

Attention is drawn to the order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 178
3005311

BETWEEN FLOWER BRADLEY
Applicant
A N D EMPOWERED HEALTH LIMITED
Respondent

Member of Authority: Peter van Keulen
Representatives: Abigail Goodison, Counsel for Applicant
Tessa Cochrane, representative for Respondent
Investigation Meeting: 3 and 4 August 2017 at Nelson
Submissions Received: 18 August 2017 and 29 September 2017 for Applicant
22 September 2017 for Respondent
Date of Determination: 20 October 2017

DETERMINATION OF THE AUTHORITY

- A. I decline Flower Bradley's personal grievance for unjustified action causing disadvantage.**
- B. Empowered Health Limited unjustifiably dismissed Ms Bradley and must pay, as remedies after a reduction of 40% for contribution:**
 - a. \$2,400.00 without deduction for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and**
 - b. \$475.80 for reimbursement of lost wages pursuant to s 123(1)(b) of the Act.**
- C. I decline Flower Bradley's claim for wage arrears.**
- D. I reserve costs with a timetable set for submissions if required.**

Employment relationship problem

[1] Sometimes employment relationships do not work out and no one is to blame. They do not work out because the employee is not suited to the role, or the employer may have expectations that cannot be met by the employee, or the employer and employee simply conflict over too many issues, being unable to work cooperatively together.

[2] This is one of those occasions. Flower Bradley worked as a gym instructor at Curves gym in Nelson for Empowered Health Limited. She was an excellent gym instructor but she was not suited to the role she worked in with Empowered. Tessa Cochrane, the owner of Empowered and manager of the Curves gym, was an astute and highly motivated manager but she had expectations for the operation of Empowered's business that Ms Bradley could not meet. And despite the fact that Ms Bradley and Ms Cochrane had a reasonable working relationship, they were not ideal working partners.

[3] Ultimately, Ms Bradley could no longer tolerate what was happening during her work at Empowered and she resigned. Ms Bradley had another role lined up at a competitor and when Ms Cochrane became aware of this, she dismissed Ms Bradley during her notice period. That was, unfortunately for Empowered, the one thing that it did do wrong in this matter.

[4] Ms Bradley claims that she resigned because Empowered had breached the obligations it owed to her, including breaching the duty of good faith. Ms Bradley says the breaches and her resignation amount to a constructive dismissal or, in the alternative, unjustified actions that have caused disadvantage to her employment.

[5] Ms Bradley says, as a further alternative to her constructive dismissal claim, that Empowered unjustifiably dismissed her during her notice period.

[6] Ms Bradley also claims wage arrears for work she undertook for Empowered for which she was not paid, in early 2016.

[7] Empowered says:

- (a) It did not act as alleged and it did not breach any of the obligations it owed to Ms Bradley.

- (b) It did dismiss Ms Bradley after she had given notice of her resignation because she had accepted work with a competitor in breach of the covenants in her employment agreement and it had to take this step as this was serious misconduct and it needed to protect its business.
- (c) It paid Ms Bradley for the hours she worked and it denies that she undertook any unpaid work.

Preliminary matter

[8] In the course of my investigation I heard evidence from Ms Bradley concerning the steps she took to obtain new employment or work after her dismissal and the income she received from such work. Some of that information is commercially sensitive for a third party, the City Fitness Group, and it should remain confidential.

[9] Therefore, pursuant to Clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) I prohibit from publication any information pertaining to Ms Bradley's engagement as a personal trainer with the City Fitness Group, except for any details referenced in my determination.

The issues

Constructive dismissal

[10] In order to succeed with her claim for constructive dismissal Ms Bradley must first establish that her resignation amounts to a dismissal by Empowered.

[11] A resignation can amount to a dismissal in certain circumstances: Ms Bradley alleges that the dismissal occurred because she resigned in response to Empowered's actions and this is a constructive dismissal.

[12] However, in this case Ms Bradley's resignation cannot amount to a dismissal because the termination of her employment did not occur because of the resignation. Termination occurs when the employment actually ceases not when the employer or employee gives notice

that it will end¹. Ms Bradley had given notice of resignation but she was still employed, and working her notice period, when Empowered dismissed her.

[13] Therefore, this cannot be a constructive dismissal arising out of Ms Bradley's resignation because the notice of resignation did not bring about the termination of employment. The termination of Ms Bradley's employment was effected by Empowered's notice of immediate dismissal on 26 July 2016 and therefore I can only consider the unjustified dismissal grievance relating to this action.

Unjustified dismissal

[14] For an unjustified dismissal claim there are two broad issues to consider:

- (a) Did the employer follow a fair disciplinary process in coming to the conclusion to dismiss; and
- (b) Was the decision to dismiss substantively justified.

[15] Sections 4(1A) and 103A of the Employment Relations Act 2000 (the Act) inform the question of whether Empowered conducted a fair disciplinary process. The matters I must consider are:

- (a) Did Empowered investigate the allegation of serious misconduct sufficiently;
- (b) Did Empowered outline the allegation, explain the possible implications of a finding of serious misconduct and give all the information it had that was relevant to the allegation of serious misconduct to Ms Bradley for her to consider and respond;
- (c) Did Empowered give Ms Bradley a reasonable opportunity to respond to the information and the allegation of serious misconduct before it made its decision on whether the behaviour amounted to serious misconduct and that this justified dismissal;
- (d) Did Empowered consider properly any explanation given by Ms Bradley before it made its decision that the conduct amounted to serious misconduct and justified dismissal;

¹ *Gibson v GFW Agri-Products Ltd* [1992] 2 ERNZ 309

- (e) If there were any failings by Empowered in the steps outlined above, does that render the disciplinary process unfair?

[16] The issue I must consider on the question of substantive justification is, was the gravity of the misconduct, including any effects of it and/or the circumstances of the misconduct including any mitigating factors, such that dismissal was a decision a fair and reasonable employer could have come to.

Unjustified action causing disadvantage

[17] The issues that arise for the personal grievance of unjustified action causing disadvantage include:

- (a) Did Empowered act in a manner that caused disadvantage to Ms Bradley's employment?
- (b) If so, was that action justified, considering the statutory test for justification?

[18] Ms Bradley complains about a number of things in her statement of problem but in evidence she accepted that actually some of these were not complaints for me to consider as part of her personal grievance as they were background matters that were either not significant or agreed actions.

[19] The actions Ms Bradley complains of, that form part of her personal grievance, include:

- (a) Micro-management of her work primarily consisting of Ms Cochrane being overly critical of her work, being inconsistent in her expectations of Ms Bradley and being unnecessarily demanding.
- (b) Additional work imposed when there was not enough time to do it.
- (c) A unilateral variation to the hours of her work.
- (d) That Empowered did not support her return to work following an injury and time off work on ACC, this included adding duties to her role despite the return to work programme.

- (e) Empowered failed to engage with her and discuss her employment relationship problem through June and July 2016.

[20] So, I must decide if the specific actions occurred, if they did whether those actions caused disadvantage to Ms Bradley's employment, and if so were those actions justified.

Unjustified action causing disadvantage

Terms of employment

[21] Empowered owned and operated a gym, Curves Nelson. Curves is a franchise and it uses a unique system of training based around machines and a circuit, the circuits being done individually or in a class.

[22] Empowered employed Ms Bradley on a part time basis from 13 July 2015. Ms Bradley worked 21.25 hours per week as a Curves Complete Coach. As a Coach she was responsible for coaching classes, supervising individual circuits and carrying out assessments with members. She was also required to undertake administrative duties, sales and marketing and some cleaning.

[23] The terms of Ms Bradley's employment were set out in an employment agreement dated 30 June 2015 (the First IEA).

[24] The First IEA included:

- (a) A minimum of 13.5 hours per week over six set shifts with potential for more hours to be rostered, but it was agreed that the part-time roster was in fact 22.5 hours per week.
- (b) A wage rate of \$15.00 per hour.
- (c) A commission or bonus structure payable against new memberships being signed.
- (d) Non-compete and non-solicit covenants for 6 and 12 month periods, respectively. There was also a separate covenant from Curves provided to Ms Bradley but she never signed this.

[25] In March 2016 Ms Bradley accepted a full time position with Empowered, increasing her hours to 42.5 hours per week. Empowered and Ms Bradley agreed new terms of employment, which were set out in a second, unsigned and undated, employment agreement (the Second IEA).

[26] The Second IEA included:

- (a) A commission bonus of 15 cents per hour for every additional member of the gym over 115.
- (b) The same non-compete and non-solicit covenants as the First IEA.

[27] Ms Bradley says the commission bonus was actually agreed at a rate of 25 cents per hour for every additional new member over 110 members. She also says that the role was agreed as Manager but the Second IEA referred to her position as Curves Coach. However, she conceded that both of these issues were resolved by agreement with Empowered.

Micromanagement

[28] Ms Bradley complains about a number of things that occurred during her work at Empowered:

- (a) Ms Cochrane was critical of her including not answering the telephone enthusiastically, not having blinds pulled up evenly, use of toilet paper, and not placing the advertising sign outside correctly.
- (b) Imposition of unreasonable and unnecessary rules around heating and lighting – for example not being allowed a heater yet also not being allowed to wear a jacket.
- (c) Ms Cochrane was inconsistent in her requirements – telling her to prioritise coaching for members on the gym floor but other times saying consultations were more important, or requiring her to cancel classes in order to accommodate consultations.
- (d) Ms Cochrane was critical of her coaching style but was conflicting in her criticism – suggesting she push members harder but then being critical of this.

And, insisting that she not talk to members for too long as there was other work to do.

- (e) Being told she could not park in public car parking outside the gym.
- (f) Ms Cochrane communicated mostly through notes and comments in a communication book – often these notes were critical of Ms Bradley.
- (g) Frequent problems with logging members in, in the morning. When Ms Cochrane explained how to use system she was patronising.
- (h) Being blamed for negative feedback about Ms Cochrane being posted on the Empowered's Facebook page and then subsequently having her access to the Facebook page reduced.

[29] On balance, I am satisfied that these events occurred except the Facebook incident, but I am not satisfied that they occurred in the way Ms Bradley perceived them. That is, for example, Ms Cochrane did have particular requirements around blinds and heating in order that the temperature in the gym was optimal and not too hot because of direct sunlight or heating or too cold because there was insufficient heating. There was no element of micromanagement here just requirements for the sensible operation of the gym. And any inconsistency was perceived and not actual – there was a rationale behind the instructions.

[30] Overall, I am not satisfied that any of the alleged micromanagement gives rise to an unjustified disadvantage grievance. Yes, these events occurred but they were part of the day-to-day operation of the gym. Therefore, the events did not cause any disadvantage to Ms Bradley, they were simply job requirements, or the actions were justified, again because they were job requirements.

Additional work

[31] Ms Bradley complains that there was too much work expected of her and insufficient time to complete it all. Some examples of this include:

- (a) Ms Bradley undertook about 40 hours of training that she was not paid for.
- (b) Ms Bradley had to put together her own routines for exercise classes, in her own time and this was not paid.

- (c) The cleaner was not replaced when she left and Ms Bradley had to take over 30 minutes of cleaning per day.
- (d) Ms Bradley's morning shift commenced at 6:25 am but because the gym had to be opened at 6:30 am and there was more than 5 minutes working to prepare for opening, Ms Bradley always had to work additional time, which was unpaid.
- (e) Ms Bradley was required to work up to 30 minutes extra on evening shifts to finish the tasks required.

[32] I am not satisfied that these events occurred to the extent Ms Bradley claims. Yes, she did some extra work but when I questioned her about this, I was not persuaded it was as much work as she remembered and most of it was done by choice. In response to my questions Ms Bradley actually said about the additional work – “I didn't mind, I just did it”.

[33] I do not accept that these events give rise to an unjustified action causing disadvantage grievance. Much of this arises out of the operational requirements for a small gym that had limited staff numbers due to its size. Ms Bradley was required to do a number of things that she might consider additional to gym instructing, such as a bit of cleaning, but I do not consider this unreasonable given the operation of the gym.

[34] My conclusion is that these actions may have occurred but they did not cause disadvantage to Ms Bradley's employment or they were not unjustified – much of this was what was required for the efficient operation of Empowered's business.

Unilateral variation to hours

[35] On 9 May 2016, Ms Cochrane told Ms Bradley that her hours would be reduced to 32.5 per week. The evidence from Ms Cochrane and Ms Bradley conflicted slightly on the events that led to this decision being made but I accept there was some discussion of the potential need to reduce hours and some options discussed. In the end Ms Cochrane made the only decision available to her – Empowered had to reduce the hours being worked because it was not making enough money to pay Ms Bradley. And Ms Bradley appeared to accept this stating in an email “I guess we will have to go with it and see how it goes along and pans out”.

[36] In the circumstances this does not amount to an unjustified action causing disadvantage. Ms Bradley's hours were reduced after some discussion and she appeared to accept this. The reduction in hours was substantively justified and the process was acceptable.

Return to work

[37] On 14 April 2016 Ms Bradley suffered an injury whilst working out at the gym for which she required time off work. Ms Bradley took two weeks off, returned to work for one week and then took a further three weeks off work.

[38] Then when Ms Bradley was on a return to work programme through ACC she complains that her duties were increased unnecessarily.

[39] There is insufficient evidence to prove that this in fact occurred. I find that Ms Cochrane did her best to support Ms Bradley's return to work on light duties and there is no unjustified action causing disadvantage grievance relating to this complaint.

Employment relationship problem

[40] Ms Bradley complained about two meetings she had with Ms Cochrane near the end of her employment, on 27 June and 26 July 2016. Ms Bradley complained about Ms Cochrane's attitude to her, that she did not engage in the discussion about her concerns and that she was critical of her again.

[41] Ms Cochrane also complains about these two meetings. She says she felt bullied by Ms Bradley and was unable to speak to her properly.

[42] Both Ms Cochrane and Ms Bradley agree the meetings were not productive. However, the meetings do not give rise to unjustified action grievances.

Conclusion – unjustified action causing disadvantage

[43] As I said at the outset, this employment relationship just did not work out but I am not satisfied that Empowered was responsible for that to the extent its actions amount to a grievance for Ms Bradley.

[44] Ms Bradley was not happy at Empowered. In contrast, in response to my questioning Ms Bradley clearly accepted she was happier in a self-employed personal trainer role where, subject to some requirements imposed by the gym she works at, she is able to run her training as she sees fit and does not have any additional tasks such as cleaning.

[45] This was a two-way relationship and Ms Bradley's subjective analysis of many of the actions distorted the reality of what was occurring. In short, Ms Bradley struggled with the role because of what was required of her and the management undertaken by Ms Cochrane but Empowered was not at fault for that.

[46] I decline Ms Bradley's claim for a personal grievance for unjustified action causing disadvantage.

Unjustified dismissal

[47] On 26 July 2016, Empowered dismissed Ms Bradley for serious misconduct. That misconduct was that she had accepted a role at City Fitness. Empowered believed this was a breach of the non-compete covenants that Ms Bradley had signed and it believed it had no option but to dismiss Ms Bradley in order to protect its business.

[48] In reaching these conclusions, Empowered did not discuss any of its concerns or thinking with Ms Bradley. It simply analysed what it knew, reached a conclusion and advised Ms Bradley she was dismissed with immediate effect.

[49] As I have already identified, there are two broad issues I must consider and on the face of it appears that Empowered has failed to meet the standard required to show that the dismissal was justified:

- (a) It has not followed a fair disciplinary process in coming to the conclusion to dismiss; and
- (b) As a result, it is not clear that the decision to dismiss was substantively justified.

[50] I will however, turn to consider these two broad issues in more detail.

Disciplinary process

[51] Did Empowered investigate the allegation of serious misconduct sufficiently? Whilst Empowered had access to information that indicated Ms Bradley had agreed to become a personal trainer with City Fitness it did not take any steps to verify that information or assess the extent of the commitment Ms Bradley had made. I accept that Empowered had few options for investigating this matter as it either contacted City Fitness or Ms Bradley to get more information, but it should have done more before it made its decisions.

[52] As there was no contact at all with Ms Bradley over this issue before she was dismissed, Empowered clearly failed to outline the allegation, explain the possible implications of a finding of serious misconduct and give all the information it had that was relevant to the allegation of serious misconduct to Ms Bradley for her to consider and respond. Empowered also failed to give Ms Bradley a reasonable opportunity to respond before it made its decision on whether the behaviour amounted to serious misconduct and that this justified dismissal. And, of course Empowered could not have considered any explanation as Ms Bradley was not asked to provide one.

[53] Ms Cochrane accepts that Empowered did not meet the specific requirements as outlined above. However, she submits that Empowered was not required to conduct a process tantamount to a criminal or civil trial². She also submitted that in this case, any process undertaken would be pointless and it would not change the outcome – given the evidence of breach and the fact Ms Bradley chose not to advise Empowered of her pending move, dismissal was the only possible outcome³. For these reasons the lack of process should not render the dismissal unjustified; there is no prejudice to Ms Bradley in the flawed process.

[54] I accept that a disciplinary process is not required to meet the standards of a civil or criminal trial however, there are minimum expectations in terms of process that will ensure the principles of natural justice are met and there is no prejudice to an employee. Without meeting those standards it cannot be enough to say the outcome would have been the same so there is no prejudice to the employee.

[55] The failings by Empowered are significant and they render the disciplinary process unfair.

² *The Warehouse v Cooper* [2000] 2 ERNZ 351

³ *Waterford Holdings Ltd v Morunga* [2015] NZEmpC 132

Substantive justification

[56] Ms Cochrane also argues that the misconduct was such that summary dismissal was justified. That is, in terms of the issues I must determine, that the gravity of the misconduct including any effects of it and/or the circumstances of the misconduct including any mitigating factors was such that dismissal was a decision a fair and reasonable employer could have come to.

[57] I cannot accept this submission. At first glance it might be arguable that summary dismissal was a decision a fair and reasonable employer could have come to in the circumstances. However, given that Empowered failed to conduct any process with Ms Bradley it is impossible to say if a fair and reasonable employer could have dismissed had it properly investigated the issues and had Ms Bradley explained her actions.

Conclusion on unjustified dismissal

[58] Empowered unjustifiably dismissed Ms Bradley. This is both from a procedural prospective and substantively. I must now consider what remedies Ms Bradley is entitled to.

Remedies

Compensation

[59] First, I will consider compensation for humiliation, loss of dignity and injury to feelings pursuant s 123(1)(c)(i) of the Act.

[60] The evidence shows however that the humiliation, loss of dignity and injury to feelings arose from a combination of events; the various events Ms Bradley complains of in her unjustified disadvantage grievance, her resignation, her injury suffered in the gym, and her dismissal. The difficulty I have is assessing how much of what was described can be attributed to the unjustified dismissal.

[61] Ms Bradley had difficulty in describing fully the impact Empowered's actions had on her. She was emotional and described being full of hurt, anxious over her injury, concerned about her finances, being really stressed and feeling helpless. Much of this was connected to those events and actions that were not part of the unjustified dismissal grievance. Specifically in connection with the dismissal Ms Bradley identified that she was upset that Ms Cochrane

did not discuss the situation with her and felt that identifying her actions as serious misconduct was “too big a label”.

[62] There is little clear evidence on which I can differentiate between the impact the various actions had on Ms Bradley in the terms identified, except for the limited evidence directly attributed to the dismissal. I can only assess the amount of compensation I would award under s 123(1)(c)(i) of the Act based on the evidence I have. Then I can apply the principles set out in s 157 of the Act, in particular that I should act as I see fit in equity and good conscience, to decide how much of that amount should be awarded to Ms Bradley for the humiliation, loss of dignity and injury to feelings arising from her dismissal.

[63] I conclude that \$4,000.00 is an appropriate award of compensation.

Reimbursement

[64] Second, pursuant to s 123(1)(b) of the Act I may provide for reimbursement to Ms Bradley of any wages or other money she lost as a result of her grievance.

[65] I am satisfied that Ms Bradley has lost remuneration because of her dismissal. Therefore, pursuant to s 128 of the Act, Ms Bradley is entitled to receive the lesser of three months ordinary time remuneration or her actual loss.

[66] As Ms Bradley had resigned her loss can only be wages for the remaining notice period she was not able to work.

[67] It might be that if Ms Bradley was able to show that, but for the unjustified dismissal she would have had a successful claim for constructive dismissal, then her actual loss would be greater to cover lost remuneration until she obtained further employment. In this case, I am satisfied that there is no basis for constructive dismissal. I am not convinced that the legal requirements for constructive dismissal are met. That is there was not a repudiatory action or course of conduct (in line with my reasoning on the unjustified disadvantage analysis), or if there was I am not satisfied that Ms Bradley resigned because of it and finally on this point, there may well be foreseeability issues as well.

[68] I calculate the lost remuneration based upon the eight remaining working days of Ms Bradley’s notice period to be \$793.00 (gross).

Contribution

[69] Pursuant to s 124 of the Act I must consider whether Ms Bradley contributed to her grievance in such a way that I should reduce the remedies that I have awarded.

[70] When assessing if Ms Bradley'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 dismissal. If I am satisfied that there is a link then I must consider whether the behaviour was culpable or blameworthy, which would require a reduction in remedies⁴.

[71] I find that Ms Bradley's actions of accepting other work with City Fitness, which is potentially in breach of the covenants she owed to Empowered, without discussing that with Empowered, is conduct that contributed to her grievance. And I find that the behaviour was culpable and blameworthy. I reduce Ms Bradley's remedies by 40%.

Wage Arrears

[72] Prior to commencing full time employment, Ms Bradley undertook some promotional work for Empowered in order to try to increase the membership at the gym. This involved handing out flyers and speaking to potential new members. Empowered did not pay Ms Bradley for this work. Ms Bradley says the work lasted 5 weeks and was for about 10 – 15 hours per week.

[73] There was insufficient evidence to establish the amount of promotional work Ms Bradley undertook and that there was any agreement over payment for this work.

[74] I decline Ms Bradley's claim for wage arrears.

Determination

[75] I decline Ms Bradley's personal grievance for unjustified action causing disadvantage.

[76] Empowered unjustifiably dismissed Ms Bradley and must pay, as remedies after a reduction of 40% for contribution:

⁴ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

(a) \$2,400.00 without deduction for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and

(b) \$475.80 for reimbursement of lost wages pursuant to s 123(1)(b) of the Act.

[77] I decline Ms Bradley's claim for wage arrears.

Costs

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

[79] If they are not able to do so and a determination on costs is needed, any party seeking 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