letter is dated 12 September 2012.

[16] Moreover, Mr Maynard denies using any words on 22 June 2012 would or could be reasonably interpreted as a termination of the employment. He says that the events of that evening were obviously stressful for both parties and that he said

something to the effect *I have had enough. I am out of here.* He denies that those words, properly construed, could representing a “sending away” in a legal sense.

[17] In any event, after 22 June 2012, it is common cause that the personal relationship between Mr Maynard and Ms Baker had ended although Mr Maynard was clear in his evidence to the Authority that he sought a reconciliation and it is apparent on the evidence before me that the two parties continued to have some contact.

[18] Amongst other things, the two of them met at a restaurant on 6 July 2012 and while the parties do not agree about what was discussed at that meeting, both seem to be in agreement that the discussion was around their personal relationship rather than their employment relationship.

[19] Equally importantly and contemporaneously with that dinner, Hauraki Rail Trail was writing to Ms Baker maintaining both that the employment relationship was still on foot and that they wanted to engage with Ms Baker (who was not attending to her duties) with a view to resolving any employment relationship problems. Amongst other things, Hauraki Rail Trail suggested mediation as a way of resolving issues.

[20] The trail of messages and correspondence from the employer to Ms Baker continued from shortly after the date of the assault until what seems to be a final communication on 16 August 2012 where Hauraki Rail Trail indicates it is unable to make progress in resolving an employment relationship problem if Ms Baker will not engage with them. Mediation was also proposed. By this stage, Mr Peter Maynard had stepped aside as a director of Hauraki Rail Trail and been replaced.

[21] The evidence is that Ms Baker requested paid sick leave on 25 June 2012, that this was granted, and that she continued to be paid at least until the middle of July, her last pay apparently being received on 10 July 2012.

[22] But the evidence for the employer is that there was a final pay made some considerable time later which paid out Ms Baker’s annual holiday leave and other final pay entitlements and the implication from the evidence for Hauraki Rail Trail is that if they could have engaged appropriately with Ms Baker after the events of 22 June 2012, payment might have continued beyond the middle of July 2012. This is because Ms Baker’s position was subject to a subsidy payable through Work and Income New Zealand (WINZ) but a term of that subsidy was that the employee had to

sign pay slips and those pay slips were then provided as intervals to WINZ to support the continued payment of a wage subsidy.

[23] Since the proceedings were filed in the Authority, the parties have been through domestic violence proceedings in the Family Court and a criminal trial in the District Court. Those matters go some way to explaining the significant delay in the Authority addressing this matter.

[24] There is a further explanation for that lengthy delay and I refer to that now. After the criminal and Family Court matters had been dealt with, the parties attended a further mediation in this jurisdiction and by email dated 11 November 2014, I was advised by counsel for the applicant the matter was in the process of settling and accordingly a hearing date which I had set of 4 December 2014 could be vacated. In the result, despite the best efforts of counsel and an intervention by me to try to encourage resolution of the matter by agreement, the problem remained unresolved and the present hearing, which this determination records, was the ultimate result.

[25] Having heard Mr Maynard's evidence at the investigation meeting I now understand why there was a difficulty in achieving settlement and because I think it is relevant to his *bona fides* in the matter I record now why the matter was not settled as a consequence of the last mediation. An offer to settle was made by the employer and although not accepted by the employee at the time was subsequently accepted and a settlement agreement was prepared for execution by the parties.

[26] That settlement agreement was not accepted by Hauraki Rail Trail.

[27] I now understand why. Mr Peter Maynard was never intending that the settlement be funded by Hauraki Rail Trail which has limited resources; he proposed that it be funded by another company which he is involved with, but because of a health reverse which he suffered, he was unable to effect the settlement during the period in question. It follows that the matter remains unresolved, as I said before, and this determination now deals with the matter.

## **Issues**

[28] The Authority will need to determine the following questions:

- (a) How did the employment relationship come to an end; and

(b) What consequences if any flow from that conclusion?

**How did the employment relationship end?**

[29] In the unusual circumstances of this case, I have no hesitation in concluding that the employment relationship could not have continued after the assault on 22 June 2012. This is so notwithstanding the fact that as a matter of fact, payments were still being made of wages after that date. But the legal position seems to me to be clear enough that an employment agreement, or indeed any contract, can only continue on foot where both parties remain committed to it.

[30] While it is true that Ms Baker continued to receive some wages after 22 June 2012, and moreover, that Hauraki Rail Trail corresponded with her through until the middle of August 2012 endeavouring to get some proper engagement with her, the short point was that the effect of the events of 22 June 2012 was to cause a complete repudiation of the employment agreement on and from that date.

[31] No employee ought to have to persevere with an employment relationship having been assaulted by a governing director of the employer and accordingly I conclude that notwithstanding the evidence of initiatives taken by Hauraki Rail Trail to perpetuate the employment after 22 June 2012 by the payment of wages and by correspondence, the fact of the assault must be seen to have brought the employment relationship to a shuddering halt by repudiation.

[32] That said, the next question is whether the termination of the employment is unjustified or not and again I conclude that the answer to that question is in the affirmative. Where the employer's agent assaults the employee that constitutes such a grave repudiation of the normal incidents of employment as to constitute an unjustified dismissal.

[33] Put another way, if the assault of itself is not seen as sufficient evidence of a repudiation of the employment relationship by Hauraki Rail Trail then the effect of the conduct of Mr Maynard on 22 June 2012 was such as to create the kind of environment where no right thinking employee could reasonably be expected to continue in the employment and it does no violence to the facts in any particular by categorising this case as an example of entirely inappropriate behaviour of an employer which has the dominant effect of bringing the employment relationship to an end.

[34] I conclude then that Ms Baker has a personal grievance for unjustified dismissal for the reasons articulated. I think the same factual matrix also supports a conclusion that Hauraki Rail Trail breached its good faith obligations and that the employer failed to provide Ms Baker with a safe workplace.

**What are the consequences of those conclusions?**

[35] I propose to deal with the matter globally and consider that having found that Hauraki Rail Trail breached its good faith obligations, unjustifiably dismissed Ms Baker, and unjustifiably disadvantaged her by failing to provide a safe workplace the proper course is to look at a compensatory sum which, in its totality seeks to remedy those various failures.

[36] I made the observation at the investigation meeting that the compensatory sum sought of \$30,000 was at the high end of the awards made in this jurisdiction and I maintain that view now. While the extent of Ms Baker's suffering in the evidence before me is palpable this was an employment of very short duration no doubt complicated by the personal relationship between the principal protagonists. I accept the point made by counsel for the applicant that Hauraki Rail Trail must take the employee as they find her and in consequence, if it could be alleged that Ms Baker was less robust than some, then that was irrelevant to the issue of compensation because it was Ms Baker who was the employee and it was her suffering that was entitled to relief.

[37] I am of course required by the Employment Relations Act 2000 to consider whether Ms Baker has contributed in any way to the circumstances giving rise to either of her personal grievances and on the facts I heard, it seems to me that she is blameless. In respect to the employment relationship simpliciter there is no evidence whatever that Ms Baker contributed in any way to the circumstances giving rise to either personal grievance.

[38] In addition to compensation, Ms Baker seeks lost wages of \$41,600 gross.

[39] I am not persuaded that there can be any award for lost wages. This is because the legal position is quite clear; if an employee cannot work by reason of ill health then it is not possible to visit the consequences of the wage loss on the employer. It is apparent that Ms Baker was prevented by ill health from working for the period in question; there is no basis on which she would qualify for a sickness benefit, or its

equivalent unless she were sick and if she is sick she cannot aspire to work and if she cannot aspire to work she cannot look to her former employer to contribute to wages which she could not have earned.

[40] But of course, if, as in this case, it is difficult to escape the conclusion that it was the employer who created the ill health in the first place, or at least contributed to it, then that must sound in compensation.

[41] Accordingly, I direct that Hauraki Rail Trail Limited is to pay to Ms Baker the sum of \$17,500 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[42] I further direct that Hauraki Rail Trail Limited is to pay to Ms Baker the sum of \$71.56 being the filing fee for this matter to be dealt with in the Authority.

[43] For reasons earlier advanced, I make no award in respect to lost wages but record, for the avoidance of doubt, that the compensation figure which I have awarded reflects my considered view of the contribution to Ms Baker's ill health by Hauraki Rail Trail Limited.

### **Costs**

[44] In the particular circumstances of this case I do not reserve costs but determine them now. I note that Ms Baker is legally aided. And she has been completely successful in her application to the Authority.

[45] The effect of the daily tariff approach to costs fixing in the Authority would require a payment by Hauraki Rail Trail to Ms Baker of \$1,750.00. This matter was dealt with in a half day of hearing time and there is nothing in the material before me that would justify either a reduction in the daily tariff or indeed an increase in it.

[46] Accordingly I direct that Hauraki Rail Trail is to pay to Ms Baker the sum of \$1,750.00 as a contribution to the costs that she has incurred in this matter, such sum to be paid in due course through Ms Baker to the Legal Services Commissioner.

**James Crichton**  
**Member of the Employment Relations Authority**