

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Paula Cochrane (Applicant)
AND Nicky's Superfresh and Discount Cigarette Limited (Respondent)
REPRESENTATIVES Janet Marquet, Counsel for Applicant
Graham Murphie, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 23 May 2006
DATE OF DETERMINATION 25 May 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Paula Cochrane worked for Nicky's Superfresh and Discount Cigarette Limited from 23 September 2004 until she resigned on 13 October 2005. Ms Cochrane says that she was constructively dismissed and that she has a personal grievance against her former employer. She seeks compensation for distress and lost remuneration as well as costs.

[2] Graham Murphie is the principal of the company. He lodged a statement in reply in which he says that Ms Cochrane abandoned her employment or resigned without notice. The company seeks an order for compensation against Ms Cochrane for various losses which Mr Murphie says resulted from Ms Cochrane's failure to give notice.

[3] Although the proceedings were lodged against Graham Murphie, it was clear early on that the employer was a company. By agreement I made an order substituting the company as the respondent.

[4] There is a written employment agreement. It entitles either party to terminate the agreement by two weeks notice unless a lesser period of notice is agreed. The agreement does not specify when wages are due. However, the practice was to pay wages weekly. After a period of Ms Cochrane's employment, Mr Murphie started paying wages on a Wednesday so two days in advance to help her out. The agreement provides that the employee may be required to work up to 50 hours per week subject to mutual consent. Thirty hours per week are set as the minimum.

Constructive dismissal claim

[5] The basis of the constructive dismissal claim is an allegation that Mr Murphie verbally abused Ms Cochrane and made her feel like a thief for no reason so that by October 2005 she had had enough and her only option was to resign. Ms Cochrane and another former employee (Nicola

Bremner) gave evidence in support. Both Ms Cochrane and Mr Murphie referred to a number of irrelevant matters which it is not necessary to canvass. However, it is necessary to give some context before canvassing the events that preceded Ms Cochrane's resignation.

[6] Ms Cochrane was critical of Mr Murphie for giving her a written warning in December 2004. Her evidence is that she felt she might thereafter be dismissed for any minor thing that went wrong. However, I do not accept that the warning from November 2004 had anything to do with the resignation. Even Ms Cochrane accepted that things were fine between her and Mr Murphie until the departure of the shop manager (Kim Crawford) in January 2005. Nothing of any significance happened between January 2005 and September 2005.

[7] There was a BBQ attended by Ms Crawford, Mr Murphie, Ms Cochrane, her partner and others on or about 10 September 2005. At that BBQ, Ms Crawford (by then Mr Murphie's partner) made some allegations about Ms Cochrane's partner. It is not necessary to discuss the allegations but they naturally caused some distress to Ms Cochrane. Mr Murphie was supportive of Ms Cochrane and she makes no material complaint about him at this point. On the following Monday, Ms Cochrane told Mr Murphie that she did not think that she could continue to work for the company given events at the BBQ but Mr Murphie was again supportive and praised her work performance to try and discourage her from leaving. That worked and Ms Cochrane stayed on.

[8] However, there developed some strife between Ms Bremner and another employee. There was considerable tension at work between them and Mr Murphie. Ms Cochrane did not contribute to the tension but she was affected by it as a bystander. The other employee left work on 1 October 2005. That did not resolve the tension between Mr Murphie and Ms Bremner. The difficulties at work caused Mr Murphie to change his plans for a holiday about which he was less than pleased. However, Mr Murphie did not blame Ms Cochrane for what was happening.

[9] On Tuesday 11 October 2005, Mr Murphie gave Ms Bremner and Ms Cochrane a memo in which he explained that he needed them both to work additional days and hours so he could take leave from 18 October until 25 October. The last line reads *Please let me know by Friday 14 October if you are able to do this please.* The tone of the memo reflects the provision in the employment agreement which requires mutual consent for additional hours. Mr Murphie does not specifically recall Ms Cochrane coming back to him to respond but he does recall her saying that she could not work because she was shifting and she could not delay shifting because arrangements had been made to borrow a truck. Ms Cochrane's evidence is that Mr Murphie was quite unreasonable as a result of her saying that she could not work. It is fair to say that Mr Cochrane was unhappy with the response to his request from both Ms Bremner and Ms Cochrane.

[10] Ms Bremner did not attend work the next day and when Ms Cochrane arrived, Mr Murphie's father warned Ms Cochrane that his son was in a bad mood as a result. Ms Cochrane worked the whole day. Sometime in the morning, Mr Murphie told Ms Cochrane that he was going to pay her at the end of the week rather than on the Wednesday. In evidence, Mr Murphie told me that he adopted this stance because he was annoyed with Ms Bremner's failure to attend work. I find that it also related to his view that neither employee was being very accommodating about his holiday intentions. Mr Murphie normally did the pays by internet banking but he had decided he would not take the time to do that as he had to cover Ms Bremner's absence. He told Ms Cochrane to ring her bank to make arrangements to cover her own payment obligations.

[11] Ms Cochrane says that during the day, every time she tried to talk to Mr Murphie, she got a *snarly remark*. Ms Cochrane was unable to give details of the claimed abuse or shouting and my finding is that Mr Murphie's behaviour this day and probably at some other times was uncivil and ill mannered rather than abusive. Nothing else of any significance happened that day although I do

accept that Ms Cochrane was upset by the end of the day, having felt like she had to walk on egg shells so as not to provoke a response from Mr Murphie.

[12] Ms Cochrane rang in sick that morning but actually went to see a solicitor, that having been arranged the day before after work. The solicitor faxed a letter to Mr Murphie on 13 October alleging constructive dismissal on behalf of both Ms Bremner and Ms Cochrane. The allegation of constructive dismissal for Ms Cochrane is based on a lack of confidentiality; Ms Cochrane being made to feel useless; ill treatment of Ms Cochrane through a lack of trust; a lack of consultation over the extra hours; humiliation and bullying of Ms Cochrane. The point about the non payment of wages is not marshalled in support of the constructive dismissal but is dealt with by a demand for payment.

[13] Constructive dismissal includes the situation where an employee has resigned following a breach of duty on the part of the employer. The relevant breach must be sufficiently serious to make it reasonably foreseeable that the employee would not be prepared to work under the conditions prevailing: see *Auckland Electric Power Board v Auckland Provincial District Local Authorities IUOW Inc* [1994] 1 ERNZ 168.

[14] Mr Murphie's behaviour towards Ms Cochrane on 11 & 12 October after she declined to work the extra hours was no doubt inconsiderate but I do not accept that it constituted any breach of duty. Prior to the BBQ in September, the working relationship between Mr Murphie and Ms Cochrane had been good. Mr Murphie was not responsible for the discord that followed between the other two employees, he understood that it was not caused by Ms Cochrane and she knew that Mr Murphie did not attribute any blame to her. Mr Murphie was annoyed by Ms Bremner's non appearance at work and by the response to his memo and that showed in her tone and manner but it did not get to the point of a breach of duty.

[15] The unilateral change to the pay arrangement was a breach of duty. I accept it was something of a favour to Ms Cochrane to be paid early but it had been a reasonably long standing arrangement. The company could have changed the pay day so that wages were paid after they fell due but that required reasonable notice of the change. However, in the context of the employment relationship I do not accept that it was reasonably foreseeable that the breach would cause a resignation. The matter could easily have been sorted out without harm to what had otherwise been mostly a satisfactory working relationship. Accordingly, there is no constructive dismissal.

[16] It also follows that Ms Cochrane is in breach of the requirement in the employment agreement to give two weeks notice of its termination. The agreement does not stipulate for the deduction of two weeks wages for a default in meeting that obligation. There can only be a recovery of damages for the breach to the extent that there is proof of a loss suffered as a result of the breach. There is no evidence of any such loss. Mr Murphie blames Ms Cochrane for a decline in patronage but that is simply speculation on his part. The company's counterclaim is rejected.

Summary

[17] Ms Cochrane resigned and there was no constructive dismissal.

[18] The company has suffered no proven loss as a result of Ms Cochrane's failure to give proper notice.

[19] Although the result might be seen as a success for the company, there might be no costs that can be claimed. First, it emerged during the investigation meeting that Ms Cochrane had been granted legal aid. The Authority had not been advised of that despite the obligation on counsel to

notify the Authority. Also, Mr Murphie represented the company so it apparently incurred no legal costs. However, I will reserve the point in case Mr Murphie wants to raise any point. He should do so in writing to the Authority within 14 days. Ms Cochrane may then have 7 days to respond.

Philip Cheyne
Member of Employment Relations Authority