



New Zealand Employment Relations Authority Decisions

You are here: [NZLII](#) >> [Databases](#) >> [New Zealand Employment Relations Authority Decisions](#) >> [2011](#) >> [2011] NZERA 39

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Burke v Gracestone Granite and Marble Limited [2011] NZERA 39; [2011] NZERA Christchurch 11 (18 January 2011)

Last Updated: 11 February 2011

IN THE EMPLOYMENT CHRISTCHURCH

RELATIONS AUTHORITY

[2011] NZERA Christchurch 11

5156482

BETWEEN

MELISSA BURKE Applicant

AND

GRACESTONE GRANITE

AND MARBLE LIMITED

Respondent

Member of Authority:

M B Loftus

Representatives:

Jonny Sanders, for Applicant

Shirley Grace and Wayne Harris-Daw, for Respondent

Investigation Meeting: 25 June 2010 at Christchurch Submissions received:
5 July 2010 and 16 July 2010 from Applicant

10 July 2010 from Respondent

Determination:

18 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Melissa Burke, claims that she was unjustifiably disadvantaged in her employment and that she was then dismissed, albeit constructively, from her employ with the respondent, Gracestone Granite and Marble Limited.

[2] Ms Burke cites three specific events she considered disadvantageous and which, when considered in their totality, amounted to a course of action designed to procure the resignation she subsequently tendered. Those events were:

- (i) The unilateral variation of her duties and the removal of tasks upon which she had previously spent some 85% of her work time;
- (ii) A warning for poor performance (attendance); and (iii) The "forging", by Mrs Grace (A Director of the respondent company), of her signature on a quote.

[3] The respondent denies the claim. It says:

(i) Ms Burke's duties were, both before and after the change, administrative. Therefore they have not changed fundamentally and the changes which did occur were necessitated by business needs and implemented after a comprehensive consultation process;

(ii) Its response to the absenteeism was fair given its continuation at an unacceptable level despite previous discussions and warnings; and

(iii) There was nothing inordinate about the 'signature'. It was not a signature but the initials 'MB' which recognised the fact that the quote was prepared by Ms Burke.

Background

[4] Ms Burke was employed by Gracestone Granite and Marble (Gracestone) as an Administrator in the middle of 2007. She was one of two office based staff and performed a multiplicity of administrative tasks.

[5] The ensuing months were positive for Gracestone and the company experienced a period of significant growth. Late 2008 the company concluded it needed more staff and it also engaged a Human Resources Consultant to work with its employees, look at work flows, identify potential areas of stress caused by business growth and undertake position mapping which could lead to the reallocation of responsibilities. There was not, in Gracestone's view, any possibility that anyone's employment would be at risk.

[6] Ms Burke says she was advised of this at the end of year break up function when Mrs Grace and Ms Archer (Ms Burke's manager) informed her that her job description would change in the new year. Another change that occurred around this time was the commencement of Ms Buckley. She was engaged to fill the second administrative role and replaced Ms Burke's previous colleague who had resigned.

[7] On 17 January 2009 Ms Vivienne Patterson, the Consultant engaged by Gracestone, met with Ms Burke. Ms Burke says they discussed her duties and responsibilities before going on to say:

She asked if I believed there were any issues that needed addressing. I was not aware that there was any risk that my role would be changed significantly, and I was not invited to have anyone present with me at this meeting. I understand that Ms Patterson met with other office staff also.

[8] There was a further meeting on 21 January which was attended by Ms Burke,

Mrs Grace, Ms Archer, Ms Patterson and Ms Buckley. Ms Burke says:

Ms Patterson wrote up on the wall the duties each of us completed and began reallocating these amongst us. I could then see that about eighty percent of my current responsibilities were being assigned to other staff. The only allocation of jobs for me was telephone inquiries, quotes and showroom presentation. I had previously been responsible for a much larger administrative role, covering invoicing, data entry, stock control, cheque writing and other clerical duties.

[9] Ms Burke estimates that she was to lose 85% of the duties she previously performed. The figure of 85% differs from the 80% appearing in Mr Burke's written evidence but became the accepted measure of the changes extent. She goes on to say:

It appeared that I was losing major parts of my role that I had worked hard for and were important in terms of furthering my career. I made it clear at this meeting to Shirley Grace that I was not impressed with the new structure....

[10] Mrs Grace accepts that she told her staff that their roles had to change. She says that staff had previously done "a bit of everything" but she felt that had to change and accounting functions especially should be performed by an employee with appropriate skills. She says that at the meeting of 21 January the tasks were written down, allocated and then she asked if that was fair and that they all said ok. She says new job descriptions were then prepared and given to the staff who were asked to sign a copy as acknowledgement of their agreement (though the evidence would suggest this did not actually occur until March).

[11] A further meeting occurred on 28 January. This was attended by Mrs Grace,

Ms Burke and Ms Archer. Ms Burke states:

I told them how I was unhappy with the changes and that I viewed that I was being demoted. I stated that I believed I was being pushed out of the company.

[12] Ms Burke is of the view that neither Mrs Grace nor Ms Archer took her concerns seriously and states that they turned the conversation to one about her attendance.

[13] Notes of the meeting record that:

- it had been initiated by Ms Burke so that she could discuss the proposed restructure;
- she was not happy;
- she thought she was being "victimised and pushed out" due to her impending demotion;
- the company denied this, saying the rationale was to ensure duties were being performed in the effective way and that the duties they wished Ms Burke to perform were crucial to the company's success;
- Ms Burke could discuss the issue further with Ms Patterson; and
- Ms Burke was to receive a warning for her recent poor attendance.

[14] The issue of attendance was raised given Mrs Grace's view that Ms Burke's recent attendance has been poor and her absence on the two previous Mondays (the 19th and 26th) was emphasised. This was not the first time Ms Burke's attendance had warranted comment. There had been previous warnings and she accepts her attendance was *not as good as it should have been*. She does, however, take umbrage at this complaint as her recent absences had been occasioned by genuine medical issues.

[15] Ms Burke says that the changes were then introduced incrementally over the next weeks with the majority of tasks previously performed by her going to the new employee, Ms Buckley.

[16] On 11 March Ms Burke received a letter from Ms Archer. Attached was a new job description which, Ms Burke claims, contained further changes to her duties. The title had also changed.

[17] Ms Burke considered this to be final confirmation that her protests had been ignored and that she was to lose functions that she considered valuable for reasons of potential career advancement and job satisfaction. She concluded the letter was evidence that Gracestone no longer wished her to perform any serious functions, and she had doubts that they wished her to remain an employee. She turned to professional advice and met with her advisors the following day, Thursday 12 March 2009.

[18] Ms Burke says she started drafting a letter intended for Mrs Grace and expressing her concerns but that events overtook her. On Monday the 16th she was sick. She sent a text to Mrs Grace informing her of the absence. She states that Mrs Grace responded with a demand for a medical certificate and that was obtained. Ms Burke returned the following day and, upon arrival, placed the medical certificate in Ms Archer's tray.

[19] Ms Burke goes on to say that just before lunch Ms Archer handed her an envelope. It contained a letter dated 16 March headed 'First Written Warning Letter'. It opens by advising that:

Further to our meeting on the 28th of January, I confirm given your continued poor attendance the decision has been made to issue you with a formal written warning.

[20] The letter goes on to refer to a performance review of 15 October 2008 at which Ms Burke's attendance was said to have been discussed before advising:

What's more in addition to your poor attendance you have also been previously advised that if you are absent from work it is expected you phone in, a text message is not acceptable form of communication. ...you must phone ... prior to your normal start time.

[21] Ms Burke states that when Ms Archer delivered the letter she said that:

. she should have had a meeting with me where I could have had someone present but that there wasn't enough time to organise that, so she decided to just give me a warning.

[22] The above comment would appear to be a reference to Gracestone's 'Work Rules' and the detailed performance management procedure contained therein.

[23] Ms Burke says that the issuing of the warning added to the stress she now felt under. She states that she felt her employer was trying to pressure her into leaving given the removal of most of her job and the issuing of an unfair warning without following the required process. She left work immediately, visited her doctor and then sought further advice about her employment situation.

[24] Ms Burke's advisors then wrote to Gracestone on her behalf. The letter challenges both the variation of duties and the warning. It reiterates the views expressed in 23 above before advising:

Our client is rapidly losing trust and confidence in her employer and is currently considering her ongoing employment.

[25] Gracestone responded by letter dated 23 March stating that there had been considerable consultation in respect to the change of duties and that:

... at no time during the first or subsequent meetings did Melissa raise any issues with Vivienne Patterson about the work allocated to her - although there was direct opportunity to do so.

[26] The letter goes on to advise:

Gracestone's position on this is that the role Melissa was employed to do was an administrative position, the changes required of the Administrative Coordinator role remain administrative and are not outside of the scope of this position. Her terms and conditions of employment have not varied. Gracestone views this role as critical as it is customer facing.

[27] Gracestone contends its approach to the absences more than fair given previous discussions and warnings and the continuation of what it considered significant absence, especially on Mondays. Mention must also be made that Ms Burke's letter talks of a "clean slate" in respect to absences. Gracestone denies that occurred and Ms Burke gave no evidence about it.

[28] Ms Burke's representative and Mr Harris-Daw then met. They were unable to resolve the issues and Ms Burke's representatives were then instructed to seek the assistance of a mediator. The mediation occurred on 20 April 2009.

[29] In the interim, and shortly before the mediation, Ms Burke had:

. found a quote that Mrs Grace had signed. Mrs Grace had signed this quote in my name and forged my signature. I did not believe there was any reason for her to do this. My suspicion about what was going on in the workplace, and the respondent's intention to remove me was exacerbated. I thought I was being set up and that the invoice would be used against me somehow in an allegation against me.

[30] Mrs Grace says that it was not a signature but that she simply added the initials 'MB'. This was to recognise the fact that the quote was prepared by Ms Burke and to advise the client accordingly though I have no knowledge as to whether or not that explanation was offered before I heard it during the investigation meeting.

[31] Suffice to say the mediation was unsuccessful. Immediately thereafter, Ms Burke's representative wrote to advise:

Our client has now instructed us to inform you that she is resigning from her employment with Grace Stone Granite and Marble Ltd, effectively immediately.

Determination

[32] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

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

[33] Ms Burke is claiming that the effect of a serious breach (namely the alteration to her duties) was exacerbated by two other disadvantageous actions (an unjustified warning and the signature) thus leading her to believe she was the subject of a course of action designed to force her out.

[34] That a unilateral and substantial variation to an employee's duties resulting in that employee's resignation can constitute a constructive dismissal is well established (see, for example, *RMS Shopfitters Ltd v Baldwin* [1998] NZEmpC 103; [1998] 2 ERNZ 387). Similarly an employee offered a position that she considered a "downgrade" was found to have been constructively dismissed after a subsequent resignation (*NZ Performance & Entertainment Workers Union v 93FM Independent Broadcasting Co Ltd* [1991] 1 ERNZ 774) and in *Abdalla v Chief Executive Officer of the Southern Institute of Technology* 5 May 2006, Colgan J, CC4/06 the Court concluded that directions about roles and responsibilities were matters of contractual negotiation and not issues about which the employer was entitled to give unilateral directions. To unilaterally alter those directions was a breach of contract entitling the employee to resign and claim that he had been constructively dismissed.

[35] To decide whether or not Ms Burke could likewise consider the changes imposed on her a breach sufficient to cause her to resign I need look no further than answers Mrs Grace gave to various questions.

[36] In answer to a question from me, Mrs Grace said that she accepted Ms Burke's estimate that she would no longer perform around 85% of the tasks she previously undertook. That is a significant proportion!

[37] In response to questions from Ms Burke's representative Mrs Grace accepted the removal of accounting functions was, effectively, a demotion and could be considered disadvantageous by Ms Burke. She also accepted that the notes of the 28 January meeting were accurate, that Ms Burke had expressed dissatisfaction and that she had advised that she thought she

was being pushed out. Mrs Grace advised that the only step she took to address Ms Burke's concerns was to ring Ms Patterson but, in any event, her overriding consideration was what was important to the company and an employer could change an employees' duties if business needs necessitated the change.

[38] On this last point Mrs Grace is wrong as is evidenced by some of the cases cited above. She is also wrong to assert that the role was 'administrative' and the changes were not therefore fundamental. 'Administrative' is far too holistic a term with accounting functions being, in my view, quite different from the duties of, say, a records clerk. In any event, the idea that the change was effectively de-minimus is completely undermined by Mrs Grace's acceptance that the changes were a demotion and were, from Ms Burke's perspective, disadvantageous.

[39] Similarly the warning and the way it was delivered was, in my view, significant. That there was a breach is undeniable given the detailed protocol the company had in respect to disciplinary processes and the fact that it was totally ignored. To introduce a completely unheralded disciplinary issue into a meeting called by an employee to discuss an unrelated and legitimate concern with no recognition that there are certain procedural minima to be adhered to in such processes and then wait some six weeks before completing the process is inexcusable.

[40] Ms Burke was the victim of two significant breaches that were, in my view, sufficient for her to consider she was being constructively dismissed. While I am not so sure about the signature I accept that Ms Bourke could easily be suspicious given the other improprieties foisted upon her, and I have no doubt given what had recently transpired that she did, as she claims, see it as further evidence of the employers desire to see her gone.

[41] There is however a further issue to be considered when an employee claims to have been constructively dismissed - is the possibility of a resignation foreseeable to the employer? In this instance it is impossible for Gracestone to claim that they could not have foreseen the possibility. Ms Burke told them she questioned whether or not they wanted her to stay and advised that she thought she was being pushed out. Her advisors similarly put the company on notice that she was considering her options and here I must comment that given answers Ms Burke gave to my questions I am satisfied that the impetus for that advice came from her and was not manufactured by her representatives.

[42] Gracestone's claim there was no intention that Ms Burke leave is, I consider, irrelevant. Whilst it is the norm in constructive dismissal cases for the initiative for dismissal to come from the employer that is not always the case, at least in respect to claims under the third head cited in *Woolworths*;

As a matter of law there could still be a breach of a duty which amounted to a constructive dismissal notwithstanding a desire on the part of an employer to retain the services of the employee. To constitute a breach of the implied term that employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust, it was not necessary to show that the employer intended any repudiation of the contract. [Review Publishing Co v Walker [1996] 2 ERNZ 407]

[43] Gracestone were told of Ms Burke's feelings, yet chose to do nothing to address them. To the contrary, the company continued with a course of action Ms Burke had told them she considered akin to dismissal.

[44] For the reasons above I conclude that Ms Burke was, as claimed, constructively dismissed.

[45] The conclusion that Ms Burke has a personal grievance means I must consider whether or not she contributed to the situation in which she found herself. In this case there is the obvious issue of absenteeism but I dismiss that as a factor and conclude there was no contribution. The absenteeism was totally unrelated to the key breach (the alteration to Ms Burke's role) and I do not believe I can consider it in respect to the warning given the total absence of an opportunity to explain. Given what I heard about Ms Burke's health, an opportunity to explain may have led to a decision not to warn. Even if it had not, the decision to warn would have at least been reasoned and the employer capable of proffering a substantive justification supportive of a finding of contribution.

Remedies

[46] While Ms Burke claimed to have been both unjustifiably dismissed and unjustifiably disadvantaged I do not believe I have to consider remedies for both. This is mainly due to the fact that the disadvantageous actions were those that gave rise to the dismissal but also relies on the fact that only one set of remedies was sought.

[47] Ms Burke seeks reimbursement of wages lost and \$15,000 as compensation for hurt and humiliation, loss of dignity and injury to the feelings (s.123(1)(c)(i)).

[48] Ms Burke gave uncontested evidence of the financial predicament her resignation placed her in, her attempts to find new employment and the fact that she did not succeed until October.

[49] Notwithstanding the fact it took some six months to secure alternate employment she only seeks three months pay as recompense. The claim totals \$8,840 (being \$17 per hour and 40 hours per week for thirteen weeks).

[50] In the absence of a finding of contribution wages are a given and assuming an applicant attempts to mitigate the loss by seeking alternate employment, three months is now considered the minimum award unless new employment is attained within that period. In those circumstances the amount sought will be awarded.

[51] Ms Burke seeks \$15,000 under s.123(1)(c)(i). In support of that claim her advocate notes she gave uncontested evidence of her distress which was supported by another witness and medical documentation.

[52] Whilst it is clear that Ms Burke suffered angst I must balance that against the fact that there were many other events occurring in her life around that time that would not only have contributed to her state of mind but may also have aggravated it. In the circumstances I consider an award of \$5,000 appropriate.

Orders

[53] For the reasons given the following orders are made:

(i) The respondent, Gracestone Granite and Marble Limited, is to pay to the applicant Ms Melissa Burke, the sum of \$8,840.00 (eight thousand, eight hundred and forty dollars) as reimbursement of wages lost as a result of Ms Burke's unjustified dismissal; and

(ii) The respondent is to pay to the applicant a further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[54] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Ms Burke wishes to seek costs, she is required to file her application within 28 days of this determination. A copy shall be served on the respondent who is to file any response within 14 days of the application.

Mike Loftus

Member of the Employment Relations Authority