

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 59
5615217

BETWEEN MARILYN FAULKNER
 Applicant

A N D LOIS USSHER T/A THE LITTLE
 RIVER GARAGE
 Respondent

Member of Authority: Peter van Keulen

Representatives: Mike Harrison, Advocate for Applicant
 Joe Tonner, Advocate for Respondent

Investigation Meeting: 6 April 2017 at Christchurch

Submissions Received: Written and oral submissions from both parties on 6
 April 2017

Date of Determination: 24 April 2017

DETERMINATION OF THE AUTHORITY

- A. Lois Ussher unjustifiably dismissed Marilyn Faulkner.**
- B. In satisfaction of Ms Faulkner’s personal grievance Ms Ussher is to pay Ms Faulkner, the following amounts, which include a reduction of 35% for contribution:**
- a. \$3,900.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and**
- b. \$4,269.79 (net) for lost remuneration pursuant to s 123(1)(b) and s 128(2) of the Employment Relations Act 2000.**
- C. I reserve costs with a timetable set for submissions if required.**

Employment relationship problem

[1] This employment relationship problem arises out of an unfortunate misunderstanding between the applicant, Ms Faulkner, and the respondent, Ms Ussher.

[2] Ms Faulkner and Ms Ussher had an altercation at work on 4 December 2015. Ms Ussher told Ms Faulkner to leave and Ms Faulkner took this to be a dismissal. Ms Ussher says she did not dismiss Ms Faulkner she merely wanted her to take some time away from work to cool off.

[3] Ms Faulkner left the work premises for a short period but then returned to collect her personal belongings. There was then a second altercation between Ms Faulkner and Ms Ussher. Ms Ussher interpreted Ms Faulkner's actions in this second altercation as a resignation. Ms Faulkner says she did not resign; she believed she had already been dismissed.

[4] On 7 December 2015, Ms Faulkner wrote a letter to Ms Ussher seeking to resolve the issues between them. Ms Ussher took this as a request by Ms Faulkner to have her job back; a request she was not prepared to grant so she did not respond to Ms Faulkner.

[5] Ms Faulkner never returned to work and subsequently raised a personal grievance for unjustified dismissal.

[6] The resolution of this employment relationship problem turns on the issue of whether Ms Faulkner resigned or Ms Ussher dismissed her.

Discussion

Background

[7] Ms Faulkner worked for Ms Ussher in the Little River garage. Ms Faulkner was responsible for serving customers, handling stock including ordering some stock and occasional data entry in the computer system.

[8] Ms Faulkner worked four weekdays every week and every second weekend. She worked 79 hours in total each fortnight and was paid \$1,010.59 net.

First altercation – a dismissal?

[9] On 4 December 2015 Ms Faulkner was working at the garage. A sales representative from a drinks company arrived about 11:30 am to take a drinks order and provide stock.

[10] Ms Faulkner would normally place the requisite order with the sales rep but on this occasion she was reluctant to do it. This was because she believed Ms Ussher had previously criticised her for ordering too many drinks.

[11] Ms Ussher then became aware that Ms Faulkner did not want to place the order and her reason for this. Ms Ussher confronted Ms Faulkner asking her when she had told her she was ordering too many drinks. Ms Faulkner did not want to answer Ms Ussher's question, thinking it was inappropriate given that the agent was there and a drinks order needed to be completed so she ignored Ms Ussher. Ms Ussher asked the question a second time and Ms Faulkner responded by telling her she did not want to argue with her.

[12] Ms Ussher says it was clear to her that Ms Faulkner was upset, agitated and angry so she told her to get out. Ms Ussher says this was to allow her to calm down.

[13] Ms Faulkner thought this was a dismissal. She reacted angrily to this, collected some personal items from behind the counter and left the garage.

[14] I have reviewed the CCTV footage of the garage, which shows this conversation taking place. It does not have any audio but the actions are consistent with the evidence, particularly Ms Ussher's direction to get out as she gestures in the direction of the door and Ms Faulkner's reaction.

[15] There are limitations on the reliance I can put on the CCTV footage given the lack of audio. In *Margaret Harris v The Warehouse Limited*¹ Judge Colgan states, at paragraph [117]:

So, whilst the footage can corroborate the presence of a person in a particular place at and for a particular time and can corroborate that the person was speaking and perhaps the degree of animation of that person while speaking as indicated by hand gestures, it cannot reasonably corroborate other allegations about what was said and, in most cases, to whom.

¹ [2014] NZEmpC 188

[16] I have not relied on the CCTV footage to determine what was said. But, given the evidence I heard, what I could see in the CCTV footage and considering the events as a whole I am not satisfied that Ms Ussher's actions in sending Ms Faulkner away during this first altercation was a dismissal.

[17] However, I do accept Ms Faulkner's evidence that she thought Ms Ussher had dismissed her. Her immediate reaction is consistent with this, as are her subsequent responses including in particular the letter she wrote on the following Monday.

Second altercation – a resignation?

[18] About 30 minutes later Ms Faulkner returned to the garage to collect some other items from behind the counter. Ms Faulkner says she heard Ms Ussher speaking to someone on the telephone organising for that person to cover her weekend shift. She says this confirmed to her that she had been dismissed.

[19] Ms Ussher says she spoke to a friend of one of her employees to see if she would cover Ms Faulkner's shift for that day. She says she was not on the telephone when Ms Faulkner came back; that conversation took place immediately after the first incident.

[20] Ms Ussher says Ms Faulkner came into the garage and abused her. Ms Faulkner describes the second altercation as Ms Ussher refusing to speak to her and simply being very angry at her, so she collected her things and left. In the course of collecting items from behind the counter Ms Faulkner took a small bag of some food for Ms Ussher's dog that she had bought into the garage and threw it at Ms Ussher.

[21] Ms Ussher believed the actions of storming back into the garage, abusing her and then throwing the dog food at her amounted to Ms Faulkner resigning. Ms Faulkner says she was not abusive and merely threw the dog food onto Ms Ussher's desk not at her.

[22] The CCTV footage shows Ms Faulkner coming back into the garage and collecting items. She appears animated and angry. Ms Ussher is not in the footage as her office is not covered by the camera. Ms Faulkner's actions are consistent with Ms Ussher being in her office just out of shot of the camera. It appears from the footage that Ms Faulkner and Ms Ussher are engaged in a conversation. Given the evidence I

heard I believe this was a heated conversation with both of them being angry at the other.

[23] Based on the evidence I heard and the CCTV footage I have reviewed I am satisfied that Ms Faulkner did not resign in the course of the second altercation. There is no evidence from either Ms Ussher or Ms Faulkner that she said she quit. Ms Ussher simply says Ms Faulkner's actions amounted to a resignation; she took the abuse directed at her and throwing the dog food at her as being Ms Faulkner quitting. I do not accept that these actions amount to a resignation.

Letter of 7 December 2015

[24] On 7 December 2015 Ms Faulkner left a letter for Ms Ussher at the garage. That letter included the following:

...

The last few days I felt so uncomfortable because what ever I said or did was wrong. I had been ordering less drinks because you had said to me at one time not to order so many with the sale of the garage pending I thought best to leave the ordering to you in case I ordered too many.

I said to you I did not want to argue with you and when you told me to go, get out I thought it best to do so.

Whilst at the diner with Ann, Neil Manson came in and asked why was I not at work and why was I upset. All I said to him was, I had been told to go, get out. What else was I to do but do as told.

...

I so wish last Friday had not happened the way it did.

Marilyn

[25] The 7 December letter is ambiguous. It is not entirely clear that Ms Faulkner is stating Ms Ussher had dismissed her and/or that she would like her job back.

[26] However, the letter does not refer to Ms Faulkner resigning, for example by asking for her resignation to be withdrawn or suggesting she had acted without thinking. In contrast, the letter references being sent away by Ms Ussher. This is to explain why Ms Faulkner left and why she was not at work when asked about this later that day.

[27] At the very least, Ms Faulkner is saying Ms Ussher sent her away and the context of those statements, in the letter, suggests Ms Faulkner is saying she treated that as being a permanent sending away. As Ms Ussher believed her to have resigned, the letter should have indicated to Ms Ussher that there was a misunderstanding arising out of the altercations.

[28] Further, Ms Ussher stated in her evidence that she took the letter to be an apology and a request to be re-employed. So at the very least Ms Ussher interpreted the letter to say Ms Faulkner was sorry for the way she acted and she wanted her job back.

[29] The letter gives rise to three consequences. First, it indicates to Ms Ussher that Ms Faulkner had wrongly believed she was dismissed. Second, it indicates to Ms Ussher that she may have wrongly interpreted Ms Faulkner's actions as being a resignation and that was not what was intended. And third, either way there is a request to unwind whatever occurred so Ms Faulkner could continue to work for Ms Ussher.

[30] Dealing with the first situation, it is clear from *New Zealand Cards Limited v Ramsay*² that where an employer becomes aware that an employee misunderstood a communication to mean she was dismissed, contrary to the employer's intention, the employer cannot simply do nothing about this. In *Ramsay*, after referencing *Boobyer v Good Health Wanganui Limited*³ Judge Couch says:

[51] If the mistake is about dismissal rather than resignation, the analogous scenario is this. Where the communication is equivocal, the employer learns that the employee has misunderstood it as a dismissal contrary to the employer's intention but does nothing within a reasonable time to correct the employee's false impression. In such a case the employer must suffer the adverse consequences of passively standing by and letting the employee think that a dismissal has taken place.

[31] In the second situation, it is clear an employer cannot seize upon actions or words of employee and treat them as a resignation where those words or actions are not capable of amounting to a resignation or those words or actions occurred in circumstances where the resignation was not intended, such as in the heat of the moment.

² [2012] NZEmpC 51.

³ WEC 3/94, 24 February 1994.

[32] In *Christopher Taylor v Milburn Lime Limited*⁴ Judge Couch referred to a situation where an employer had good reason to doubt whether an employee intended to resign, then the duty of good faith requires the employer to do more than simply accept the purported resignation. Judge Couch stated:

[32] Where such doubt exists, the good faith obligation to be “active and constructive in ... maintaining a productive employment relationship” requires an employer to investigate the situation further before responding to the supposed resignation. Put another way, where there is doubt, a fair and reasonable employer will ensure that its response is based on the employee’s actual intentions rather than what might be inferred from equivocal words and conduct.

[33] So, in circumstances where the 7 December letter indicated that Ms Faulkner wrongly believed she had been dismissed, that she had not intended to resign and she wanted to continue to be employed by Ms Ussher, Ms Ussher should have done more than simply allow the status quo to continue.

[34] Ms Ussher’s failure to respond to Ms Faulkner’s letter amounted to a dismissal.

[35] And, it follows from the circumstances of that failure to act, the dismissal is unjustified as Ms Ussher’s actions have not met the standard required by ss 4 and 103A of the Employment Relations Act 2000 (the Act).

Remedies

Reimbursement

[36] I am satisfied that Ms Faulkner lost wages because of the unjustified dismissal. Therefore, pursuant to ss 123(1)(b) and 128 of the Act Ms Faulkner is entitled to the lesser of three months ordinary time remuneration or her actual loss.

[37] Three months ordinary time remuneration is the lesser amount and therefore Ms Faulkner is entitled to be paid that amount being, \$6,568.90 (net).

Compensation

[38] Ms Faulkner is also entitled to be paid compensation for any humiliation, loss of dignity and injury to feelings arising from the actions of Ms Ussher.

⁴ [2011] NZEmpC 164

[39] Ms Faulkner's evidence was:

- (a) She was dumfounded and humiliated by the dismissal, particularly the events that happened in front of the agent.
- (b) She was very upset by what occurred and it affected her deeply.
- (c) She became stressed because of the loss of income and the loss of security in having a job that she believed would see her through to retirement.
- (d) She had to borrow money from her sister.

[40] Based on the evidence I heard I assess the level of compensation to be \$6,000.00.

Contribution

[41] In assessing remedies for the personal grievance, I must consider whether Ms Faulkner's actions contributed to the grievance and if so if this warrants a reduction in any remedies awarded⁵.

[42] When assessing if Ms Faulkner's actions contributed to the situation that gave rise to her grievance I am looking for a causal link between Ms Faulkner's actions and the situation that gave rise to her dismissal. If I am satisfied that Ms Faulkner's behaviour contributed to her grievance i.e. there is a link, then I must consider whether the behaviour was blameworthy so as to justify a reduction in remedies⁶.

[43] I believe Ms Faulkner's actions in both altercations on 4 December 2015 contributed to her personal grievance. She became angry in both instances and retaliated by verbally abusing Ms Ussher. In leaving, as she did in the second altercation, she also contributed to the dismissal; as Ms Ussher said an employee acting the way she did could not expect to continue to work so she must have been quitting. The last conclusion, that the actions amounted to a resignation, is not correct but the behaviour did create a conclusion in Ms Ussher's mind that Ms Faulkner could not expect to continue to be employed and that she did not want to remain employed.

⁵ Section 124 of the Employment Relations Act 2000.

⁶ *Pavonski v Marine Trimmers and All Awnings 2004 Ltd* (2008) 5 NZELR 739 (EmpC).

[44] I also find that Ms Faulkner's behaviour was blameworthy and this justifies a reduction to the remedies I will grant.

[45] In this case, I assess the level of reduction to be 35%.

Determination

[46] Ms Ussher unjustifiably dismissed Ms Faulkner.

[47] In satisfaction of Ms Faulkner's personal grievance Ms Ussher is to pay Ms Faulkner, the following amounts, which include a reduction of 35% for contribution:

(a) \$3,900.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and

(b) \$4,269.79 (net) for lost remuneration pursuant to s 123(1)(b) and s 128(2) of the Employment Relations Act 2000.

Costs

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[49] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority