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Gillespie v Fox & Gunn Limited (Auckland) [2007] NZERA 144 (3 May 2007)

Determination Number: AA 137/07 File Number: 5046442

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY OFFICE

BETWEEN

Jennifer Gillespie (Applicant)

AND

Fox & Gunn Limited (Respondent)

REPRESENTATIVES

Mark Benvie, for Applicant Graeme Norton, for Respondent

MEMBER OF AUTHORITY

Marija Urlich

INVESTIGATION MEETING

Wednesday 28 February 2007

FURTHER INFORMATION AND SUBMISSIONS RECEIVED

DATE OF DETERMINATION

1, 8, 15 and 22 March 2007

3 May 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Fox & Gunn operates an industrial tool importing business from premises in Mt Wellington. Jennifer Gillespie was employed in an accounts role from May 2005 until 9 June 2006. Ms Gillespie says she was unjustifiably constructively dismissed following Fox & Gunn's disclosure to an employee facing disciplinary action that she was the witness to the conduct which was the subject of the disciplinary action that employee was facing. Ms Gillespie says this disclosure was unauthorised and in breach of her employment agreement which, combined with other subsequent breaches, amount to a constructive dismissal. She seeks remedies of lost wages, compensation for hurt and humiliation consequent to her dismissal and costs.

[2] Fox & Gunn say Ms Gillespie resigned of her own volition following the respondent's repeated attempts to convince her to return to work and payments to her during this period.

[3] The Authority must determine whether Ms Gillespie's resignation was caused by a serious breach of duty owed to her by Fox & Gunn.

Ms Gillespie as witness in a disciplinary investigation

[4] In mid April 2006 Ms Gillespie was approached at her desk by a co-worker, M, who said in an agitated manner that he hated his manager, V, that he knew where he lived and that he and his "mates" would go to his home and "beat him up to deal with him". In her witness statement Ms Gillespie said:

"As [M] was saying this to me, I became very scared. I was staggered at what [M] was saying. I will never forget the scary look in [M]'s eyes as he told me these things. He looked as though he really meant to do what he said he was going to do."

[5] Ms Gillespie was then approached by M's manager who asked what it was he had said to her. She quietly told the manager. This was conveyed to the managing director, Ken Russell, on the same day, who took immediate action by sending the threatened employee home and suspending M while his conduct was investigated.

[6] M's manager asked Ms Gillespie several times over the next few days if she would put in writing what M had said to her. Ms Gillespie said she would not put it in writing because she was scared of M. Ms Gillespie recalled telling M's manager that she did not want to be the next person on M's list. In her evidence to the Authority Ms Gillespie said she was scared of M because he had boasted about his illegal drug use to her, threatened other people and that he was a "nutter".

[7] Ms Gillespie was given an assurance that her written statement would be treated confidentially and that M would not know she had made a written statement of what had occurred. Ms Gillespie then agreed to write down what M had said to her about V. Ms Gillespie emailed this statement to M's manager on 20 April 2006. The statement states:

"This email is written confirmation that [M] verbally had a discussion with me about threatening [V]. I felt concerned about his threatening tone and he told me he knew where [V] lived and he and his mates could go around there and physically hurt him."

[8] About a week later Mr Russell asked Ms Gillespie to provide him with a copy of her email statement. She asked Mr Russell to promise that her name would not "come out" and told him that she was scared of M. Mr Russell assured Ms Gillespie that her name would not be revealed to M, that she was one of a number of people who he would be speaking to about M's behaviour and that none of these people would be identified to M. Ms Gillespie said she felt reassured by this and sent Mr Russell a copy of her written statement.

[9] During a later meeting Mr Russell told Ms Gillespie he had been advised that he may have to "name names", that is, he may have to identify those who had made written statements to M. Ms Gillespie said Mr Russell went on to say that he would not do that because of his loyalty to his staff and he specifically said to Ms Gillespie that he would not name her. Ms Gillespie said Mr Russell's statements made her feel secure and less worried the M would take revenge on her because she had made a written statement. Ms Gillespie said that during this conversation Mr Russell said the disciplinary meeting with M would not be held in the workplace because M's unpredictable behaviour was a possible danger to staff. Ms Gillespie said this comment was a further assurance to her.

[10] Mr Russell said he told Ms Gillespie that he would do everything possible not to name her to M. Mr Russell says that in the time leading up to the investigation meeting with M that he told Ms Gillespie he may have to make her name known to M, that he told her he did not think she was under any threat and that he felt over time that Ms Gillespie became less resistant to the idea of her name being made known.

[11] On 1 June 2006 M's disciplinary meeting was held in the Fox & Gunn boardroom. Ms Gillespie said she spoke with Mr Russell about the location of the meeting earlier in the day and was unhappy that the meeting would be held in the boardroom. Mr Russell could not recall telling Ms Gillespie where the disciplinary meeting would be held. He recalled telling Ms Gillespie during an earlier discussion that the meeting would be held off site "if it was an issue".

[12] Prior to the disciplinary investigation meeting with M, Mr Russell had completed an investigation report. This report was provided to M. Ms Gillespie was not identified in the report. Mr Russell's investigation found that M had made threatening comments directly to V. He concluded that M's threatening behaviour towards V was racially based and amounted to serious misconduct. During the disciplinary meeting M demanded to know who had been interviewed. Mr Russell said in evidence that he felt he was in a bind trying to look after what Ms Gillespie had said was important to her and trying to avoid any pitfalls in the disciplinary process with M. Mr Russell said he decided to disclose Ms Gillespie's name to M because, based on the findings of his investigation, he believed the threats were directed at V and that Ms Gillespie was not in any real danger from M.

[13] At the conclusion of the disciplinary meeting M was dismissed. He left the boardroom and, unescorted, crossed the office floor to exit the building via the staircase. Ms Gillespie's desk overlooks the mezzanine walkway to the staircase and is divided from it by a 1.7m high partition. The witnesses agreed M is about 6ft 4. M leaned over the partition, looked straight at Ms Gillespie and said aggressively "thanks a lot Jennifer - it was YOU."

[14] Ms Gillespie said she felt shaky and sick and started to cry at her desk. She went to her manager, Baiju Lal's office in tears. She told Mr Lal Mr Russell had told M her name, that she was scared of M and worried he would return to work or telephone her. Mr Lal told Ms Gillespie to put him through to her if he rang.

[15] Ms Gillespie returned to her desk and shortly after received a telephone call from M. He demanded to know why she had "lied" and why, from the investigation witness notes provided to him by Mr Russell, she was so scared of him. Ms Gillespie told M she had not lied and what she had written in her witness statement was what he had said to her. Ms Gillespie said nothing else. M finished the call by saying "If you don't want to talk about it then..." Ms Gillespie then told Mr Lal she had received the telephone call from M.

[16] These events were relayed to Mr Russell who telephoned and wrote to [M] that same day:

Dear[M]

I made an error today, I should never have told you the name of Jennifer Gillespie as the unnamed person in the investigation report.

When you left from the disciplinary meeting this afternoon you said to Jennifer "Thanks a lot Jennifer I know it was you." Why did you say this?

I asked you not to communicate with colleagues on our premises. I had told you that there were two scared people here. Scared of you. It was clear in the investigation report that the person (Jennifer Gillespie) was scared that you may take it out on her if you knew who repeated the comment that you made. With you knowing this why did you make this comment? It made her very concerned. She ended up in tears in Baiju's office.

What are you trying to do?

Then later today you ring her and say to her that you did not make the comments to her and told her you would never hurt her. Jennifer told me that she said to you. "You did make those comments to me [M]".

Jennifer Gillespie is scared of you [M].

I am appalled at your actions.

There is no way I could allow you to continue to work here. The decision I made earlier today was the right one.

I am to be your one and only contact at the company. Please do not contact [V] or Jennifer Gillespie for any reason.

Yours faithfully

[17] The following day, Friday, 2 June 2006, Ms Gillespie called in sick. Mr Lal contacted her at home to express his concern for her and to ask if she wanted the company to serve a trespass notice on M. Ms Gillespie said she felt confused and stressed and told Mr Lal she would need to think about it. Mr Lal told her to take as much time off as she needed, that the days would not be counted as sick leave and that Ms Gillespie would be paid as normal. This advice was confirmed in an email dated 7 June 2006.

[18] Mr Russell telephoned Ms Gillespie later that day. He suggested that it would be in Ms Gillespie's interests to consider a trespass notice and that he had spoken to the police about a trespass notice. He said V had agreed to sign one, that the Police thought it was important and that he would call in at Ms Gillespie's home so she could sign it. Ms Gillespie told Mr Russell that she wanted to think about it. Later in the conversation she agreed to come into the office to sign the trespass notice.

[19] On 7 June Ms Gillespie emailed Mr Lal advising that she was having difficulty sleeping and had a doctor's appointment the following day. In the same email she asked that Mr Russell not call her again because she was not up to speaking to him. The email goes on to state that it was Ms Gillespie's intention to seek legal advice when she was feeling better because she was concerned she may have to give evidence if M took Fox & Gunn to "court". Mr Russell said he did not attempt to contact Ms Gillespie after this email was received.

[20] On 7 June Ms Gillespie saw a locum doctor at the practise she usually attends who told her to rest and not return to work before the following week.

[21] On 26 June Ms Gillespie was reassessed by her usual doctor, Dr Sarah Redfern, who wrote the following letter:

I can confirm that Jennifer saw my locum Dr Tiller in my absence on 7 June 2006. Dr Tiller diagnosed Jennifer with an acute stress reaction resulting from conflict with and intimidation from a work colleague and also ongoing conflict with her employers due to the management of this situation.

I have reviewed her today and confirm this diagnosis with Jennifer having ongoing symptoms such as insomnia, nightmares, high levels of anxiety and symptoms of depression. She is receiving treatment for this including medication and counselling.

She is unable to return to her workplace due to the circumstances and I believe her health would deteriorate further should she be placed back in this workplace indefinitely."

[22] On 9 June Ms Gillespie's counsel wrote to Fox & Gunn tendering her resignation and raising a personal grievance for constructive dismissal.

Was Ms Gillespie constructively dismissed?

[23] Ms Gillespie says her resignation was caused by 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 of trust and confidence. In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] NZCA 250; [1994] 1 ERNZ 168, at 172 the Court of Appeal stated:

"In such case as this we consider that the first relevant question is whether the resignation had been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee had tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach."

[24] I am satisfied that Ms Gillespie's resignation was a result of Mr Russell's disclosure to M that Ms Gillespie had passed on M's threat about V.

[25] I am also satisfied that Fox & Gunn was on notice of Ms Gillespie's serious concerns about her identity being disclosed to M.

[26] The determinative question here is whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[27] Mr Russell said in his evidence that he decided, in the meeting, to tell M that Ms Gillespie had passed the information of his threat to V because M demanded to know, he did not believe M posed any real threat to Ms Gillespie because the threats were racially based and directed to V, that Mr Russell understood Ms Gillespie had become less resistant to the idea of her name being disclosed and he had told her that it may be necessary to disclose her name to M.

[28] The evidence is clear that Ms Gillespie's agreement to make the written statement of 20 April was conditional on her name not being disclosed to M. There is no evidence that Ms Gillespie withdrew that consent and agreed that her name be disclosed to M.

[29] I am not satisfied that Mr Russell had any reasonable basis to conclude that Ms Gillespie had conditionally agreed that her name should be disclosed to M in the event Mr Russell decided it was necessary to do so. I accept that Mr Russell told Ms Gillespie that he had received advice that he may have to disclose her name to M, but there is no evidence that Ms Gillespie was told her name would be disclosed or that Ms Gillespie was given the opportunity to consider withdrawing her statement in light of this advice.

[30] Further, I do not believe Mr Russell had any reasonable basis to conclude that M did not pose a real threat to Ms Gillespie. There was no evidence that Mr Russell ever discussed with Ms Gillespie the basis of her concerns about M.

[31] I am satisfied from his letter of 1 June that Mr Russell accepted Ms Gillespie's concerns were genuinely held and that those concerns were serious. Ms Gillespie's evidence as to why she was afraid of M is consistent with the evidence of the respondent witness, Louis MacKinnon, who described M as a very unstable character who was subject to mood swings and that he would not be surprised if M had taken illegal drugs and that he was cunning enough to have made threats out of ear shot of others.

[32] I accept that the respondent did not want Ms Gillespie's employment to end and that it took steps following the disclosure to repair the working relationship and to protect her from any potential risk from M. Mr Russell acknowledged he had made an error, facilitated the issuing of a trespass notice and continued to pay Ms Gillespie's wages during the period of leave prior to her dismissal and during the notice period. However, there can still be a breach of duty which amounts to a constructive dismissal where the employer wants to retain the employee.

[33] This is a most unfortunate situation. Ms Gillespie had the courage to report her serious concerns about M's conduct in circumstances where other staff had not^[1]. The non-disclosure condition placed on her report was reasonable given her concerns about M's conduct. There was no evidence that that condition had been withdrawn. Mr Russell did not ask her why she held those concerns and did not tell her he would disclose her name to M. While I appreciate that Mr Russell was faced with a difficult situation the perceived procedural pitfall of not telling M Ms Gillespie's name could have been overcome if he had asked Ms Gillespie why she was scared of M. He could then have satisfied himself that he had a justifiable basis to withhold her name from M. Further, Mr Russell's investigation had revealed that M had made threats of violence directly to V. This information alone could have formed the basis of a finding of serious misconduct.

[34] Ms Gillespie said she could not return to Fox & Gunn because she could not work for someone she could not trust, that she no longer felt safe in that work place and that she still feels unsafe in Mt Wellington. Fox & Gunn accepted Ms Gillespie's view that she was afraid of M as evidenced by Mr Russell's letter of 1 June 2006. Ms Gillespie impressed me as a sensible person who has not exaggerated her concerns about M.

[35] The disclosure of Ms Gillespie's name to M in the meeting of 1 June without her express consent, in the particular circumstances of this matter, amounts to a serious breach of the obligations owed to her under the employment agreement. I accept that following this breach, which was compounded by the respondent's failure to adequately manage M's exit from the building, that the obligation of trust and confidence was irreparably broken and given the serious nature of the breach, that Ms Gillespie's resignation was reasonably foreseeable. It follows that I accept that Ms Gillespie was constructively dismissed.

Remedies

[36] Ms Gillespie has established that she has a personal grievance and is entitled to a consideration of the remedies she seeks.

[37] Ms Gillespie gave evidence of the surprise and distress she experienced when M confronted her in the workplace

following his dismissal and then telephoned her to challenge her statement. She said she felt betrayed by the disclosure and could not return to the office again. She gave evidence that following these events she took medication to help her sleep and attended counselling sessions.

[38] Kirsten Magnusson, a friend of Ms Gillespie's, said in her written evidence that when she saw Ms Gillespie a week after the disclosure of her name to M that Ms Gillespie was frightened to return to work and afraid to be alone. Ms Magnusson described Ms Gillespie as "a complete wreck", that she was nervous and that her hands were shaking and that this was out of character.

[39] Ms Gillespie's domestic partner, Darryl Doherty, said that following the events at Fox & Gunn Ms Gillespie seems less confident and more hesitant and that immediately following the events she was unable to sleep properly and did not want to be left alone.

[40] I consider that in all the circumstances an award of \$6,000 pursuant to [section 123\(1\)\(i\)](#) of the Act is appropriate.

[41] Fox and Gunn paid Ms Gillespie until the end of June 2006 and she commenced alternative employment on 10 July 2006. Ms Gillespie lost 1 week's wages as a consequence of her constructive dismissal. She is entitled to be reimbursed for that week, calculated by her salary at date of dismissal of \$60,000 per annum.

[42] Ms Gillespie did not contribute to the circumstances which culminated in her dismissal.

Costs

[43] Cost are reserved. The parties are invited to resolve this issue themselves. If these attempts are unsuccessful Mr Benvie should file and serve a memorandum as to costs within 28 dates of the date of determination. Mr Norton should file and served any reply within a further 14 days.

Marija Urlich

Member, Employment Relations Authority

[\[1\]](#) Refer to Mr Russell's investigation report, that M's direct threats to V had not been reported.