

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 11/09
5077636

BETWEEN	GEMMA BURROWES Applicant	ISABEL
AND	ELECTRONICS BOUTIQUE AUSTRALIA PTY LIMITED Respondent	

Member of Authority: Paul Montgomery

Representatives: Andrew Marsh, Counsel for Applicant
David Beck, Counsel for Respondent

Investigation Meeting: 26 June 2008 at Christchurch

Submissions received: 31 July and 12 August 2008 from Applicant
18 July, 2 and 12 August 2008 from Respondent

Determination: 30 January 2009

DETERMINATION OF THE AUTHORITY

[1] Gemma Burrowes, the applicant, claims she was unjustifiably disadvantaged in her employment by the respondent suspending her on 16 November 2006 and subsequently unjustifiably constructively dismissing her. The latter she says arose from the manner in which she was treated in the course of her suspension and upon her return to work.

[2] The applicant is seeking reimbursement of lost remuneration, compensation for hurt and humiliation and her legal costs.

[3] The respondent's position is that Ms Burrowes resigned prematurely of her own free will and that it had made *more than reasonable efforts to resolve matters* prior to the resignation. In respect of the suspension, the company accepts it did not

provide the applicant with an opportunity to express her views on the proposed suspension, but this occurred because the investigating manager was intent on protecting the company stock from further theft.

[4] The parties made efforts to resolve the problems following the resignation, but were unable to reach agreement. The respondent does not agree to meet the remedies sought by the applicant.

Relevant facts

[5] Ms Burrowes began her employment with the respondent in February 2006 and was appointed as a senior key holder at the Hornby store some time later. There was no problem in the relationship until, in November 2007, Mr Cory Reed came to Christchurch to investigate some irregularities which had come to light in a stock take at the store.

[6] The applicant was called to the back of the store by Mr Reed and asked if she knew anything about the missing stock. She said she did not. Mr Reed then asked Ms Burrowes whether any other employees knew her password or associate number. The applicant told him everyone knew everyone else's associate number and Mr Wright, the store manager, knew her password as well. Mr Reed then told Ms Burrowes that he was suspending her on pay as a number of questionable transactions had been made using her associate number. He asked her for her store keys and told her to leave the store.

[7] Ms Burrowes says she was humiliated at this action and the more so because she was given no opportunity to discuss the suspension nor to take any advice on her situation. Some 3½ weeks later she was asked to attend a meeting on 12 December 2007 at which Ms Burrowes says she was asked about banking practices and store transfers. She explained she was not responsible for these. She was then shown a number of suspicious transactions, of which a number had occurred when the applicant was not working in the store.

[8] The day following this meeting, the respondent was advised by Mr Wright that he was responsible for the thefts. Ms Burrowes was advised of his admission. Unsurprisingly, Ms Burrowes believed the suspension would be lifted and she would be returned to work. She heard nothing. Both the applicant and her father attempted to contact Mr Reed but heard nothing until he finally contacted Ms Burrowes on

20 December. Mr Reed directed that the applicant was to return to work but at the Riccarton, not the Hornby, store. On arrival there the following day, she met with the store manager, whom Ms Burrowes said appeared to be under instructions.

[9] The applicant says he handed her a Welcome to EB Games pack which is provided to new employees, advised she was to stock shelves, tidy the store and assist customers but was not to undertake any sales transactions but to hand purchasers over to other staff. This she found very demeaning and raised it with the store manager who undertook to speak to Mr Reed. It appears he may not have done so that day and Ms Burrowes left work that day feeling very down in spirits.

[10] The following day, the applicant attended her doctor who issued a medical certificate dated 22 December 2007 stating Ms Burrowes would be medically unfit for work until 27 December. Subsequent certificates were issued covering her absence until 12 and 29 January 2008 respectively. A summary note from Dr Schroeder dated 25 June 2008 stated that Ms Burrowes was absent over these times because *in my medical opinion Gemma was unfit for work for the duration because of an acute depressive illness.*

[11] During this period, the applicant contacted Mr Reed by email to keep him apprised of her issues and to express her views on what she saw as a demotion upon her return to work, on concerns that staff and customers were openly commenting on the events at Hornby and were presuming her involvement in the thefts from that outlet. Ms Burrowes says Mr Reed never responded.

[12] Convinced her concerns were not being addressed, Ms Burrowes tendered her resignation through her solicitor effective from 19 January 2007. The applicant says she attempted to find alternative employment but was unsuccessful either because of inexperience for some roles or because potential employers were unable to accommodate her university study and care of her young child.

[13] The respondent acknowledged it had handled the suspension poorly but made it clear there was a legitimate concern at that point that the applicant could have been involved and it needed to protect its own interests.

[14] On the issue of the long delay between imposing the suspension and arranging a return to work, the respondent is remarkably silent. In regard to the lack of response from Mr Reed to the matters the applicant complained of prior to her resignation, it

says Mr Reed did respond once he returned from leave on 4 January 2007, but accepts little was done to allay the applicant's concerns until a meeting on 8 February 2007 when Mr Carl Pearson stepped in after Mr Reed resigned to take up a position with another company.

[15] Both parties agree this was an open and constructive meeting. Mr Pearson apologised for Mr Reed's *slackness* in responding to the applicant's concerns and Mr Beck apologised for the way the suspension was conducted. While expressing regret in respect of this latter matter, Mr Beck nonetheless contended that the circumstances were such as to warrant prompt action.

[16] The respondent's position is that, in this meeting, it genuinely attempted to put in place the building blocks to enable Ms Burrowes to return to the workplace, although not necessarily at the Hornby store. After the meeting, an offer of contribution to the applicant's legal costs, some back pay and some compensation was made but, in the view of the applicant, it fell short of her expectations and no resolution was achieved.

The issues

[17] To resolve this matter, the Authority must make findings on the following issues:

- Was the respondent entitled to suspend the applicant upon finding discrepancies in the store's stock inventory; and
- Was the respondent entitled, once the applicant's innocence was established, to delay her return to work; and
- Was the respondent entitled to deploy the applicant for further training in the Riccarton store; and
- In these matters, did the respondent do what a fair and reasonable employer would do in its dealings with the applicant; and
- Did the respondent foresee the possibility that the applicant may resign; and

- If the applicant has a personal grievance, did she contribute to the circumstances which gave rise to her grievance; and
- To what remedies, if any, is the applicant entitled in this case?

The investigation meeting

[18] At the investigation meeting, the Authority heard evidence from the applicant herself and from Daniel Wright. On behalf of the respondent, evidence was provided by Mr Carl Pearson, Mr Paul Crabtree, the respondent's New Zealand operations manager, and from Mr Cory Reed. The meeting proceeded without any undue difficulty and was comfortably completed within a day. I record the Authority's appreciation for the openness of the witnesses when giving their evidence and answering questions and also its appreciation of the efforts of counsel for each party.

[19] The meeting was somewhat remarkable for the appearance of Mr Daniel Wright who confirmed he was fully responsible for the theft, had admitted this to the respondent, pleaded guilty in the District Court and said he was sentenced to six months' home detention. Further, Mr Wright confirmed *Gemma did not have any idea that this was going on and had nothing whatsoever to do with it. I am solely responsible for the wrongdoing at the Hornby store.* His appearance and his evidence does him some credit.

Discussion and analysis

Suspension

[20] The employment agreement is silent on the matter of the employer's right to suspend and thus justification will usually be found lacking if it is devoid of a fair process, and in particular, if the opportunity to be heard is denied. Given what was known at that time by the respondent, suspension may well have been a reasonable course of action as some transactions were processed using the applicant's codes and password. In those circumstances, I think it reasonable for the respondent to suspend however, to do so without explaining the reasons and giving the applicant the opportunity to reply fell short of the required standard.

Return to work

[21] Following Mr Wright's admission and his consequent dismissal, the applicant was entitled to be told when she could expect to return to work. While there may have been some minor matters the respondent wished to attend to in, perhaps, some of its internal security systems, the delay was unduly prolonged, particularly having regard to the suspension period which preceded the 12 December 2006 disciplinary meeting.

[22] An issue here is the probable perception, and likely gossip, of staff and others that the applicant was in some way guilty as her suspension was continued even following the dismissal of Mr Wright. In such circumstances, undue delays in investigating the incidents and bringing back those cleared by the investigation are inevitably inviting incorrect inferences, inferences detrimental to the applicant in this case.

[23] Another issue is the extraordinarily inept process the respondent put in place surrounding Ms Burrowes' return to work. The terms of that agreement needed to be carefully planned and agreed to, to ensure as problem-free a return as possible. Failure to prepare all concerned for the applicant's return led directly to her feeling demeaned and under continued suspicion by the respondent. While I accept that the respondent had communicated with Ms Burrowes regarding some retraining, the details of that appear to have lacked precision and definition of purpose.

Sick leave and resignation

[24] The medical certificate issued on 22 December 2006 states that the applicant was medically unfit for work from that day through until 27 December 2006. That and the subsequent two medical certificates are non-specific in regard to the medical condition diagnosed.

[25] The inertia of Mr Reed in the face of the applicant's emails looking for information and support during the period she was on sick leave seriously eroded the company's response to what it later discovered was a serious situation and further compounded Ms Burrowes' low mood and sense of being unwanted.

[26] While I am critical of Mr Reed's lack of response, I must also place that in the context of the company being unaware at the time that Ms Burrowes was suffering

from a depressive episode. There was no evidence before the Authority that the company had sought to determine what was delaying progressing the matter however, had it been appraised of Ms Burrowes' actual condition, the company's response may well have been significantly different.

[27] Up to this point, the situation was probably salvageable but the performance of Mr Reed fostered the applicant's view that the company had become disinterested in retaining her services. Mr Reed's concession that he could have done more was honest. However, his excuse that he assumed that the local Hornby manager was dealing with the matter was limp and unconvincing.

[28] The earnest and honest efforts of Mr Pearson to retrieve the situation simply came too late. Had he been involved prior to Ms Burrowes' resignation it is, in my view, possible the applicant would have remained employed by the respondent and the parties spared the expense occasioned by this litigation. On the other hand, it may have felt that the remedies sought by Ms Burrowes, including the terms of her return to work, were unreasonably demanding.

The determination

[29] Returning to the issues set out above, I find:

- The respondent was entitled, in the specific circumstances, to suspend the applicant but failed to consult her on the reasons for such an action in the context of an investigation and to hear her response. The failure of the respondent to keep Ms Burrowes appraised of the progress of its inquiry during the weeks following the suspension and prior to the formal investigation meeting, was unfortunate but understandable given the type of inquiry involved.
- Once the applicant's innocence was established, the respondent failed to reinstate her promptly and in a manner likely to result in Ms Burrowes' successfully returning to her employment.

The delays in respect of this issue and the unlawful suspension constitute an unjustified disadvantage.

- The employer was entitled to deploy the applicant in another store to rectify gaps identified in the applicant's earlier training. Its error was in not thoroughly explaining what its process would be and having it agreed by the applicant. As a result, the applicant was treated as though she knew nothing of her employer's procedures and was given menial tasks to perform on her return.

In the light of the emails from the applicant to Mr Reed, it was evident Ms Burrowes was looking for solutions to enable her to return to work with the respondent. I find it totally foreseeable that, subjected largely to being ignored, the applicant would lose confidence in her employer and question whether its wish to assist her back to work was genuine. A fair and reasonable employer would have actively engaged in designing a process to restore the applicant to work and not have ignored her communications.

The respondent breached its duty of care and good faith towards Ms Burrowes which breaches gave rise to her resignation. I find she was entitled to repudiate the employment agreement, given these breaches.

- Having considered the issue of contribution by the applicant to the circumstances giving rise to her grievances, it is self-evident that but for the applicant providing her associate code and her cash card PIN number, Mr Wright would have been unable to embark on his sorry little enterprise. I accept without reservation Ms Burrowes' evidence that the PIN was given in trust as a matter of convenience to enable her manager and flatmate to purchase lunch and coffee for her. The company's policy regarding each employee keeping his or her associate code confidential appears more honoured in the breach within the Hornby store. One reason for the policy should now be strikingly clear; if a fellow employee does not have another associate's code, no transactions can be made using that code except by its authorised holder and the integrity of the system's information remains intact.

Put simply, had Ms Burrowes not disclosed her cash card PIN, even if Mr Daniels had known her associate number as the applicant's manager,

he would have been unable to access her bank account for the depositing and withdrawal of ill-gotten funds. Nor would the company have been put to the trouble and expense of investigating the shrinkage due to his activities at the Hornby store.

In the circumstances, I assess Ms Burrowes' contribution at 20%.

Remedies

Lost remuneration

[30] Mr Marsh submits that remuneration lost by his client should be calculated from 21 December 2006. I disagree. The point at which the applicant called halt to the relationship was effective on Friday, 19 January 2007 and that is the date on which the relationship ceased. I do, however, accept his calculation of the net weekly loss suffered by his client.

[31] Considering the evidence and the attempts made by Ms Burrowes to find alternative employment, I think this is a case in which the exercise of the Authority's discretion under s.128(3) is warranted.

[32] The respondent is to pay the applicant the sum of \$1,603.27 net of tax being 17 weeks' remuneration lost as a result of the grievances.

Compensation

[33] The sum of \$10,000 was claimed in the statement of problem lodged with the Authority in the first instance and was confirmed in Mr Marsh's submissions. In relation to that, counsel submits that:

This is not a situation where the ordinary compensatory amount as awarded in a grievance claim (generally \$4,000-6,000) is appropriate. There were several serious breaches by the respondent. The effects on the applicant were far more serious than is the case in the ordinary course of events. As stated by her, she suffered an acute depressive illness as a result of her grievances. She was offered anti-depressants and sleeping tablets. She burst into tears, both at the time of her suspension and when visiting her GP in relation to the period of stress leave required.

[34] This is a fair précis of the evidence put before the Authority in respect of the detriment suffered by Ms Burrowes over the relevant period of time.

[35] There is no difficulty in accepting the medical opinion of Dr Schroeder, nor in accepting his assertion that between 22 December 2006 and 29 January 2007 Ms Burrowes was suffering *an acute depressive illness*. The difficulty for the Authority lies in establishing a causal link between the events in the workplace and the episode itself. The medical documents provide no such link and no specialist evidence was adduced to clarify any such link. On the facts and on the balance of probabilities, I have found there is a link, but I have no evidence of any predisposition to the disorder suffered by Ms Burrowes.

[36] While resisting counsel's urging to award at the level he suggests, a significant award is called for. The respondent is to pay the applicant the compensatory sum of \$6,500 under s.123(1)(c)(i) of the Act. The payment is in consideration of both personal grievance claims.

[37] The deduction of 20% under s.124 is to apply to both the lost remuneration and the compensation awards.

Costs

[38] Costs are reserved. The parties are to attempt to resolve the issue of costs between themselves. Failing this, Mr Marsh has 30 days from the issue of this determination to lodge and serve his memorandum. Mr Beck is to have a further 14 days in which to respond.

Paul Montgomery
Member of the Employment Relations Authority