

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Lynda Barlow (Applicant)  
**AND** Harper Photographics Limited (Respondent)  
**REPRESENTATIVES** Ken Nicolson, Counsel for Applicant  
Penny Swarbrick, Counsel for Respondent  
**MEMBER OF AUTHORITY** Alastair Dumbleton  
**INVESTIGATION MEETING** 2 and 8 August 2005  
**FURTHER INFORMATION RECEIVED** 12 September, 10 and 12 October 2005  
**DATE OF DETERMINATION** 16 November 2005

**DETERMINATION OF THE AUTHORITY**

Employment relationship problem

[1] Ms Lynda Barlow the applicant has lodged a claim with the Authority. Although the respondent party is referred to ambiguously as "SIMON HARPER Harper Photographics Ltd" it became clear during the Authority's investigation that the latter cited corporate entity had been the only employer of Ms Barlow at material times and that any of her claims which may have been brought personally against Mr Simon Harper, in a separate capacity, were withdrawn.

[2] Ms Barlow's claims against Harper Photographics Ltd (HPL) are stated to be; a. Unjustified Disadvantage, b. Unjustified dismissal, and c. Sexual discrimination and work place bullying. As remedies for her problem Ms Barlow sought a penalty in respect of an alleged failure by her employer to provide a written employment agreement and compensation for disadvantage suffered as a result of inappropriate sexual remarks and conduct amounting to bullying and intimidation. Further, she sought reimbursement of remuneration lost as a result of her alleged dismissal and she sought compensation for hurt and humiliation resulting from that dismissal.

Penalty and disadvantage claims

[3] I find that the penalty claim cannot succeed because it was not brought within 12 months of the cause of action arising, as every such claim is required to be under s.135(5) of the Employment Relations Act 2000. If there was a breach of s.64(2) of the Act – which requires an employer to provide a copy of the intended employment agreement to the employee – the cause of action was completed at the time the employment was entered into. That was in about January or February 2004, when Ms Barlow changed her status from contractor to employee. The claim for a penalty

was not lodged until over a year later in May 2005. (I note that the December 2004 amendments to s.135 and other provisions of the Act, are expressed not to apply to anything done before 1 December 2004.)

[4] At the end of the investigation meeting on 2 August 2005, Mr Nicolson advised that Ms Barlow's disadvantage claim was withdrawn. That left only the claim of unjustified dismissal to be determined by the Authority.

#### Unjustified dismissal claim

[5] Ms Barlow started in a work relationship with Mr Harper and his company the respondent (HPL), in June 2003. Although then a contractor, she later became an employee, in about January or February 2004, working with Mr Harper in his photography business as his assistant. For this work she was paid \$20 per hour, or about \$41,000 per year.

[6] Ms Barlow alleges that Mr Harper told her she was dismissed on Saturday 6 November 2004 during a row the pair had on the footpath outside the location they were working at. She says that although at her own insistence she did not go immediately as Mr Harper had made plain he had wanted, by 9 am. on Monday 8 November she had acknowledged her dismissal by giving back the keys to her workplace.

[7] Although the sweep of the case Ms Barlow presented was much wider, it is what took place between 6 and 8 November that has been the focus of the Authority's consideration of this claim. At times the presentation of some of Ms Barlow's evidence descended into farce. I refer to the impromptu modelling before the Authority of the 'La Hooters' female bar staff attire ('Hooters' it may be noted from Brookers on-line Employment News of 16 September 2005, is a US restaurant chain "best known for its well-endowed, tightly clad waitresses." Ms Barlow's former Takapuna establishment 'La Hooters' seems to have emulated that particular look or theme.) I refer also to the tendering of her affidavit of 28 August with its bizarre final paragraph.

[8] Ms Barlow referred to Mr Harper as having a "Jekyll and Hyde" personality but I equally regard her as having a chameleon-like character. Despite the digressions of witnesses into risqué material the Authority has approached the claim as one being pursued seriously by Ms Barlow and all relevant evidence has been considered.

[9] Central to the claim of unjustified dismissal and its determination must be the accounts given in evidence by Ms Barlow and Mr Harper about their actions and the words they exchanged, on the morning of 6 November 2004 outside the place where they worked that day. Their conduct then and over the following two days, and the contents of letters they wrote to each other on 8 and 9 November, is the best guide to whether there was a dismissal delivered by Mr Harper or a resignation given by Ms Barlow.

#### The parties' letters to each other

[10] In her letter to Mr Harper written on Monday 8 November, Ms Barlow said;

*Dear Simon*

*In regards to the dismissal of my position as P.A on Saturday 06/11/04 I have followed your instructions as demanded & returned your keys.*

*After I returned your key you called me & confirmed my dismissal on the phone.*

.....

[11] In his letter written on Tuesday 9 November, Mr Harper said;

*I am writing in response to the letter you delivered to me yesterday, regarding what you have termed 'your dismissal.' You certainly appear to have misunderstood the events that took place on Saturday 6 November 2004, the day on which you resigned your position with Harper Photographics Limited. Due to your misapprehension I have noted the events as follows:*

[12] Mr Harper then went on in his letter to recount the arrangements he thought he had made to pick Ms Barlow up and drive her from the North Shore to the shoot location in Kingsland on the Saturday morning, before receiving a message from Ms Barlow just before 9 am that day saying she was driving herself there. He recounted the discussion he had when he met her about the reason for her changing the plan. What she said about the need for her to have her own car left him with a concern that she intended to leave the photo shoot at 5pm even if it had not been completed. He explored that concern with Ms Barlow by asking if it was her intention to leave before the shoot was finished. Mr Barlow recounted her response, which he said had been to complain about having to work on weekends;

*I again explained to you that our jobs were not 9 to 5 and occasionally longer hours and weekend work was required. You knew these facts when you were first employed by Harper Photographics. You then replied "In that case, maybe it's time you and I parted company and that I should resign."*

*I continued to unload the camera gear for our shoot. I then moved back to where you were standing and said "I accept your resignation, and you may as well give me your keys now, as you don't seem to be in the right frame of mind to work and I need to concentrate on this job at hand." You then replied "No, I won't do that. I'm already here so I'll stay."*

*That was the last we talked of leaving or resigning and I thought the matter would subside. Throughout the shoot you were very obviously annoyed about being there .....*

*Once the job was completed at 6pm you and I packed up the camera gear, then parted company, saying a quick "See you later."*

*On Monday morning (8 November) ..... I rang your mobile at 9.20am. When I asked you if you were coming to work today, you replied "No. I have left the keys at the lunch bar, as I have resigned." I replied "Okay" and hung up.*

*At 9.40am I rang you again and asked if you were sure you wanted to resign. You replied "Yes. I didn't appreciate the way you spoke to me." I apologised for the way I spoke to you and again asked if you would come back to work. You said "No," and hung up. I then sent you a text message at 10.45am, again asking if you were sure you didn't want to return to your job. I received no reply to that message. On Tuesday 9<sup>th</sup> November I again texted you the same message but again received no reply.*

*Lynda I have given you every opportunity to withdraw your resignation and I am saddened that you haven't.*

.....

*I am sorry that you have resigned as I valued you as an employee and it saddens me that you have brought our working relationship to such an unpleasant and abrupt end. Please find enclosed details of your final pay, to be banked into your account on Wednesday 10<sup>th</sup> November.*

[13] It is not unknown for letters like those above written by Ms Barlow and Mr Harper to be used to manufacture evidence, against the possibility that they will be read and considered by a mediator or by the Authority, at some time in the future when a grievance claim is being pursued or resisted. The proximity of the letter writing to the events in question and the style and content of the letters, make it seem unlikely that was part of their purpose and I regard them as expressing to their respective addressees the beliefs actually held by their authors at the time they were written. I note that it was not until 7 December 2004 that Mr Nicolson first communicated with Mr Harper, raising a grievance and the prospect that the resolution of it would be expensive for his business.

#### The representatives' letters

[14] In his letter Mr Nicolson, presumably repeating Ms Barlow's instructions, said that after the row erupted on the morning of 6 November over the arrangements for her transportation to work, Mr Harper had sworn at, abused and intimidated Ms Barlow and had then;

*.....moved up close to Lynda's face and said "Give me your Fucking keys back ... and get out of here!!"*

Ms Nicolson continued;

*Lynda replied "I have come here to work and I have given up my Saturday, I am not going to be fired over nothing."*

*At first you walked away and then you walked back and said: "Fine you can stay then but you will give me your fucken keys and resignation on Monday and you can stand there by the fucken car until I say otherwise." As a result Lynda stood by the car and after 10 minutes you came up and said "You can go in now." The rest of that day you were rude and snapped at Lynda in front of others. At the end of the day you said to Lynda: "You can go home now but don't forget on Monday, I want your keys and resignation. And that is how the situation was left until Monday 8<sup>th</sup> November 2004.*

[15] Mr Nicolson in his letter continued on to say that after the keys had been delivered back Ms Barlow was rung by Mr Harper and their conversation went;

*"So you have resigned, where is your resignation?" Lynda replied truthfully "No I have not resigned, you fired me and I have returned the key as you asked me to do."*

[16] Mr Nicolson, a barrister practiced in employed law, advised in his letter that he preferred to view these confused circumstances as giving rise to an "actual" summary dismissal rather than a "constructive" dismissal.

[17] A reply to this letter was written on 16 December by Mr Meyland, also a professional employment law representative and one of long experience. His advice is consistent with what Mr Harper had written a month earlier to Ms Barlow in his letter of 9 November, and includes the following;

*Mr Harper denies absolutely that he dismissed Ms Barlow or ever expressed words to*

*that effect. There was a considerable period from the time she expressed her intention to resign on the Saturday before Mr Harper acknowledged and accepted the resignation. As also noted above, there were also the attempts after the Saturday to follow-up with Ms Barlow to determine her intentions.*

### The parties evidence to the Authority

[18] Ms Barlow's written statement of evidence confirmed the advice Mr Nicolson had given in his grievance letter. She confirmed that despite feeling "totally intimidated and embarrassed" and despite being "shocked and scared" by what Mr Harper had said and done (including disciplining her like a child by making her stand in one place until he told her she could move), she had maintained her insistence on being allowed to work with him as his assistant for the next eight or nine hours.

[19] Mr Harper's written evidence did not contradict the advice of his representative Mr Meyland about what had happened.

[20] In her oral evidence Ms Barlow told the Authority that she had been "scared to death" by Mr Harper's words and actions on the morning of 6 November. She described him as being out of control and aggressive, and as having invaded her personal space. In that state, she said, he had put his face up close to hers and said "give back the key, and I was fucking fired." She also said that she had hoped he would call her over the weekend to apologise and admit that things had got out of hand.

[21] Ms Barlow confirmed that Mr Harper had asked her if she wanted her job back. She said he had also asked her where her resignation letter was.

[22] Mr Harper in his oral evidence agreed that he had asked for a resignation letter during the row on the Saturday morning when Ms Barlow had said that she might as well resign.

### Consideration of the evidence

[23] Without the advantage of having directly witnessed for itself what took place during the row on the morning of 6 November and over the following few days, the Authority must try and build a picture from the contradictory written and oral accounts given by Ms Barlow and Mr Harper, as well as from the letters written for them by their representatives Mr Nicolson and Mr Meyland.

[24] After considering everything Ms Barlow said, the Authority is left with an impression that to some extent she has a busy imagination and is prone to over-dramatise events. I do not think she set out to give false evidence to the Authority, but rather she has come to believe that she was dismissed. I am not able to accept as correct the account she has put forward of what happened. I consider it likely that over time she had become dissatisfied with her job and used the row with Mr Barlow as a convenient piece of drama to accompany the ending of her employment that she wanted to bring about.

[25] I am not so sure that she is easily embarrassed or that she is shy, as she described herself. Her other description of herself as strong willed seems more accurate and I therefore do not believe that she would have put up with the behaviour she described as being meted out to her by Mr Harper. I think she would have had more self-respect than to stand by and be sworn at, abused and treated like a naughty child, all in a public place, and then apparently submit to Mr Harper by working for him for a full day.

[26] Ms Barlow's claim in her letter to Mr Harper of 8 November that he had "confirmed" her dismissal on the phone that day, is completely at odds with her evidence, and his, that Mr Harper had asked her to continue working for him. A request like that is quite the opposite of a confirmation of dismissal.

[27] From the evidence I find it unlikely that it was Mr Harper who first mentioned resignation. It is more likely that he responded to that suggestion made by Ms Barlow, by saying that he required confirmation of her intention in writing. It is not in dispute that by 8 and 9 November he had made it clear that he did not want Ms Barlow to leave. I find it unlikely that Mr Harper tried to compel Ms Barlow to write a resignation letter against her own wishes.

[28] While it is clear there was a serious set-to between Mr Harper and Ms Barlow on 6 November 2004 that has to be viewed in the context of the relatively informal manner of personal interaction that they had allowed to develop between them over some time. Mr Harper had also apparently been a not infrequent patron of La Hooters bar when it was run by Ms Barlow, and no doubt that earlier contact influenced the less conventional way they related when they became employer-employee.

### Determination

[29] I accept Mr Harper's evidence as correct and I find that he did not unjustifiably, whether actually or constructively, dismiss Ms Barlow from her employment with HPL. Indeed he did not dismiss her at all.

[30] For that reason the personal grievance claim is not upheld and no orders against the respondent company are necessary to resolve this employment relationship problem.

### Costs

[31] Costs are reserved. If Ms Swarbrick and Mr Nicolson are unable to resolve the question themselves written application may be made to the Authority asking it to fix costs between the parties.

A Dumbleton

**Member of Employment Relations Authority**