

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 211
3014352

BETWEEN ABBEY JESSICA DAWBER
Applicant

A N D CHURCH LANE NZ LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Angeline Boniface, Counsel for Applicant
Rowan Kearns, Advocate for Respondent

Investigation Meeting: 22 November 2017 at Christchurch

Submissions Received: 22 November 2017 from Applicant
22 November 2017 from Respondent

Date of Determination: 7 December 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant was unjustifiably constructively dismissed and suffered unjustified disadvantage in her employment. She is awarded the remedies set out in this determination.**
- B. Costs are reserved.**

Prohibition from publication order

[1] Evidence was produced by the respondent at the Authority's investigation meeting comprising written statements about Ms Dawber from three staff members of the respondent. These statements were generally uncomplimentary and contained some personal information about Ms Dawber. Apparently, the three staff members did not know their statements were going to be produced in evidence. They were not at the investigation meeting themselves.

[2] For these reasons I prohibit from publication the contents of the statements, save to the extent set out in this determination, and the identities of the three staff members.

Employment relationship problem

[3] Ms Dawber claims that she was unjustifiably constructively dismissed from the employment of the respondent and that she suffered unjustified disadvantage in her employment, although the actions complained of are the same actions that she relies upon to claim constructive dismissal. Ms Dawber's claim of unlawful deductions from her wages was withdrawn at the start of the investigation meeting.

[4] The respondent denies that Ms Dawber was unjustifiably dismissed and that she suffered unjustified disadvantage in her employment.

Brief account of events leading to Ms Dawber's resignation

[5] The respondent company owns and operates retail establishments in Motueka and Christchurch and is owned by Rowan and Sharon Kearns. Their daughter, Hannah Kearns, manages the stores and has the title of National Store Manager. All three live in the Nelson area. Ms Dawber was employed pursuant to an individual employment agreement which Ms Dawber signed on 25 September 2016. Schedule 1 of the agreement describes Ms Dawber's role as "Store Manager".

[6] When she commenced employment, Ms Dawber was the Store Manager of the Vintage Rose Fashion outlet in Northlands Mall, Christchurch, earning \$18 an hour. In November 2016 she met with members of the Kearns family, and was offered the management role of an additional store, which was due to be opening in Riccarton in December 2016. Ms Dawber agreed to take on this extra role and, in early December 2016, her pay was increased to \$22 an hour.

[7] Towards the end of March 2017, Hannah Kearns emailed Ms Dawber asking her to distribute a letter to all the staff setting out some changes that they were planning to make over the forthcoming three months. Essentially, these were merchandising changes. The letter stated expressly:

Your rosters and job roll [sic] will not change. The only thing that will change is the products you sell which will require a bit more knowledge about Churchlane. This will come with some extra training and marketing we supply.

[8] Ms Dawber says that, on 29 March 2017, she had an altercation with a new member of staff (who is one of the three staff members subject to the non-publication order, and who will be called Ms X in this determination). She says that she told Ms Kearns and asked for a meeting to discuss it but that Ms Kearns replied “*Both of you are mature and you need to suck it up for today*”. Subsequently, Ms Kearns said that she would discuss matters with Ms X.

[9] However, Ms Dawber says that, whilst she and Ms X did manage to work through the rest of the time without there being any further incidents, Ms X later blocked Ms Dawber from the staff Facebook page, which includes roster information and so forth, and chose not to reply to Ms Dawber’s texts in regard to a dress that Ms X had on hold. Ms Dawber says that she had no opportunity to resolve matters with Ms X, and had no feedback as to what discussions took place between Ms Kearns and Ms X in order to try to resolve matters.

[10] Ms Dawber says that, on the morning of 21 April 2017, during her annual leave, she received a text from Ms Kearns asking her to meet with her and Sharon Kearns later that day. Ms Dawber says that, although she was on annual leave, she was happy to meet and she believed that this was another one of the regular monthly meetings that she had with Ms Kearns to discuss the business.

[11] Ms Dawber says that she met with Hannah and Sharon Kearns at a coffee shop in Riccarton Mall as arranged, and during the meeting they told Ms Dawber that they did not think that the stores were performing at their best and that they wanted to double the money coming in. They said that they were making huge changes to the stores and that Hannah Kearns would be taking over Ms Dawber’s position and that Ms Dawber would remain on at the Riccarton store as Assistant Manager. Ms Dawber says that she was also told that her pay would drop back to \$18 an hour and that the changes would take effect immediately.

[12] Ms Dawber says that she asked about why another staff member had not received an employment agreement, and she was told that that was “Hannah’s issue now” and that “Everything was to be up to Hannah, and [Ms Dawber] was not to be part of it”. Ms Dawber said that she left the meeting abruptly as she was very confused about what was happening and was extremely upset.

[13] Ms Dawber says that she received a telephone call from a staff member later on, and a message from another staff member, advising that Hannah Kearns had told everybody in both stores that Ms Dawber was no longer to be the manager.

[14] Ms Dawber received an email from Hannah Kearns the following day, Saturday 22 April 2017, which stated as follows:

To: Abbey Dawber

Subject: Re – Our Meeting yesterday

Hi Abbey

Just a quick catch up. I hope your [sic] enjoying your weekend.

As we discussed at our meeting yesterday afternoon, we have put your job position back to the original (In-Store Assistant/Manager). Unfortunately this means your pay will also be decreased back to the original wage of \$18 per hour.

The reason for this as discussed is that both stores need our guidance and direction at this stage with all the changes we are & about to keep making with products. The stores have also been underperforming in our eyes so we have to take the reins and fix this problem before the business can afford any higher wage earners.

These changes I will rectify on your contract and send you a copy as well.

Thanks for holding the forte [sic] over the last few months as that has been a good help to us but like we say we have a lot of improvements to make in both stores over the next few months before we can pass to a manager again.

Talk soon any way.

Thanks.

Kind regards.

Hannah Kearns

[15] Ms Dawber says that she had never believed that her position was a temporary one. She responded by email to Hannah and Sharon Kearns the same day. She states the following:

22-4-2017

To Hannah and Sharon

As discussed at our meeting on Friday and the follow up email, I would like to put in writing that I am declining the offer of role of Store assistant/Manager with the pay decrease to \$18 and also the hour decrease. As we discussed verbally on Monday the 5th of December I was to be store manager of both Christchurch stores and to have a pay rise of \$22.

I have enjoyed this role immensely and have cared about the two stores. I understand why Hannah is to come into the stores to monitor them and to help guide. I believe that the underperforming of the

store is not a reflection of how I do my job and if you believe so this should have been brought to my attention sooner in a performance review out of good faith.

I have recently signed a 12 month lease for an expensive property as I believed I had a solid job and possibly a career within the company, this is also something that I am studying for. Now I am left feeling stressed and unsettled.

Moving forward I would like to stay at the same pay rate and continue working the same hours I have worked or near to it. This is an average of 38.5 hours over the space of 12 weeks (including last week where it was the only time I have worked under 30 hours). Me working 30.5 hours next week on a lower pay is not satisfactory for the work I have been putting into this job. I don't mind if I spend less time at Northlands due to many issues I have had with [Ms X], I have brought these to your attention on multiple occasions and they have been dismissed and not attended to. So being taken off that Roster has not caused me any grief. Although the problems may get worse if I am ever to cover a shift with her.

I believe I am a high energy, self motivated staff member who has worked hard to get where she is within your two stores and to be kicked out of my role so Hannah to come in to guide and direct the store and staff members is not the way to go about this.

I look forward to a reply.

Abbey Dawber

[16] Ms Dawber says in her written evidence that she had no reply to her letter by the time she was due to return to work on 24 April, and had become sick and bedridden by then due to the stress. She then sent a medical certificate to Hannah Kearns. However, during the investigation meeting the respondent produced emails which showed that there were exchanges between Ms Dawber and Ms Kearns between 26 April and 27 April. These exchanges concerned the return of keys, but also contained the following passages:

From Ms Kearns: Thanks for your email. We will keep that [a medical certificate] on file and be in touch next week in regards to your last email.

From Ms Dawber: As for replying to my email, it is causing me a lot of distress waiting for a reply. Why do you want to wait until next week for you to get in touch with me?

From Ms Kearns: We don't want you to be distressed over anything. I have just sent you your roster for next week too. Keep me posted if you are unable to make it. We are considering your email and need to work out a plan & solution. This takes time. Will be in touch soon.

From Ms Dawber: Until we come up with a solution, I just want to confirm if I work Next week it will be at my current pay rate of \$22 and current role of store manager.

From Ms Kearns: Yes that is correct, everything will stay as it is until we have a solution. We will be in touch.

[17] Ms Dawber says that she had been due back from her annual leave on Wednesday 26 April and had received her roster. This stated that she was the Assistant Manager and that her rostered hours that week were to be 30.5. She said that the roster had her only working four days.

[18] Ms Dawber obtained legal advice and her lawyers, Cameron & Co., wrote a letter to the respondent on 1 May 2017. This letter was marked “Without Prejudice” and a copy has not been seen by the Authority, although the text of that letter was replicated in an open letter from Cameron & Co. dated 16 May 2017 which was sent to the respondent’s solicitors, Pitt & Moore.

[19] The letter of 1 May raised a personal grievance on behalf of Ms Dawber, stating that she had suffered a disadvantage in her employment which had caused her to feel upset and humiliated. The actions of the employer about which the personal grievance was raised concerned the meeting on 21 April in which Ms Dawber was told that she was no longer to be Store Manager and that her pay would drop \$4 an hour.

[20] The letter ended in the following way:

Ms Dawber absolutely loves the brand and the people at the stores. However, she feels so hurt that this has occurred without any warning or opportunity to be heard. In addition, Ms Dawber tried to express her concerns about [Ms X] and as far as we can tell, no further action has been taken.

Ms Dawber has since been very tearful and upset. She has required medication to help her sleep and the situation has really been quite traumatising for her.

Ms Dawber now feels embarrassed and too humiliated to come back to work until this matter is resolved.

Remedies Sought

In these circumstances, Ms Dawber feels that the relationship and trust and confidence with her employer has [sic] been eroded.

Please advise urgently whether you would be prepared to attend mediation to try to resolve matters.

[21] On 3 May 2017 Cameron & Co. wrote to Sharon and Hannah Kearns saying that Ms Dawber was too upset to come to work and asked whether she could take paid special leave from 4 May onwards (as her medical certificate expired on 3 May). On 5 May Cameron & Co. sent a letter to Sharon and Hannah Kearns asking for a response to the request for special leave. It seems that no response was ever given to that request by or on behalf of the respondent.

[22] On 9 May 2017 Pitt & Moore replied on behalf of the respondent to Cameron & Co. The letter contained the following passages:

In December 2016 our client approached Ms Dawber to the effect that changes were about to be undertaken with respect to the structure of the shops, and she was asked to take on management of two shops on a temporary basis while that process was worked through.

That process has now been worked through and therefore our clients were looking to re-establish the previous employment relationship and reporting lines.

Our clients acknowledge that they could have approached that in a better fashion and when Ms Dawber made her objections clear they ceased any further action with respect to the proposed approach. No decisions will be made until Ms Dawber has had every chance to comment.

As Ms Dawber's pay rate and hours have not to date been reduced, and will not be reduced (if at all) until all due process has been followed it is our view that there has been no disadvantage.

We note that your client has not attended work since she first raised these issues though she has been rostered on and our clients would like her to resume her work as soon as possible. To date no reasons have been provided for her absence.

In the meantime, in Ms Dawber's absence from work a number of issues have been raised with our clients about her treatment of staff and her performance which our clients would like to discuss with Ms Dawber upon her return to work. Please note that this is at the investigation stage only and no disciplinary or other consequences are proposed, although the next step will of course depend on your client's responses to these issues.

The issues arise from reports from other staff members that Ms Dawber has on various occasions:

- (a) Advised staff that if they didn't lose weight, Hannah and Sharon would fire them;
- (b) Required a staff member to try on several items of clothing to prove that they didn't fit as Ms Dawber could not believe that anybody could be so fat as to not fit the clothes;
- (c) Stated to one staff member that another staff member hated her and hated working with her;
- (d) That Ms Dawber has been disclosing confidential information about employees to other employees;

- (e) That Ms Dawber has considerably longer breaks than her allocated 15 minute breaks;
- (f) That Ms Dawber ignores customers when they enter the store;
- (g) Ms Dawber has advised other staff members to be careful about providing feedback about her to our client, as she is likely to see it;
- (h) Ms Dawber has cried many times on the shop floor. While our clients have every sympathy for people in emotional distress, it should not be in view of customers and other staff.

The above are allegations only and as above our clients do not have any preconceived ideas as to their veracity or otherwise. Our clients would like to meet with Ms Dawber only to hear her point of view, after which meeting a decision will be made as to whether there are any further actions to be taken or whether these issues will be closed.

We would be grateful if you could advise your clients proposed return to work together with her availability for a meeting such as the above as soon as possible. Again, while this is not a disciplinary matter at this stage, she is of course welcome to bring in a representative or a support person.

[23] On 10 May, Cameron & Co. replied to Pitt & Moore taking issue with the statement that no reasons had been provided for Ms Dawber's absence, pointing out that two medical certificates had been provided and that the letter of 1 May makes it clear why Ms Dawber was not at work. The letter also stated that Ms Dawber was seeing her doctor again that day and would advise the respondent directly as to whether she would return to work in the meantime.

[24] On 16 May Cameron & Co. provided the text of the personal grievance, which had originally been marked without prejudice, in an open letter to Pitt & Moore.

[25] On 23 May a conversation occurred between Ms Boniface, who was acting for Ms Dawber, and Mr Mason, who was acting for the respondent in which they discussed going to mediation. At the Authority's investigation meeting Mr Kearns produced a copy of an email to him from Mr Mason which summarised the conversation. Mr Kearns expressly waived privilege in the contents of the communication from his legal adviser. Mr Mason said in the email that he had advised Ms Boniface that there were a number of issues that needed to be resolved as quickly as possible; in particular when Ms Dawber anticipated being back at work and "the very serious issues that had been raised". Ms Boniface was to take instructions and get back to Mr Mason.

[26] It seems that there was no further communication between the parties, until 29 May when Cameron & Co wrote again to Pitt & Moore. This letter advised that Ms Dawber was resigning. For this reason, this letter is repeated below in its entirety, given Ms Dawber's claim for unjustified constructive dismissal.

Dear Partners

Church Lane NZ Limited – Abbey Dawber

Further to our letters of 10 May and 16 May 2017, we note that your client has taken the stance that Ms Dawber's promotion to Christchurch Area Manager was a "temporary" one.

Ms Dawber absolutely disputes that position. It was never indicated to her in any way that the promotion was a temporary arrangement.

The reality of what occurred on 18 April 2017 is as follows:

- (a) Abbey was told without any consultation that her pay would be reduced back down to her original pay rate when she was first hired (\$18.00 per hour);
- (b) Abbey was told, again with consultation [sic], that her position as Christchurch Area Manager was being taken from her, effective immediately, and the pay rate is \$18.00 an hour instead of the \$22.00 an hour she had previously been receiving.

It was made very, very clear to your client that Ms Dawber's subsequent absence from work was due to the stress, humiliation and upset that occurred as a result of that unilateral action on the part of your clients. We emphasised that in our letter of 9 May 2017.

Ms Dawber has advised us that she is receiving counselling following this unjustified action on your clients' behalf. The last roster Ms Dawber received was on the 5 May this year and covered up until the 14 May 2017. Ms Dawber was asked to return keys in early May and she was blocked off the business Facebook page. In addition, she has not received any roster with her name on it since the 14 May 2017.

It is understood by Ms Dawber that the roster she did receive for the period 5 May 2017 to 14 May 2017 was not the roster that other people received. Ms Dawber's name was on the roster that she had, but it is believed that the other staff members received a roster without her on it.

Church Lane NZ Limited has made it impossible for Ms Dawber to return to work. The hurt that she has felt from your client trying to demote her and advising staff about it before it was finalised has had [sic] made a huge impact on Ms Dawber's future with the business. The situation has been worsened by the false accusations subsequently made against Ms Dawber (all of which she would have ordinarily disputed those [sic] through a proper process). It is difficult for her to hear those allegations, as she is well aware that most if not all of them are incorrect.

Ms Dawber advises that the only reason she is too stressed to come to work is because this incident occurred.

Accordingly, she feels that she has absolutely no option left but to resign, effective immediately.

We note that your clients have taken no further steps to progress the Personal Grievance raised. We must insist on receiving the information requested and

we must insist on an urgent response as to whether your clients are prepared to attend Mediation or not.

Yours faithfully,

CAMERON & CO.

[27] In her oral evidence, Ms Dawber said that she resigned because she had stopped receiving rosters, had no store key and her stress and illness were progressively getting worse, to a point where she had never been so ill before. She said that the lack of communication from the respondent and the lack of respect being shown to her made her realise she did not want to be an employee of the company any more.

[28] The respondent did not lodge any briefs of evidence (despite being directed to do so) but Ms Hannah Kearns and Mr Rowan Kearns gave oral evidence to the Authority. Ms Kearns said that she oversaw all of the respondent company's stores and that, when Ms Dawber had been offered the position of store manager of both the Riccarton and Northlands stores in December 2016, Ms Dawber had not been told that it was a temporary position, but had also not been told that it was a permanent position either. Ms Kearns said that she had told Ms Dawber that they needed to "see how it goes". Ms Kearns said that the company had not changed Ms Dawber's employment agreement to refer to her managing two stores, or her increased pay rate.

[29] Ms Kearns did not agree that Ms Dawber had been demoted in April 2017, saying that Ms Dawber had reverted to managing the Riccarton store (as Ms X was in the Northlands store and Ms Dawber and Ms X did not get on). Ms Kearns said that the hours shown on the new rosters sent to Ms Dawber after the April meeting had reduced because Ms Dawber was no longer to manage the Northlands store.

[30] Ms Kearns' explanation for why the new rosters showed Ms Dawber as assistant manager was that Ms Dawber was to assist her. Mr Kearns said in evidence that Ms Dawber had not been demoted but that Ms Kearns had come in over her. However, I note that Ms Dawber had previously been designated as manager in rosters prior to the April meeting, and Ms Kearns had always been national store manager.

[31] Mr Kearns also said that he believed that Ms Dawber had felt unable to return to work because of the ill-feeling between her and the other staff. This reference to ill feeling referred to evidence put before the Authority by the respondent on the day of the investigation meeting of written and oral comments about Ms Dawber which Ms Kearns had received from three staff members in early March and early April¹. It is not necessary to repeat the detail of the comments, but they are fairly wide ranging in content, and are largely critical of Ms Dawber's management style. I am satisfied that the comments were sufficiently serious to legitimately cause concern to the respondent, and for it to want to find out more about the allegations.

[32] However, the evidence of the respondent is that it wanted to find out more about how the two Christchurch stores were being run before confronting Ms Dawber with the allegations. Ms Kearns said that the allegations were partly the reason for the respondent's decision to have Ms Kearns take over management of the stores.

The issues

[33] The following issues need to be determined by the Authority:

- (a) Was Ms Dawber unjustifiably constructively dismissed from her employment?
- (b) Was Ms Dawber unjustifiably disadvantaged in her employment?

The governing legal principles

[34] The following are key sections of the Employment Relations Act 2000 (the Act) which are relevant to the issues to be considered.

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

- (a) must deal with each other in good faith; and
- (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
 - (i) to mislead or deceive each other; or
 - (ii) that is likely to mislead or deceive each other.

¹ Although Pitt & Moore's letter of 9 May 2017 suggested that the issues had been raised during Ms Dawber's absence from work.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is 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 or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

- (a) minor; and
- (b) did not result in the employee being treated unfairly

[35] The principles relating to the question of whether an employee has been constructively dismissed have been developed over a series of judgements. The starting point has been expressed as follows:

A constructive dismissal is one in which the employer's actions are equivalent to a dismissal, or the employer's conduct tantamount to a dismissal.

...

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. This is the doctrine of constructive dismissal.²

[36] In the first New Zealand Court of Appeal decision considering constructive dismissal³, the Court enunciated three (non-exhaustive) situations in which a constructive dismissal may occur:

- i. where the employee is given a choice of resignation or dismissal;
- ii. where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- iii. where a breach of duty by the employer leads a worker to resign.

[37] Ms Dawber relies on the third category.

[38] In *Commissioner of Police v Hawkins*⁴ the Court of Appeal held that the very nature of a claim for constructive dismissal is dependent on the events that preceded it; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach of the employer's duty or other actions by the employer).

² *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* [1983] ERNZ SEL Cas 95 (AC) at [104].

³ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372.

⁴ [2009] NZCA 209

[39] A common constructive dismissal scenario occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship or trust in confidence. In such a case, it is not necessary to show that the employer intended any repudiation of the contract (*Review Publishing Co Ltd v Walker*⁵). A serious breach of the duty of good faith is also usually sufficient to entitle an employee to treat herself as constructively dismissed.

[40] In all cases, the breach must be sufficiently serious to have repudiated the employment agreement, and the employee may choose to accept that the agreement has been breached, and resign, claiming constructive dismissal, or ignore the breach and continue working, although he or she may still seek damages for the breach, if relevant.

[41] The repudiatory conduct by the employer may involve a series of events over a period of time such that no single event may be sufficiently serious to enable the employee to treat the contract as repudiated but the cumulative effect may be. (*Lewis v, Motor World Garages Limited*⁶).

[42] A resignation need not take effect immediately, and an employee may still succeed in a claim of constructive dismissal by giving notice (*Para Franchising Limited v Whyte*⁷). However, an employee cannot wait a significant length of time without good reason. Also, if an employee affirms the contract, by taking action that indicates that he or she regards the contract as still on foot, no constructive dismissal may arise.

[43] To found a claim for constructive dismissal the breach of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable. (*Weston v Advkit Para Legal Services Ltd*⁸).

⁵ [1996] 2 ERNZ 407

⁶ [1986] ICR 157 (CA)

⁷ [2002] 2 ERNZ 120

⁸ [2010] NZEmpC 140

Was Ms Dawber unjustifiably constructively dismissed?

[44] Taking into account the letter of resignation sent by Cameron & Co, and the oral evidence given by Ms Dawber, I find that her reasons for resigning were as follows:

- a. She was told on 21 April 2017 that her pay was to be reduced to \$18 an hour from \$22 an hour without consultation;
- b. She was told on 21 April 2017 that her position of Store Manager of the Riccarton Mall and Northland Mall stores was to be taken from her;
- c. All the staff were told about her no longer being manager of the two stores;
- d. She had her hours unilaterally reduced to 30.50 per week;
- e. No rosters were sent to her after 5 May;
- f. She had the store keys taken off her;
- g. Although she was told that she would retain her store manager role and her pay while a solution was being explored, there was no communication from the respondent about that solution; and
- h. These circumstances were making her very stressed, and ill.

[45] Although the respondent says that Ms Dawber was not demoted, this is, frankly, completely contradicted by all the evidence. Her employment agreement, and the rosters prior to the meeting of 21 April 2017, described her as “store manager”. After that date, she was described by Ms Kearns as “In-Store Assistant/Manager” and in the rosters as Assistant Store Manager. It is quite clear that she was told at the meeting of 21 April 2017 that she was to lose her role as store manager of the two Christchurch stores.

[46] The respondent is now trying to spin the events to make it appear that Ms Dawber was only store manager on a trial basis, and that she had, essentially, failed the trial. However, I accept that it was never made clear to Ms Dawber that the promotion to regional store manager (as Ms Dawber called the role) in December

2016 was on a trial basis. She not unreasonably understood her promotion to be permanent.

[47] Furthermore, I am satisfied that the complaints from the three staff members were substantively (if not wholly) responsible for the decision to take the store manager role away from Ms Dawber. Ms Kearns and her mother met with at least two of the complainant staff members in the days immediately prior to the 21 April 2017 meeting. My understanding of the evidence is that Ms Kearns and her mother had their preliminary decision to take over the store management confirmed after having spoken to the two staff members.

[48] Despite this, no word of the complaints from staff, or of the respondent's concerns about Ms Dawber's staff management performance, was said to Ms Dawber on 21 April. Although Ms Kearns and Mr Kearns both emphasised that they had not finished investigating the complaints, the respondent nonetheless acted on them by telling Ms Dawber that she was to lose her store management role and have her pay reduced.

[49] The meeting of 21 April was effectively an ambush of Ms Dawber, and Ms Dawber was effectively being punished because of allegations against her that she had had no chance at all of defending. Indeed, it was only at the Authority's Investigation Meeting that the details of the complaints were made known to Ms Dawber.

[50] Ms Kearns said that the allegations made by the three staff members were made on a confidential basis, and that this had been the other reason that they had not been made known to Ms Dawber. I appreciate that this made it difficult for Ms Kearns to address the complaints. Indeed, this is a classic difficult scenario for an employer where serious allegations are made known to an employer against another employee, but the complainant does not want to have them made known to the subject of the complaints. However, the scenario is difficult exactly because of the duty to protect both the complainant and the subject of the complaint.

[51] It is clear that accepting the complaints as true, and taking action against the subject of the complaint without giving him or her a chance to comment on the complaints, is a breach of natural justice, as well as a breach of the duty of good faith and of s 103A of the Act. Furthermore, the employment agreement between the parties set out a mandatory process for dealing with poor performance which was not followed by the respondent.

[52] I am satisfied that the actions of the respondent at the 21 April 2017 meeting amounted to a fundamental breach of express terms of the employment agreement between the parties. Furthermore, they also amounted to a breach of the duty of good faith and a breach of the duty of trust and confidence. Therefore, had Ms Dawber resigned then and there, she would have had a clear constructive dismissal claim, as the actions of the respondent were repudiatory and were not what a fair and reasonable employer could have done. Furthermore, the resignation would have been reasonably foreseeable to a reasonable employer.

[53] However, the matter is complicated by subsequent events. To her credit, Ms Dawber did not immediately resign, but raised her objections to the respondent's actions the next day, clearly articulating her reasons for doing so, and seeking a resolution. As set out above, an email exchange followed, in which Ms Kearns agreed that Ms Dawber's job title and pay would remain as they had been "until we have a solution". The personal grievance was raised on 1 May by Cameron & Co. On 9 May Pitt & Moore wrote to Cameron & Co and said that Ms Dawber's pay rate and hours had not been reduced to date and would not be until "all due process had been followed".

[54] Do these assurances by and on behalf of the respondent cure the breaches of the respondent? I believe they were theoretically capable of having done so. Between 22 April and 9 May 2017, the parties had been reasonably responsive and communicative with one another. Unfortunately, after that date, there was little communication between the parties (they were mainly just Ms Dawber sending in medical certificates) and little communication between the lawyers (one letter and, apparently, one telephone conversation) until Ms Dawber resigned on 29 May.

[55] Mr Kearns was correct in saying, I believe, that once the lawyers got involved, the matter became more formal, and the parties more cautious. Mr Kearns said he basically stepped back and left matters in the hands of Pitt & Moore. It appears that the following state of affairs had been reached by 9 May:

- a. Ms Dawber was very unwell, and was deteriorating in her health, and was unable to come to work;
- b. Ms Dawber was waiting for “a solution to be found”; and
- c. The respondent was waiting for Ms Dawber to return to work so they could discuss matters, and investigate the staff concerns about her management.

[56] There was no particular single trigger which sparked her decision to resign, according to Ms Dawber, but she gradually formed the view that she could no longer work for the respondent.

[57] My analysis of this situation is that the duty of good faith, which both parties continued to owe to each other during Ms Dawber’s sick leave, required the respondent to be active and constructive in maintaining a productive employment relationship⁹. This duty meant that stepping back and letting the lawyers drive the process was exactly the wrong thing to do. The respondent had created a situation in which Ms Dawber was faced with complete uncertainty about her future role at the respondent. Despite the assurances made by Ms Kearns and Pitt & Moore, they were not absolute assurances, but contingent on a ‘solution’ being found, with no reference to the process to be followed in reaching that solution.

[58] Furthermore, after Ms Kearns had emailed on 27 April to say Ms Dawber’s pay and role would stay the same, she sent a roster to Ms Dawber showing reduced hours and her title as Assistant Store Manager. Whilst Ms Kearns implied in her oral evidence that this was a mistake and not important, it was sending confusing mixed messages to Ms Dawber. In addition, Ms Dawber was aware that the other staff had been told that she was no longer Store Manager, but the respondent did nothing to reassure Ms Dawber that this message would be withdrawn, or alternatively, the ‘solution’ found within a reasonable timeframe.

⁹ Section 4(1A)(b) of the Act

[59] In addition, whilst the reduction in hours resulted from Ms Kearns wishing to keep Ms X and Ms Dawber apart, the respondent needed to have consulted with Ms Dawber and Ms X about ways of resolving the poor relationship, so as to try to avoid Ms Dawber suffering an eight hour a week reduction in her hours simply so as to avoid a staff member. Although the hours of work were not guaranteed in the employment agreement, Ms Dawber's expectation was that she would be rostered to work at least five days a week. Given that she was the manager of two stores, that was not an unreasonable expectation.

[60] In their letter of 9 May, Pitt & Moore stated "our clients acknowledge that they could have approached this in a better fashion". The respondent was therefore aware that they had made an error and had created an employment relationship problem which needed to be resolved by them. However, the respondent specifically was not active and constructive in resolving the problem, but instead tried to shift the onus back on Ms Dawber to take the next steps.

[61] On balance, I believe that the breach of the duty of good faith by the respondent in failing to be active and constructive, after it had signalled in the meeting of 21 April that it would breach fundamental terms of the employment agreement by demoting Ms Dawber and reducing her pay, was sufficiently serious to entitle Ms Dawber to treat her employment agreement as having been repudiated and to accept that breach by resigning. The fact that she reached that decision gradually over a period of five weeks does not invalidate that finding in the circumstances. Ms Dawber did nothing to affirm the contract and so she is not precluded her from resigning and treating herself as constructively dismissed.

[62] I am also satisfied that it was reasonably foreseeable that the respondent's actions were of such character as to make the employee's resignation reasonably foreseeable. It does not matter that the respondent itself did not foresee she would resign. What is important is whether an employer being reasonable could have done so. I actually believe that Mr and Ms Kearns shut their eyes to Ms Dawber's situation, their role in its creation, and their responsibilities towards her.

[63] In summary, I find that Ms Dawber was constructively dismissed. I also find that that was unjustified as no fair and reasonable employer could have acted in the way that the respondent did, in all the circumstances.

Did Ms Dawber suffer unjustified disadvantage in her employment?

[64] The actions complained of are a threatened unilateral variation in Ms Dawber's terms and conditions of employment, including her position, her pay, and her hours of work, followed by a failure to be active and constructive in resolving the problem those threatened actions had caused. I have found that all of these actions constituted the same breaches that justified Ms Dawber treating her employment agreement as having been repudiated. I therefore find that these actions also constituted an unjustified disadvantage in her employment.

[65] Whilst Ms Dawber cannot recover remedies twice for the same losses, it is necessary to consider whether some losses arise from the unjustified disadvantage, rather than the dismissal.

Remedies

[66] Section 123(1) of the Act provides:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[67] Section 128 provides:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[68] Ms Dawber claims the sum of \$11,011 gross in lost wages. This breaks down as 13 weeks multiplied by an average of 38.5 hours work per week at \$22 an hour gross. The respondent agreed that Ms Dawber worked around 38.5 hours per week on average. However, in her evidence Ms Dawber says that she took seven weeks to find a new job, and her new job paid better than she had been paid by the respondent. Any loss of earnings arising out of the constructive dismissal is therefore limited to seven weeks' pay. That amounts to \$5,929 gross.

[69] Ms Dawber also claims for lost wages arising from the disadvantage she suffered, which made her ill. Ms Dawber went on sick leave on 24 April 2017, and got paid four days' sick leave. Her loss therefore started on 28 April, until her resignation on 29 May 2017. That amounts to 4 weeks and 4 days.

[70] I am satisfied that Ms Dawber did suffer loss as a result of the unjustified disadvantage personal grievance, and that it is just to reimburse her for the period she was on sick leave without any pay, because she would not have been off sick if she had not been subjected to the unjustified disadvantage.

[71] At \$847 a week gross, Ms Dawber would have earned \$3,388 during the first four weeks of her unpaid sick leave period, and a further \$567.74 for the remaining four days. Therefore, the loss of earnings for the period of sick leave is \$3,952.74. In total that amounts to \$9,881.74. This is less than three months ordinary time remuneration, and so is the sum due to Ms Dawber under s 128(2) of the Act.

[72] In terms of the award of compensation for humiliation, loss of dignity and injury to her feelings, I am satisfied that Ms Dawber suffered reasonably serious effects. Ms Dawber said that, since the meeting on 21 April 2017, she had been left feeling sick and stressed, that she has problems sleeping, and takes medication for this and still takes anti-depressants. She says that she has constant headaches and has started grinding her teeth because of the stress. She says she was very tearful, and had stomach pains which resulted in her having diarrhoea and vomiting. She was tearful in the investigation meeting when recounting her feelings about what had happened in her employment.

[73] Ms Dawber says that she had some counselling which was offered to her when her doctor put her on to antidepressants, but can no longer afford counselling. She says that she had never been on antidepressants before.

[74] Ms Dawber says that the situation has had a “huge impact” on her and that she has not felt like leaving the house or going out. Before it happened she was a social person, and would go out with friends, but now she does not even want to go out for a drive in the car. The evidence from her partner confirmed these effects. The respondent did not challenge any of these stated effects on Ms Dawber.

[75] Ms Dawber started looking for new work in July of 2017 and obtained a job in a clothing store working 40 hours a week and earning \$48,000 a year plus a \$1,000 clothing allowance. She says that, whilst it was great to be back at work, she was still not sleeping and because of the previous experience with the respondent and the stress she was still feeling, she felt isolated and singled out and so resigned from that position, her last day being 12 September 2017.

[76] These effects are fairly significant and, in my estimation, fall into the lower end of band 3¹⁰, as designated in *Waikato District Health Board v Kathleen Ann Archibald*¹¹. Assuming that that band roughly encompasses compensation awards falling between \$26,667 and \$40,000¹², I would have fixed Ms Dawber’s award at around \$25,000.

¹⁰ “High level loss/damage”

¹¹ [2017] NZEmpC 132, at [62],

¹² Based on Chief Judge Inglis’ designation of her award of \$20,000 in *Waikato District Health Board* as falling “around the middle of band 2”, at [63], which suggests that she theoretically envisages the three bands as justifying awards of between \$1 to \$13,333 for Band 1, \$13,334 to \$26,666 for Band 2,

[77] However, in her statement of problem, Ms Dawber specifically asks for the sum of \$10,000, and has never asked to amend that sum. Indeed, Ms Boniface repeated that sum in her oral submissions. The Employment Court judgement of *McIver v Saad*¹³ makes clear that the Court (and so the Authority) cannot award more in compensation than has been pleaded, and so I limit the award under s 123(1)(c)(i) of the Act to \$10,000.

[78] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[79] There were some reasonably serious allegations of poor performance levelled at Ms Dawber by three staff, which the respondent never investigated. However, I cannot safely reduce the remedies by reference to these allegations as they have not been proven. Indeed, Ms Dawber produced in evidence a number of notes sent to her by one of the staff members who complained about her, which were written in warm tones, and one of which stated “LOVE YOU ABBEY. Thank you for making my life worth living and buying me my fav earrings”. At the very least, had Ms Dawber known about the allegations, she could have produced this note and called into doubt the credibility of that staff member’s complaints.

[80] I therefore decline to reduce the awards.

Recommendation

[81] Section 123(1)(ca) of the Act provides that, if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, it may make recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring.

and \$26,667 to \$40,000 for Band 3. Presumably, a more approximate approach would need to be adopted for practical purposes.

¹³ [2015] NZEmpC 145, at [56]

[82] My recommendation is that the respondent's director and managers take steps to understand, and implement as necessary, the aspect of the duty of good faith that requires it to be active and constructive in establishing and maintaining a productive employment relationship, in which the parties to the employment relationship are, among other things, responsive and communicative. Whilst the respondent cannot be criticised for instructing solicitors, that step did not relieve it of its duty to actively manage the employment relationship problem before it, given that Ms Dawber was still its employee.

Order

[83] I order the respondent to pay to Ms Dawber within 14 days of the date of this determination:

- a. The gross sum of \$9,881.74; and
- b. The sum of \$10,000 pursuant to s 123(1)(c)(i) of the Act.

Costs

[84] I reserve costs. The parties are to seek to agree how costs are to be dealt with between them. If they are unable to do so within 14 days of the date of this determination, and if Ms Dawber wishes to seek a contribution towards her costs from the respondent, she is to serve and lodge a memorandum setting out what contribution she seeks and the basis for it, within a further 14 days. The respondent will then have a further 14 days within which to serve and lodge a reply.

[85] In her statement of problem, Ms Dawber sought an order "to cover my lawyer's fees due to not responding in a timely manner or not at all to the matter in hand". This appears that it may be a claim for special damages, of the kind envisaged in *Catherine Stormont v Peddle Thorp Aitken Limited*¹⁴. However, Ms Dawber lodged the application without legal assistance, I understand. Therefore, if she wishes to pursue reimbursement of this element of her costs, and is unable to agree it with the respondent, the memorandum referred to above must address it, explaining the basis of this claim and the amount sought, along with supporting invoices and narratives.

¹⁴ [2017] NZEmpC 71 at [93] et seq

David Appleton
Member of the Employment Relations Authority