

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 96
5441318

BETWEEN

HEATHER CHAPMAN
Applicant

A N D

SWEETHEARTS AT
BERRYFIELDS LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Andy Ogilvie, Counsel for Applicant
No appearance for Respondent

Investigation Meeting: 1 July 2014 at Christchurch

Submissions Received: At the investigation

Date of Determination: 3 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Heather Chapman, claims she was unjustifiably dismissed by the respondent, Sweethearts at Berryfields Limited (Sweethearts) on 15 August 2013.

[2] Sweethearts' position is largely unknown given its failure to provide a statement in reply or represent itself at the investigation meeting though a short e-mail from one of its Directors, Mr Yin, suggests Ms Chapman resigned in June 2013.

Non-appearance of the Respondent

[3] As already said, Sweethearts was not represented at the investigation meeting.

[4] At the time of Ms Chapman's cessation Sweethearts had two directors who were also 50% shareholders. They were, and still are, Mr Yu Yin and Ms Yan Zhang.

[5] The Authority's contact was Mr Yin and he participated in a telephone conference during which the investigation meeting was scheduled. He did, however, say his input would be limited as he had no knowledge of the issues about which Ms Chapman complained.

[6] Mr Yin suggested we contact Ms Zhang and advised he was unable to do so as they were now engaged in various commercial disputes. Our attempts to contact Ms Zhang failed to elicit a response but events were to confirm she was aware of the investigation's scheduling. She appeared at the investigation meeting but with the intention of supporting Ms Chapman. Mr Yin did not attend though he had indicated he might choose not to come.

[7] Ms Zhang had no knowledge of the meeting's purpose or possible outcomes. Once these were explained the meeting adjourned while she sought legal advice. She then advised the dispute between herself and Mr Yin precluded her from participating. She could not represent Sweethearts and felt she should depart. She did.

[8] The notice of hearing advises that should a party not participate the process may continue and an adverse finding be entered against that party.

[9] Mr Yin was aware of this via the notice of hearing and the situation was explained to Ms Zhang. Notwithstanding that, and an obvious awareness of the investigation meeting and the consequences of non-attendance, both chose not to participate or make other arrangements for representation.

[10] I conclude a dispute between shareholders that may not be resolved for a considerable time does not warrant an adjournment, especially as one has not been sought. I chose to proceed.

Background

[11] Ms Chapman was employed by Sweethearts in March 2011. She performed a range of functions including gardening and kitchen hand duties.

[12] In February 2013 Sweethearts was sold to Mr Yin and Ms Zhang though existing employment arrangements continued as there had been no change other than shareholding and directorship.

[13] Soon thereafter tensions arose between the directors which led to significant staff turnover in the following months.

[14] On 11 July 2013 Ms Chapman had a non-work accident which resulted in serious injury and a significant period of absence on accident compensation (ACC).

[15] As part of the ACC process the Corporation, an injured person and that person's employer has obligations in respect of facilitating rehabilitation. As a result Ms Chapman's case manager sought a meeting with Sweethearts to discuss a partial return to work for Ms Chapman.

[16] The meeting was scheduled for 15 August 2013 and on that day Ms Chapman and her case manager met with Mr Yin. Ms Chapman adds this was the first time she had met him though she had previously seen him at the workplace. She goes on to say:

Sabrina [the ACC case manager] asked Mr Yin about me working for a few hours per week to ease me back into work. Mr Yin then informed us that he had already got a person to do the gardens and another person for kitchen hand duties and there were no vacancies available for me.

[17] Given she could not progress the rehabilitation process in such circumstances the case manager left. Ms Chapman followed Mr Yin into the kitchen and confirmed her cessation. She then asked about her holiday pay though as events transpired that was to become a further point of contention as payment was not made till after Christmas.

Determination

[18] As already said Mr Yin has suggested in an email to the Authority that Ms Chapman resigned in June and was seeking re-engagement on 15 August 2013.

[19] With respect to the alleged resignation I note Mr Yin suggests it occurred as part of a mass resignation of all staff in June 2013. The claim is belied by three factors. First, Ms Chapman denies the claim. I accept that as her evidence is both

credible and unchallenged. Second, I have evidence from a previous manager there was no mass resignation though a number of departures occurred over a period of months. Third, there is undisputed evidence Ms Chapman was still working at Sweethearts in July, which is after the resignation allegedly occurred.

[20] Having concluded she did not resign it follows she was not seeking re-engagement on 15 August and here I note a contemporaneous report from the ACC case manager. It supports Ms Chapman's claim the approach of 15 August was for the purpose of arranging a partial return to work and the employer's response was that was impossible as Ms Chapman had been replaced.

[21] In advising Ms Chapman she could no longer do the work she was engaged to perform and there were no alternates Mr Yin was effectively sending her away. A sending away is a dismissal.

[22] Section 103A of the Act, states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[23] In applying the test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[24] Similar obligations exist in respect of termination due to incapacity precluding a jobs performance which a prolonged absence on ACC may constitute. As was said in *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585:

... if the employer chooses to dismiss the employee, its action must be justified at the time in accordance with the established jurisprudence. The employer must have substantive reasons for the dismissal and must show that the procedure it followed in carrying out the dismissal was fair.

[25] There is no evidence of any inquiry into Ms Chapman's prognosis or prospects in respect of a return to work and I accept her assertion this is because there was no such inquiry. Ms Chapman knew nothing of her termination or that it was even possible until after the decision had been made and replacements sourced.

[26] Finally I must, in accordance with s.103A(3)(a) of the Act, consider the resources available to Sweethearts. I have done so and conclude its size and lack of resources familiar with its responsibilities to staff does not excuse the level of deficiency here. There is a complete failure to adhere to the requirements of s.103A and any principles of fairness.

[27] The dismissal is unjustified.

[28] The conclusion the dismissal is unjustified raises the issue of remedies. Ms Chapman seeks wages lost as a result of the dismissal and \$12,000 as compensation for hurt and humiliation.

[29] Ms Chapman seeks her full wage loss from 1 December 2013 till she obtained part-time work at the end of February 2014 plus the difference between what she would have earned at Sweethearts and has earned in part-time work since acquiring it.

[30] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis but there is a requirement the applicant try to mitigate the loss (*Allen v Transpacific Group (trading as "Medismart Limited"* [2009] 6 NZELR 530 at [78]).

[31] 1 December 2013 is chosen as it is the day ACC ceased and Ms Chapman was cleared to return to work without restriction. The part-time work was obtained almost exactly three months later so an award covering that period of loss must be made given s.128(2). The amount is \$5,850 gross.

[32] There is then the issue of the balance and whether or not I exercise the discretion and award more. The answer is no with the reason being insufficient

evidence of attempts to mitigate. While I have Ms Chapman's oral evidence about the difficulty in obtaining alternate employment there was little in the way of evidence about the extent of her attempts to do so.

[33] Turning to the claim for compensation. Ms Chapman seeks \$12,000 and supported her claim with oral evidence about the negative effects of the dismissal supported with medical evidence she suffered stress and anxiety as a result of her treatment which continued for some time. Having considered the evidence I consider an award above the average appropriate and order the payment of \$7,500.

[34] The conclusion remedies accrue means I must, in accordance with s.124 of the Act, address whether or not Ms Chapman contributed to the situation in which she found herself. There is absolutely no evidence of contribution and the answer is no.

[35] Finally there was an application a penalty be imposed for the employer's failure to be communicative and deal with Ms Chapman in good faith. I take that no further as the matter was not pursued with any vigour. There was no evidence specifically linked to the claim and it was not pursued in submissions. In any event this failure contributed to Ms Chapman's success with the grievance claim and it is addressed through the remedies awarded for that.

Costs

[36] Ms Chapman has spent \$7,648.50 pursuing her grievance. She seeks reimbursement in full and supports her claim with reference to a Calderbank dated 20 June 2014.

[37] Generally an award of indemnity costs requires the sort of behaviour described by the Court of Appeal in *Bradbury v Westpac Banking Corporation* [2009] 3 NZCA 234. While Sweethearts has been less than helpful its actions are not of the type referred to in *Bradbury* and in this instance the Calderbank is of little assistance notwithstanding the fact my award is above the amount proposed.

[38] As a general rule Calderbanks will only justify indemnity costs from the date they were made. The accounts before me show the bulk of Ms Chapman's costs were incurred before the offer. Second the accounts show some of the amount was incurred through involvement in mediation. That is not recoverable and I do not know the exact amount involved, though I have a general indication.

[39] In the circumstances I will apply the Authority's standard approach of using a daily tariff (*PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[40] This hearing took a couple of hours though it would be fair to consider it went longer as Mr Ogilvie had to prepare on the basis it would be defended. There is then the Calderbank which represents a legitimate attempt to settle which was not acknowledged, along with Sweethearts unhelpful approach. These factors justify an increase in the tariff.

[41] Having considered these circumstances and the accounts before me I conclude a contribution toward costs of \$5,000 is appropriate.

Conclusion and Orders

[42] For the above reasons I conclude Ms Chapman has a personal grievance as she was unjustifiably dismissed.

[43] As a result the respondent, Sweethearts at Berryfields Limited, is ordered to pay the applicant, Ms Heather Chapman, the following:

- i. \$5,850.00 (five thousand, eight hundred and fifty dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$7,500.00 (seven thousand, five hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- iii. A further \$5,000 (five thousand dollars) as a contribution toward the costs incurred by Ms Chapman.

M B Loftus
Member of the Employment Relations Authority