

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 122
3031211

BETWEEN HELEN BLANCHARD
Applicant

AND MURRAY BOYD
Respondent

Member of Authority: Peter van Keulen

Representatives: David Beck, counsel for the Applicant
Respondent in person

Investigation Meeting: 22 November 2018

Submissions Received: 22 November 2018 from the Applicant with further
information received on 6 December 2018
22 November 2018 from the Respondent with further
information received on 23 November 2018

Date of Determination: 5 March 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Helen Blanchard worked for Murray Boyd at Donegal House, a hotel, restaurant and bar in Kaikoura. Ms Blanchard worked in the bar.

[2] Ms Blanchard resigned after an incident on 28 February 2018. Ms Blanchard says that on the evening of 28 February, Mr Boyd yelled at her whilst she was serving a customer and then abused her over an email he believed she had failed to send.

[3] Ms Blanchard says that effectively, the incident on the evening of 28 February 2018 was the last straw for her after she had tolerated weeks of harassment (including sexual harassment) and poor and abusive behaviour from Mr Boyd.

[4] Mr Boyd denies the various allegations and says that in the short time Ms Blanchard worked for him, issues with a previous business she had run caused her stress and this manifested in bizarre behaviour including an irrational response to the incident on 28 February 2018. He says she was the one who swore at him and she then stormed out.

[5] Ms Blanchard raised personal grievances claiming that her resignation was an unjustified dismissal, or in the alternative, Mr Boyd's actions, if they do not support unjustified dismissal, were unjustified actions that caused disadvantage to her employment.

[6] Ms Blanchard also claims Mr Boyd never gave her an individual employment agreement and that he failed to produce wage and time records and holiday and leave records when requested.

[7] In a meeting on 22 November 2018 in Kaikoura, I investigated Ms Blanchard's personal grievance claims and the claims for penalties.

Issues for personal grievance claims

Constructive dismissal

[8] The issues to be resolved in respect of the constructive dismissal claim are:

- (a) Was Ms Blanchard dismissed, applying the test for constructive dismissal; and
- (b) If so, was the dismissal justified, with the onus resting on Mr Boyd to show his actions were justified in line with the test for justification and the duty of good faith set out in the Employment Relations Act 2000 (the Act)?

Dismissal

[9] Ms Blanchard alleges that her resignation is a constructive dismissal because she resigned in response to Mr Boyd's actions.

[10] In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*¹ the Court of Appeal set out three non-exhaustive categories of constructive dismissal:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign;
- (c) Where a breach of duty by the employer leads an employee to resign.

[11] Ms Blanchard relies on the third limb in *Woolworths*.

Breach of duty

[12] In *Wellington etc Clerical Workers etc IUOW v Greenwich*² the Court, when discussing constructive dismissal arising out of a breach of duty by an employer, stated:

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.

[13] The Court of Appeal elaborated on the third category of constructive dismissal in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc.*³ The Court of Appeal stated at [172]:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[14] Therefore, in order to determine if Ms Blanchard was constructively dismissed under the third limb of *Woolworths*, I must consider:

¹ [1985] 2 NZLR 372 (CA) at 374-375

² [1983] ACJ 965

³ [1994] 2 NZLR 415 (CA)

- (a) Was there a breach of duty by Mr Boyd as alleged;
- (b) Was that breach of duty sufficiently serious - repudiatory or dismissive - such that it was reasonably foreseeable that there was a substantial risk that Ms Blanchard might resign in response to that; and
- (c) Did Ms Blanchard resign in response to that breach of duty?

Unjustified action causing disadvantage

[15] The issues to be resolved in respect of the unjustified disadvantage claim are:

- (a) Did Mr Boyd act toward Ms Blanchard as alleged;
- (b) If so, did these actions cause disadvantage to Ms Blanchard's employment; and
- (c) If so, were Mr Boyd's actions justifiable?

Remedies

[16] If Ms Blanchard is successful with any of her claims I must then consider what remedies, if any, she is entitled to. If she is entitled to any remedies, I must then consider whether she contributed to her grievances in such a way that I should reduce any remedies that I award.

Penalties

[17] The penalty claim requires me to assess firstly, did Mr Boyd fail to give Ms Blanchard an individual employment agreement and did he fail to produce wage and time records and holiday and leave records when requested. If Mr Boyd did fail to do any of these things then secondly, I must assess whether a penalty should be imposed and if so the amount.

Background

[18] Mr Boyd employed Ms Blanchard to work on a casual basis as a bar person from 31 December 2017. Ms Blanchard was paid \$20.00 per hour and she was given accommodation and meals.

[19] Ms Blanchard says she was never given an employment agreement, even when she asked for it.

[20] Ms Blanchard had no direct experience working in a bar but had been broadly involved in the hospitality industry in the past so was perceived to have the ability to undertake the role. Mr Boyd's view was that specific training was not required and the best approach was for Ms Blanchard to simply learn on the job.

[21] From Ms Blanchard's perspective this was not the best way to start her role. After a few shifts where she worked with other employees and worked primarily waiting tables, Ms Blanchard was expected to work in the bar, often on her own. She describes learning her role as being self-taught, by just doing what she could through trial and error and relying on other staff when they were available to either watch what they did or seek assistance from them.

[22] Ms Blanchard also described the basis on which she was then managed by Mr Boyd as being difficult and stressful. Essentially Mr Boyd would spend the afternoon and evening shifts in the bar as a customer, seated at a table by the bar with a group of male friends, some of whom worked part-time in maintenance roles for Mr Boyd, drinking. From this position Mr Boyd would manage Ms Blanchard's work - instructing her by calling out from his table often being critical when he did this, and by whistling at her, tapping a glass or using other means to get her attention if he saw a customer who needed to be served or if he wanted further drinks for his table. Mr Boyd's friends also participated in this whistling, glass tapping and calling out.

[23] Ms Blanchard says Mr Boyd's poor behaviour was not restricted to this unacceptable management from the bar area but also there were occasions where Mr Boyd made advances or suggestions to her which were improper. So for example he suggested Ms Blanchard could go to his apartment any time she was not working to watch the TV there.

[24] It was against this background that an incident occurred on the evening of 28 February 2018. Mr Boyd had asked Ms Blanchard to send an invoice by email to a customer. Mr Boyd then discovered the email in his own inbox and believed the email had not been sent correctly. Ms Blanchard then re-sent the email taking care to ensure that she correctly typed in the recipient's email address. Mr Boyd then saw, for a second time that the email had appeared in his inbox and again he assumed, incorrectly, the email had not been sent. At this point, he lost his temper and swore at Ms Blanchard telling her she was fucking useless.

[25] It is clear that Ms Blanchard became frustrated and she responded angrily to Mr Boyd; then she resigned and stormed out.

[26] Ms Blanchard's frustration came from the way Mr Boyd swore at her and because she knew the email had been sent correctly and it was a copy of the email which was appearing in Mr Boyd's inbox, which Mr Boyd did not seem to understand.

[27] After Ms Blanchard left no attempt was made by Mr Boyd to contact her and sort out what had occurred – that is, Mr Boyd simply accepted that Ms Blanchard had resigned and left.

Analysis of personal grievance claims

[28] Mr Boyd's response to Ms Blanchard's allegations was to deny some of it, but also suggest other behaviour that did occur was taken out of context and then suggest that in fact it was Ms Blanchard who had acted poorly, even bizarrely because of the stress she was under.

[29] To support his version of events Mr Boyd had three friends provide witness evidence about what they saw occurring in the bar with Ms Blanchard. These three friends were the people Mr Boyd would drink with in the bar most afternoons and early evening.

[30] I did not find the written evidence of these three men to be particularly helpful. It was immediately obvious that Mr Boyd had written their evidence for them – some of the statements were simply cut and paste of sections in one statement into another – and they all lacked any credibility in that respect. I did however find their oral evidence to be useful. They each confirmed that they did often drink with Mr Boyd as described by Ms Blanchard, but that these sessions were not lengthy, drunken affairs but more akin to an after work drink to unwind and socialise with most of them leaving by early evening. And they all confirmed that Mr Boyd did call out to Ms Blanchard from their table in the bar and he did whistle and tap his glass to get her attention; they admitted doing the same.

[31] Moving on, I had difficulty analysing the allegations underlying the sexual harassment allegation. First, there was no corroborating evidence. Second, Mr Boyd denied doing at least one of the specific allegations. Third, Mr Boyd accepted he may have made some of the suggestions but Ms Blanchard was taking them out of context – so for example the offer to watch TV was, on face value, just an offer for Ms Blanchard to use his apartment in her breaks if she wanted and there was no ulterior motive.

[32] My conclusion on this aspect of Ms Blanchard's claims is, there may have been some questionable comments by Mr Boyd but I am not satisfied there was behaviour amounting to sexual harassment.

[33] My analysis of Ms Blanchard's complaints about Mr Boyd's management is much easier. I accept he did act as Ms Blanchard alleged, supported to some extent by Mr Boyd's own evidence and the evidence of others.

[34] My conclusion on Mr Boyd's management of Ms Blanchard falls into three areas:

- (a) The lack of any proper induction and training, the failure to provide an employment agreement at the outset of the employment and the failure to be clear on the terms of employment and expectations.
- (b) Mr Boyd's ongoing "management" of Ms Blanchard from the bar. This includes calling out from his table in front of customers, at times in a derogatory and critical manner; whistling and tapping glasses to gain Ms Blanchard's attention or to get service; and being harsh and critical of Ms Blanchard when mistakes were made, including outbursts that were angry and abusive.
- (c) The incident on 28 February 2018 – Mr Boyd was abusive and angry and as a result failed to objectively analyse what actually happened, resulting in Mr Boyd treating Ms Blanchard poorly.

[35] This behaviour was, in almost every way, unacceptable and a breach of the duty of good faith.⁴ The duty of good faith demands at least a minimum level of guidance and training for an employee in a role and then ongoing respect and courtesy between an employer and employee, in managing that employee's work – this is implicit in the requirement to be active and constructive and responsive and communicative.⁵

[36] In my view, it is clear that an employer has not met the standards of behaviour imposed by the duty of good faith when it fails to properly train an employee. This is also the case when an employee may not be performing to the standards expected and an employer is

⁴ Section 4 of the Employment Relations Act 2000.

⁵ Section 4 (1A) of the Employment Relations Act 2000.

then derogatory and abusive in front of others, as Mr Boyd was, including in the incident on 28 February 2018.

[37] Further and perhaps even more fundamentally, the standards of good faith cannot be met when an employer manages an employee by calling out, by whistling or by tapping a glass when he demands service or wants some other work to be done.

[38] That Ms Blanchard tolerated this unacceptable and distasteful behaviour from Mr Boyd and his male cronies, is a testament to her fortitude and desire to make the most of the job opportunity she had. She should not have had to endure such behaviour.

[39] To conclude my analysis of the constructive dismissal claim, there was a breach of duty by Mr Boyd as alleged; that breach of duty was sufficiently serious - both repudiatory and dismissive - such that it was reasonably foreseeable Ms Blanchard might resign in response to that; and Ms Blanchard did resign in response to that breach of duty.

[40] And nothing about Mr Boyd's behaviour which gave rise to the dismissal was justified – it was not the behaviour of a fair and reasonable employer.

[41] Ms Blanchard's claim of constructive dismissal is successful.

[42] As the unjustified disadvantage grievance was raised as an alternative, if I did not find the actions amounted to a basis for constructive dismissal, there is no need for me to analyse this claim, as Ms Blanchard has been successful in her unjustified dismissal claim.

Remedies

[43] As Mr Boyd unjustifiably dismissed Ms Blanchard, I can award her any of the remedies provided for under s 123 of the Act; Ms Blanchard seeks compensation and reimbursement.

Reimbursement

[44] Ms Blanchard seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal pursuant to ss 123(1)(b) and 128 of the Act.

[45] I am satisfied that Ms Blanchard has a personal grievance and that she lost remuneration because of that grievance, so pursuant to s 128 of the Act I must award her the lesser of the lost remuneration or three months ordinary time remuneration.

[46] Ms Blanchard commenced new employment six weeks after 28 February 2018, so she lost six weeks' remuneration because of her unjustified dismissal. Based on Ms Blanchard's earnings with Mr Boyd, I calculate her loss to be \$4,833.00 (gross). This is less than three months ordinary time remuneration, so I must award this amount.

Compensation

[47] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act. This is about compensating Ms Blanchard for the humiliation, loss of dignity and injury to feelings she has suffered because of the unjustified dismissal.

[48] What I must consider is the effects of the dismissal and the behaviour that gave rise to it on Ms Blanchard – i.e. identify the harm caused to her and the loss she suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed and then where that corresponds to the spectrum of quantum awarded as compensation.⁶

[49] Ms Blanchard's evidence shows that as a result of the way she was treated:

- (a) She was angry and upset, being tearful and reluctant to discuss what occurred;
- (b) She suffered low self-esteem and lost confidence in herself, blaming herself for what occurred;
- (c) Mr Boyd's behaviour made her feel fearful and powerless;
- (d) She suffered from stress and anxiety during work because of Mr Boyd's behaviour and then after she left she felt further stress and anxiety over being without work;
- (e) She continues to have low confidence, gets upset easily and often feels emotional and sensitive.

⁶ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[50] So, Ms Blanchard is entitled to compensation for the loss and harm caused by the loss of dignity, humiliation and injury to feelings described above. When assessing where that compensable loss and harm sits on the spectrum of loss and harm and the spectrum of compensation I have considered the recent decisions of the Employment Court, which provide guidance on the assessments.⁷

[51] I assess the level of harm and loss to be a little below the middle of the spectrum, and consider that the compensation sits around the middle of the spectrum. I quantify the compensation payable to be \$15,000.00.

Contribution

[52] As I have awarded remedies to Ms Blanchard, I must now consider whether she contributed to the situation that gave rise to her grievance.⁸

[53] When assessing if Ms Blanchard's actions contributed to the situation that gave rise to her grievance I am looking for a causal link between her actions and the situation that gave rise to her treatment and dismissal.⁹

[54] I do not accept that Ms Blanchard's actions contributed to her treatment or her dismissal by Mr Boyd. Therefore, there is no contributory behaviour and no reduction in remedies.

Penalties

[55] I am satisfied that Mr Boyd failed to provide Ms Blanchard with an employment agreement and he failed to provide wage and time and holiday and leave records when requested. These failings are breaches of the Act¹⁰ and the Holidays Act 2003.¹¹ I am also satisfied that it is appropriate to impose a penalty for these breaches.

[56] In *Nicholson v Ford*¹² Chief Judge Inglis provided guidance on the inter-relationship between: (a) *Preet*, which sets out a four step process for assessing penalties for breaches of

⁷ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁸ Section 124 of the Employment Relations Act 2000.

⁹ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

¹⁰ Sections 64 and 130 of the Employment Relations Act 2000.

¹¹ Section 81 of the Holidays Act 2003.

¹² [2018] NZEmpC 132

minimum standards; (b) s 133A of the Act, which relates to the imposition of penalties by the Court and the Authority; and (c) the other relevant factors to be taken into account, when imposing penalties.

[57] Taking this guidance and all of the factors outlined by the Chief Judge into account, and after considering the parties' submissions and assessing the circumstances of the omissions, I find that \$2,000.00 is an appropriate penalty to impose in all the circumstances of the case. Having regard to all the other relevant circumstances of the case, I have decided to exercise my discretion under s 136(2) of the Act to award half of the penalty to Ms Blanchard.

Conclusion

[58] Mr Boyd unjustifiably dismissed Ms Blanchard.

[59] In satisfaction of this grievance Mr Boyd must pay Ms Blanchard the following amounts:

- (a) \$4,833.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000; and
- (b) \$15,000.00 without deduction for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[60] Within 28 days of the date of this determination, Mr Boyd must pay to Ms Blanchard the sum of \$1,000.00 as part payment of the penalty imposed.

[61] Within 28 days of the date of this determination, Mr Boyd must pay to the Authority for transfer to a Crown Bank account the balance of the penalty imposed being \$1,000.00.

Costs

[62] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[63] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority