

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 109
5524136

BETWEEN TRACI BOOTH
 Applicant

A N D COO-EE DRYCLEANING
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Traci Booth, on her own behalf
 Alastair Hall and Joelle Avery, Counsel for Respondent

Investigation Meeting: 25 and 26 May 2015 at Palmerston North

Submissions Received: At the investigation meeting

Date of Determination: 10 November 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Traci Booth, claims she was unjustifiably dismissed (albeit constructively) by the respondent, Coo-ee Drycleaning Limited (Coo-ee) on or about 11 March 2014. Coo-ee was told of her departure on the 13th.

[2] Coo-ee denies it constructively dismissed Ms Booth and asserts she left of her own volition.

[3] Ms Booth also claims to have been disadvantaged. In particular she says she was inadequately trained and not allowed to perform her job properly.

[4] Ms Booth also raised a discrimination claim but advised at the commencement of the investigation meeting this was no longer being pursued.

Background

[5] Ms Booth commenced employment with Coo-ee in early December 2013. She was engaged to perform various customer service functions both within Coo-ee's premises in Palmerston North and as the driver of a mobile service facility.

[6] Unfortunately the relationship proved difficult leading to Ms Booth concluding she felt compelled to resign. She advised Coo-ee of this by letter dated 13 March 2014. It reads:

This letter is to advise you that I find it impossible to continue to work at Co-ee Dry Cleaners Limited as Retail Assistant and have no alternative but to leave the job which I love. I have been treated very badly and the harsh actions of the employer Andrew (Pearce – Coo-ee current owner) and you (Christina Pearce – previous owner and Andrew's mother) made the employment unsustainable.

I have tried very hard to continue but the scolding and harassment just did not stop and I got blamed for many things that was not my fault. Andrew also discriminated against me as the other staff were treated differently to me by him.

[7] The letter was followed by another advising the existence of a personal grievance dated 3 April 2014. It states Ms Booth was constructively dismissed by virtue of being treated badly, bullied, insulted and blamed for things that were not of her doing. She says this treatment was meted out by Mr Pearce, Mrs Pearce and, toward the end of the employment, other staff. The letter's introductory passages end with an allegation the employer had implied Ms Booth stole money and this was also in her mind when she resigned.

[8] The letter then goes on to cite five specific incidents as illustrating her claims of inappropriate behaviour by her employer which, in her view, *constructed her dismissal* in a predetermined way. They are:

- a. That on 2 December 2013 Mr Pearce allegedly told Mr Booth she should not wear pants in the workplace and she found this confusing and offensive;
- b. On 28 January 2014 Mr Pearce yelled at Ms Booth then criticised her for rolling her eyes before lecturing her about doing what she was told. It is alleged he concluded by again referring to the rolling of eyes and

saying “I hate people who do that, if you were a man...”. The unstated implication is Mr Pearce threatened Ms Booth;

- c. On 12 February Ms Booth was criticised about a performance issue. She says her resulting request for training went unanswered and she was simply instructed to do what she was told. The letter says this event led to a realisation she would be incapable of ever performing adequately as *she was not being given appropriate information or circumstances to complete her role required*;
- d. On 4 March Mr Pearce criticised Ms Booth’s performance in a manner she found insulting, threatening and frightening;
- e. On 10 March 2014 a cash bag Ms Booth was delivering to another of Coe-ee’s establishments was allegedly \$10 short. She says that upon her return she was questioned about it by a colleague in a manner that she felt implied she was guilty of theft.

[9] The statement of problem has a different emphasis. It focuses on Ms Booth’s alleged inability to perform to Coe-ee’s satisfaction and asserts she was either being blamed for failures that were not of her making or, when they were, incapable of getting the employer to provide adequate training. There is then an allegation the final straw was a public allegation of poor procedure by Mrs Pearce. Ms Booth says she concluded she had had enough and simply left the workplace at the end of the day not to return.

[10] Coe-ee’s response is it was doing nothing more than it was required to do; namely trying to address and rectify problems with Ms Booth’s performance. Coe-ee contends it did so in a reasonable manner and the claims of harassment and bullying are unsustainable.

Determination

[11] As already said Ms Booth claims she was constructively dismissed.

[12] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[13] In *Wellington etc Clerical Workers etc IUOW v Greenwich*² the Court stated that for a dismissal to be constructive:

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.

[14] There must also be a causal link between the employer's conduct and the tendering of the resignation³ and the possibility of resignation in response to that conduct should be foreseeable.⁴

[15] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Ms Booth to establish, prima facie, there was such a breach.

[16] Given various weaknesses in her evidence I conclude Ms Booth will fail to discharge the onus she carries.

[17] When asked to explain orally why she felt she had no option but to resign Ms Booth replied she was finding the situation too stressful. When asked to elaborate she said she didn't seem to be able to do anything right; that she was being yelled at and blamed for things she hadn't done and being harassed by a colleague. She did not support her claims with any specific examples and referred to none of those listed in the either the letter of grievance or the statement of problem.

¹ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

² (1983) ERNZ Sel Cas 95; [1983] ACJ 965

³ *Z v A* [1993] 2 ERNZ 469

⁴ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[18] When questioned further Ms Booth's evidence centred on a claim she required written prompts to assist her in applying Coo-ee's various procedures. She accepted she made errors and they were not attributable to inadequate training (which contradicts earlier assertions in the statement of problem) but criticised Coo-ee for not providing a notebook or otherwise allowing her to prepare such notes.

[19] It subsequently transpired this claim was ill-founded. Not only did such a notebook exist – it was normally stored beneath a bench at which Ms Booth worked and contained notes which would have assisted her. The claim was further undermined by the fact that while Ms Booth had no notebook in which she could enter notes about process and procedures she apparently had one in which she could record her employer's alleged misdeeds (see [20] and [21] below).

[20] Further problems arose when Ms Booth was questioned about the incidents cited in the letter of grievance. When giving evidence in respect to these Ms Booth relied on what she initially portrayed as a contemporaneous diary maintained during the employment. She says she kept it as a client had warned Coo-ee may prove a difficult employer.

[21] Subsequent evidence confirmed the diary was not contemporaneous with Ms Booth admitting it was constructed after the events reported on the basis of unproduced notes and, in some instances, she subsequently *expanded and corrected* its content. I also note Ms Booth's concession some passages now portrayed as direct quotes were not recorded as such at the time the relevant notes were prepared.

[22] I conclude I cannot rely on the diaries content given these admissions and in the face of consistent and contrary evidence from a multiplicity of respondent witnesses.

[23] There is then the fact Ms Booth had to admit the facts which she says led to her resignation are portrayed quite differently in the letter of 3 April 2014 and the statement of problem. Doubts must exist about the veracity of her claims and the events she says forced her resignation when they cannot be consistently reported in documents such as these and oral evidence proffered at the investigation.

[24] There is then a statement given in response to a question posed during the investigation that Ms Booth's departure was attributable wholly to the actions and behaviour of Mr Pearce. That is inconsistent with the claim a contributing factor was

bullying by a colleague and Ms Booth's claim the final straw was Mrs Pearce's behaviour on 11 March – Mr Pearce was not even present that day.

[25] As said earlier the onus is on Ms Booth to establish she was constructively dismissed. It is difficult to conclude she has done so when she is unable to consistently explain the factors that led her to decide the employment was no longer sustainable.

[26] This must be especially true when these inconsistencies are opposed by the consistent evidence of a number of employer witnesses that little untoward occurred. It is the employer's evidence Ms Booth struggled to understand Coe's processes and procedures despite reasonable attempts to explain them. I accept that given there appears to be a consistent theme developing. During the investigation Ms Booth frequently struggled to grasp what was occurring or understand advice aimed at assisting her from both myself and, rather graciously, Mr Hall. It also appears the reason her initial advocate no longer represents her was that the two were incapable of communicating effectively.

[27] For completeness I turn to the specific allegations contained in the statement of problem. Once again the veracity of these, or at least their worth as foundations for a constructive dismissal claim, did not survive questioning.

[28] It transpires the instruction of 2 December revolved around the wearing of jeans and not trousers pants per-se. There were then instances upon which the claims seemed to evolve and grow with new allegations being made during the investigation. Examples include assertions about Mr Pearce's behaviour during the alleged incidents on 28 January and 12 February. Surely these would have been mentioned earlier if, as now claimed, they were factors in Ms Booth's decision to resign yet they weren't and she is unable to explain the omission (other than to blame her initial advocate).

[29] There are then additional factors such as Ms Booth's acceptance she had no memory of what was said and by whom on 12 February and the admission her claims regarding the cash bag were based on her perceptions as opposed to any allegations of wrongdoing by her employer.

[30] Finally there is the fact a resignation tendered in a situation which amounts to a constructive dismissal must be foreseeable. Ms Booth accepts she never raised four of the five events upon which she relies in her letter of grievance. Indeed she

accepted she portrayed a happy exterior to those about her most of the time and Coe would not have been aware of her level of dissatisfaction.

Conclusion

[31] As said earlier Ms Booth carries the onus of establishing a prima facie case. In this instance I must conclude her evidence inadequate and that she has failed to do so. Her claim of constructive dismissal therefore fails.

[32] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority