

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 145/09  
5116028

BETWEEN                      JENESE ANNE BELZER  
   Applicant  
  
AND                              ARMAGH      INVESTMENTS  
   LIMITED  
   Respondent

Member of Authority:      Helen Doyle  
  
Representatives:              Tony Bamford and Rebecca Frost, Counsel for Applicant  
   Nicole Ironside, Counsel for Respondent  
  
Investigation Meeting:      28 May 2009 at Nelson  
  
Submissions received:      15 June 2009 from Applicant  
   1 July 2009 from Respondent  
  
Determination:                3 September 2009

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]      Jenese Belzer says that her employer Armagh Investments Limited (Armagh Investments) breached implied duties of trust, confidence, and fair and reasonable treatment which led to her resigning, and that she was unjustifiably constructively dismissed from her employment as a part time sales assistant with Armagh Investments which company owns and operates a video hire business in Nelson.

[2]      Ms Belzer says the last straw for her was on 15 August 2007 when during a heated exchange with Mr Thompson's wife about filling a gas bottle for the video store, Mrs Thompson said words to the effect that Ms Belzer did not get paid to sit on her arse all day and if she moved around she would keep herself warm. Ms Belzer said that after that conversation she complained to Mr Thompson but was made to feel

very uncomfortable when security cameras were referred to and then she had no option but to resign.

[3] The sole director of Armagh Investments is Gaire Thompson. Armagh Investments does not accept that Ms Belzer was unjustifiably constructively dismissed. It says that Ms Belzer left of her own volition without giving notice on 15 August 2007 and is not entitled to any of the remedies that she claims.

### **The issue**

[4] Ms Belzer relies on the first category of constructive dismissal set out by the Court of Appeal in *Auckland Shop Employees etc IUOW v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) that there was a series of breaches of duty by Armagh Investments that was such that Ms Belzer could not be expected to put up with it.

[5] The Authority must determine the following issues:

- Was Ms Belzer's resignation caused by a breach or breaches of duty either express or implied on the part of Armagh Investments?
- If there was a breach of duty by Armagh Investments then was it a breach of sufficient seriousness to make it reasonably foreseeable that Ms Belzer would not be prepared to continue to work under the prevailing conditions?
- If it is found that Ms Belzer was unjustifiably constructively dismissed what remedies is she entitled to and are there issues of mitigation or contribution?

### **Was Ms Belzer's resignation caused by a breach or breaches of duty either express or implied on the part of Armagh Investments?**

[6] Ms Belzer complained about several actions or omissions on the part of Armagh Investments leading to and causing her resignation as set out below:

- No employment agreement provided;
- Late payment of wages;
- No support and training;

- Necessities in the work place;
- Undervalued and not appreciated;
- Comments re busier in the shop before Ms Belzer was employed;
- Argument with Nanette Thompson about the gas bottle;
- Reference by Gaire Thompson to security camera.

### **No employment agreement provided**

[7] Ms Belzer commenced her employment with Armagh Investments on 20 March 2006 as a video assistant and worked between 20-25 hours per week. At the time her employment ended Ms Belzer was receiving \$11.25 per hour and was responsible to Mr Thompson for day to day matters. The evidence supports that Mr Thompson was accommodating about Ms Belzer's hours of work so they could fit in with her outside of work commitments and as a result Ms Belzer was not usually rostered on for weekends. The evidence did not support Ms Belzer had an issue with her roster although the hours Ms Belzer was required to work could change at fairly short notice to cover other employee's absences and the like. As a rule the hours she worked were fairly consistent.

[8] Ms Belzer was paid weekly, usually by way of automatic payment with funds deposited into her bank account on Thursday night with such funds being accessible after midnight Friday.

[9] There is a dispute as to whether or not Ms Belzer was ever given an employment agreement. Mr Thompson said in his evidence that he knew from about the end of the year 2000 that employees had to have written employment agreements and that he had arranged for employment agreements to be prepared through the Employers Association. Mr Thompson thought he had given an employment agreement to Ms Belzer but could not be certain on that point. He often had difficulty getting a signed copy back from employees. Ms Belzer was adamant that she was not given an employment agreement and said that she asked Mr Thompson for one. Mr Thompson said that had that occurred he would have made sure that she did receive an employment agreement in writing because there was no reason for that not to have occurred.

[10] Ms Belzer should have had a written employment agreement and Mr Thompson was not able to satisfy the Authority that one was ever given to her. I am not satisfied from the evidence that not having a written employment agreement particularly concerned Ms Belzer and the absence of being given one cannot be seen as causative to her resignation. Ms Belzer does not claim a penalty.

[11] Mr Bamford submits the relevance of the absence of an employment agreement is that Ms Belzer did not know who her employer was until after mediation had taken place. That is disputed by Mr Thompson who says it would have been apparent from various dockets and correspondence that the employer was Armagh Investments. This is a matter that I shall return to when considering the conduct of Mrs Thompson on 15 August 2007.

### **Late payment of wages**

[12] There was agreement between Ms Belzer and Mr Thompson that on about nine occasions Ms Belzer's wages were not transferred to her account by internet transfer on the Thursday. Mr Thompson explained that this was because he had either not received the faxed timesheets from his employees in time or that he was unable to get to a computer on time. On those nine occasions Mr Thompson would arrange for the money to be deposited manually into Ms Belzer's account on the Friday.

[13] Ms Ironside submits that the wages were therefore not paid late but I accept that a manual payment later in the day on Friday could impact on an employee's ability to access that money earlier on a Friday morning or indeed on payments coming out of an account by way of automatic payment.

[14] Mr Thompson could recall Ms Belzer mentioning that she had automatic payments coming out of her bank account and on that basis he said that if he missed the cut off time for internet banking he endeavoured to put the money into her account as soon as possible on the Friday. He did not recall, and I accept his evidence on this matter, Ms Belzer advising him that she had stopped her automatic payments because her wages had been paid in later than they would have been if the internet payments had been made.

[15] Ms Belzer said that during the first part of her employment she raised her concerns about being paid manually on the Friday with Mr Thompson and he made a comment that she should have savings. Mr Thompson said that he may well have

made the comment but he did not mean to be offensive in doing so and said that he was really trying to be helpful. Ms Belzer said that she walked away when Mr Thompson made this comment. I accept that it was important to Ms Belzer that her wages were put through by way of internet banking on Thursday night and that she was hurt by Mr Thompson's comments because not everyone can afford to save money.

[16] It was unfortunate that wages were not always put through on the Thursday night but Mr Thompson would try to rectify the situation so at least the money would be deposited on the Friday. I have calculated that Ms Belzer would have received about seventy two payments from Armagh Investments before her employment ended. Nine of these were not put through by way of internet banking.

[17] I am not satisfied that the circumstances in which the payments were not made by way of internet banking, as described above, in the context of a small business with attempts made quickly to rectify the situation, can be said to have been a breach of Armagh Investment's duty towards Ms Belzer.

[18] If it could be said to be a breach then I do not find it can be said to have been a sufficiently serious breach to support that Mr Thompson did not intend to be bound by the employment agreement between them in terms of her wages.

### **No support and training**

[19] Ms Belzer accepted that Mr Thompson had shown her what was required in the video store and that she had several telephone numbers to call if she needed anything. Ms Belzer agreed that her attention was drawn by Mr Thompson to a book which I saw at the investigation meeting, instructing on the various duties required of the video assistant. I do not find that there was a breach in terms of the support and training given to Ms Belzer at the video store.

### **Necessities in the workplace**

[20] Ms Belzer said that there was a struggle to be provided with necessities in the workplace such as toilet paper and some stationery. She also said that there were issues around having the gas bottle filled to warm the building. Ms Belzer said that on three or four occasions she was required to fill the gas bottle herself and was not

paid for doing so even though it took about 20 minutes. She said the building in which the videos and DVDs were housed was huge and got very cold.

[21] I am satisfied in terms of supplies Ms Belzer knew that she could contact either Mr or Mrs Thompson and that the evidence does not support that Ms Belzer raised the issue of supplies with Mr Thompson as a matter that caused her particular concern.

[22] Mr Thompson accepted that Ms Belzer had complained about the heat in the store in summer and the cold in winter. I am satisfied that he purchased a fan to cool the air in the video store in summer and a separate oil heater to provide some backup in winter. The gas heater also had an electric fan heater which could be used while the bottle was being filled. Unfortunately Ms Belzer was unaware of the electric fan heater component of the gas heater.

[23] The situation with the gas bottle was unsatisfactory on the occasions when Ms Belzer had to take unpaid time away from the video store to fill the gas bottle. I am not satisfied however that it was the type of situation that I could conclude there was a breach.

### **Undervalued and not appreciated**

[24] Ms Belzer felt that her contribution at the video store was not valued or appreciated by Mr Thompson. Mr Thompson said that there were times when Ms Belzer was very enthusiastic, particularly at the beginning of her employment and had some good ideas which he implemented with respect to tickets inserted in videos and DVDs as to when they were due back and some ideas about advertising and promotions during a festival.

[25] There were occasions Mr Thompson said he was concerned about Ms Belzer having her friends come into the video store. Mr Thompson said that he would raise any concerns in an informal way with Ms Belzer and he said that advised her to make sure that everything was up to date rather than watching television or reading.

[26] Ms Belzer may have felt undervalued and not appreciated in terms of her role at the video store. I am not satisfied that Ms Belzer clearly articulated to Mr Thompson that she felt this way because she said she didn't really raise concerns aside from the one time with the wages with Mr Thompson because she felt

Mr Thompson was too pre-occupied and she did not feel comfortable in raising issues with him. Mr Thompson did have other business concerns aside from the video store but I am not satisfied the evidence supports that if matters had been raised with him then he would not have taken appropriate steps to deal with them.

[27] I find although these matters that I have set out, perhaps with the exception of the employment agreement, did cause some concern to Ms Belzer during her employment, the real reason for her resignation was the exchange with Mrs Thompson that took place on 15 August 2007 against the background of events that had occurred earlier in that month which I shall come to. I am strengthened in my view about this by a letter that Ms Belzer wrote to Mr Thompson after her resignation dated 31 August 2007. I have placed weight on the letter because it was written close to the time of resignation. In that letter, which can be described as hard hitting, it is clear that the concerns for Ms Belzer are Mrs Thompson's comments against the background of inferences from Mr Thompson that the shop was busier before she was employed and a comment that Ms Belzer said was made by Mr Thompson's daughter that she saw her watching Shortland Street on television. Ms Belzer sets out in the letter the work that she has undertaken in the store to demonstrate that she was a hardworking and valuable employee. The final paragraph of Ms Belzer's letter provides:

*This letter has been about how I feel, and to let you know how insulted, upset, stressed and angry I have felt having to leave after being accused of being lazy and doing nothing as well as the inference you had been making that it is because of me that you are not getting customers. I am also writing this letter in the hopes that you will think twice before you or your family sit in judgment over any other hapless individual who ends up working for you and I hope you take a good look at yourselves before you try and make them the scape goat for your failing business. It's been you and you alone that has degraded that business to the point that it has very little customers and it's been done consistently over years. I have had nothing to do with it.*

### **Comments re busier in the shop before Ms Belzer was employed**

[28] Mr Thompson accepts that in or about early August 2007 he made a comment to Ms Belzer that the business used to have more customers at night before she starting working at the video store. He said that he was speaking generally because it was a fact that there was less custom in the shop at that time and in the context that Ms Belzer's friends were hanging around and that was of concern to him. He said

that Ms Belzer did not mention to him that she had taken the statement as an implied criticism. Ms Belzer said that she had drawn an inference from the conversation that there were more customers before she started and that she was somehow responsible for this. She denied that the comment was made when she had any of her friends in the store. She accepted that Mr Thompson had never directly called her lazy and that she did not challenge Mr Thompson about his comment. This is supported by her letter of 31 August 2007 in which she describes her reaction as *apart from me asking when that was, - because since I had been working there it was always pretty dead at night,-I never pushed you to explain that comment further – even though my gut feeling was that you were somehow blaming me. However that feeling was totally validated by your wife’s angry and totally uncalled for accusations over the phone on Wednesday.*

[29] Mr Thompson said that he did hear his daughter make any mention to Ms Belzer about having seen her watch Shortland Street on television and he could not recall Ms Belzer making a complaint to him about the matter. There was no evidence that she did.

#### **Argument with Nanette Thompson about the gas bottle**

[30] On 15 August 2007 Ms Belzer was due to attend at work at the video store. She telephoned another employee at the store to ask if anyone had come into store to take the gas bottle to be filled. The other employee said the gas bottle had not been filled and Ms Belzer decided to telephone Mrs Thompson and get her to fill the gas bottle. Ms Belzer said that she had asked Mrs Thompson in the past to undertake other tasks associated with the video store and that Mrs Thompson had always been pleasant and friendly.

[31] The evidence supports that it is more likely than not that Mrs Thompson already had the gas bottle in her possession because Mr Thompson was in Invercargill on 15 August 2007 and had reminded Mrs Thompson before he left that the gas bottle needed to be filled. He said that he had placed it in the boot of the car. Mrs Thompson said in her evidence that she had a conversation with the other employee at the video store early that day and he advised that he did not need the gas bottle filled. Mrs Thompson’s evidence is that she told the other employee that the gas bottle would be filled and at the video store by 6pm as she was taking her daughter out to basketball and would drop the gas bottle off on the way.

[32] There is no evidence to satisfy me that Mrs Thompson did not have the gas bottle in her possession. I did not hear from the other employee who did not attend to give evidence and no longer works at the video store.

[33] Ms Belzer said that when she telephoned Mrs Thompson to fill the gas bottle, Mrs Thompson said that she would not. That is in sharp conflict with Mrs Thompson's evidence that she made it clear to Ms Belzer on several occasions during the call that the gas bottle would be filled and that Ms Belzer would have known it would be at the store when she started work at 6pm. I accept that at the time of the conversation Mrs Thompson was under some pressure to get her daughter to a basketball game some distance from their home but I am not satisfied from the evidence that she refused to fill the gas bottle.

[34] Mrs Thompson told Ms Belzer after she felt that Ms Belzer kept on at her that she was lazy and didn't get paid to sit on her arse all day, or words to that effect.

[35] Ms Belzer said that she decided after the conversation that she could not go into work as that she was feeling unwell although I am not satisfied that was conveyed to Mrs Thompson. Mrs Thompson gave evidence that she dropped the filled gas bottle into the store at 5pm and had driven away from the store when she received a telephone call from the other employee to say that Ms Belzer had called the store and would not be coming into work that night, and was leaving because of what Mrs Thompson had said to her.

[36] Mrs Thompson is not a director or shareholder in Armagh Investments. She had quite strong, and it would be fair to say, negative views about the business. Mrs Thompson did provide some assistance in respect to the business in terms of obtaining supplies and helping out with employment agreements and the like. I accept Ms Ironside's submission that her involvement was quite minimal. The running of the business and important decision making was the domain of Mr Thompson. I find it likely that Ms Belzer did understand this because her dealings in terms of running the business had been in the main with Mr Thompson.

[37] Mr Bamford submits that Ms Belzer would have believed that Mrs Thompson's views were those of her employer and therefore her actions are attributable to her employer under general agency principles. Reliance is placed on the fact that Ms Belzer did not have a written employment agreement and Ms Belzer

was of the view that the video store was a family business. Mr Bamford submits that Mrs Thompson had ostensible authority to act on behalf of the company. I do not accept that submission. The evidence does not support that Mrs Thompson had apparent or implied authority from the company to talk to Ms Belzer in the way that she did, or indeed that a reasonable person in the situation of Ms Belzer would conclude that she had. The discussion was not of a planned type but a reaction because Mrs Thompson felt that Ms Belzer had spoken rudely to her. I am not satisfied the way Mrs Thompson spoke to Ms Belzer can be seen as a breach by Mr Thompson or Armagh Investments.

[38] I can understand that Ms Belzer having drawn inferences from earlier comments made to her would have been very hurt by the statement. Looking at the earlier comments the law does not compel an employer to perform the contract of employment politely however desirable courtesy and respect is: *NZ Woollen Workers IUOW v. Distinctive Knitwear NZ Ltd* (1990) 2NZILR [1992] NZILR at 438.

[39] Mrs Thompson made it clear at the investigation meeting in answer to one of my questions that she would not have apologised to Ms Belzer for the comment made by her. That can be seen as unfortunate but cannot have been a factor at the time that influenced Ms Belzer in her decision to resign, because it was not known to her.

#### **When was the decision made to resign?**

[40] Ms Belzer said that she decided after the conversation with Mrs Thompson that she could not go into work. She said that she was also feeling unwell and was concerned the place would not be warm, although I am not satisfied that Ms Belzer did convey to Mrs Thompson that she was unwell.

[41] Mrs Thompson contacted her husband that evening by telephone and told him that Ms Belzer had left the job because she had accused Ms Belzer of being lazy and sitting around on her backside all day. Mrs Thompson advised her husband that she would cover for Ms Belzer at the shop that evening.

[42] There is no dispute that later that evening Ms Belzer telephoned Mr Thompson. There is a difference in the evidence as to whether it was during this telephone call that Mr Thompson raised the issue of security cameras or during the later call after Ms Belzer had resigned. Mr Thompson said that he could not recall the conversation word for word but recalls Ms Belzer saying at the start of the

conversation that she would not returning to work because of the way Mrs Thompson talked to her. I prefer Mr Thompson's recollection of what was said to Ms Belzer during the first call because Ms Belzer accepted that her memory was not good and that the security cameras may well have been discussed during the second telephone call by which time Ms Belzer had resigned.

[43] I find that Ms Belzer made it clear that she was leaving and that it was because of the heated discussion with Mrs Thompson. I find it likely that it was during this conversation that Ms Belzer asked for her holiday pay, and Mr Thompson did express some concern that Ms Belzer had not attended at work on the evening of 15 August 2007 because it caused inconvenience. The evidence supports that it is more likely that the decision to resign was both made and conveyed to Mr Thompson on 15 August 2007.

[44] During a further telephone call, probably two days following this call, I find that Mr Thompson then made reference to have watched the security cameras and having seen Ms Belzer reading and watching television. By that time however Ms Belzer had left her employment and I do not find that the security camera comment was causative of the resignation.

### **Conclusion**

[45] Mr Bamford submitted that the cumulative effect of the actions and omissions by Armagh Investment led Ms Belzer to conclude that the employment relationship was so completely undermined that she was entitled to treat her employment agreement as repudiated.

[46] I am not satisfied that there were breaches of Ms Belzer's employment agreement and/or that they were of a sufficiently serious nature so that it would have been foreseeable that Ms Belzer would not be prepared to continue to work. The events of 15 August in terms of the exchange with Mrs Thompson were certainly most unfortunate and would have hurt Ms Belzer.

[47] I have not been satisfied however that they were the actions of Ms Belzer's employer. Ms Belzer was entitled to as she did, but only after her resignation, write a letter setting out clearly what her concerns were, and how she wanted those concern addressed. Unfortunately it was not I find until that letter was written that

Mr Thompson was aware of just how Ms Belzer felt about the employment relationship and it was too late by then for him to take any steps in that regard.

[48] Ms Belzer does not have a personal grievance that she was unjustifiably constructively dismissed and there is nothing further I can do to assist her.

### **Costs**

[49] Ms Belzer is legally aided and I would anticipate that any liability that she may have in terms of costs would be limited to her initial contribution for legal aid. I expect that the parties will be able to resolve this matter between themselves, but if it is necessary to come to the Authority then I reserve leave for Ms Ironside to lodge and serve submissions by 24 September 2009 and Mr Bamford will then have an opportunity to lodge and serve submission in response by 15 October 2009.

Helen Doyle  
Member of the Employment Relations Authority