

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 86  
5386567

BETWEEN                      MARLENE PATRICIA GRAY  
Applicant

A N D                              MAX PAHL  
Respondent

Member of Authority:      TG Tetitaha

Representatives:            M Gray, Applicant in person  
No appearance by Respondent

Investigation Meeting:     15 January 2013 at Auckland

Date of Determination:     12 March 2013

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**DETERMINATION OF THE AUTHORITY**

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**Orders/Determinations**

- A. Ms Gray was constructively dismissed by Mr Pahl on or about 15 November 2011.**
- B. An order pursuant to s128(2) of the Act that Mr Pahl pay to Ms Gray the sum of \$2,709.00 being lost remuneration.**
- C. An order pursuant to s123(c)(i) of the Act that Mr Pahl pay to Ms Gray the sum of \$5,000 being compensation for hurt and humiliation.**
- D. An order pursuant to section 131 of the Act that Mr Pahl pay Ms Gray the sum of \$4,392.12 being wage arrears.**
- E. An order pursuant to clause 11, Schedule 2 of the Act for interest on the judgment sum set out in paragraphs B to D at the rate of 5% per annum calculated from 15 November 2011 until payment.**

**F. An order pursuant to clause 15, Schedule 2 of the Act for Mr Pahl to pay \$71.56 towards Ms Gray's costs.**

**Employment relationship problem**

[1] Marlene Patricia Gray was employed as a shop assistant in 2010 then later as a store manager on 20 July 2011. She worked at a toy shop known as ABFAB Toys in Albany. The business was owned by Max Pahl. She resigned but alleges she was constructively dismissed following bullying behaviour by Mr Pahl. This behaviour included:

- During her employment tension between Mr and Mrs Pahl would create tension between Mr Pahl and herself.
- Her demotion to shop assistant from store manager without explanation on 9 November 2011
- Directions not to touch any of the stock
- Mrs Pahl angry and aggressive behaviour around her
- Mr Pahl's dismissal of her in front of sales reps and customers
- Mr Pahl's negative comments about her performance to a junior sales assistant.
- Mr Pahl's non-receptive behaviour regarding her concerns.

[2] On or about 15 November 2011 she sent Mr Pahl her resignation letter detailing her personal grievances and offering to work a further week's notice. She never heard anything further from Mr Pahl.

**Issues**

[3] Two preliminary issues have arisen. These are

- (a) Who was her employer?
- (b) Can the hearing continue in absence of the employer?

[4] Once the above issues have been determined, the following issues arise:

- (a) Was Ms Gray constructively dismissed?
- (b) What wage arrears are owed?

**Who was Ms Gray's employer?**

[5] This issue has arisen due to correspondence received from a liquidator regarding a company known as Characterland NZ Limited. This company was placed in liquidation due to money owed to a landlord. There was a concern raised the company may have been Ms Gray's employer.

[6] Ms Gray disagrees. She gave evidence of being hired by Mr Pahl. She had no knowledge of any other body being involved in her employment. There was no employment agreement or other documentation evidencing the name of her employer. She produced her bank statements showing payment from Pahl ND 2 ABFAB. She advised ND Pahl was Mr Pahl's wife Nola Pahl. Mrs Pahl had an interest in the business but she alleged Mr Pahl was the only person she dealt with as her employer nonetheless. The payment of wages by a particular entity is not conclusive of existence in an employment relationship.<sup>1</sup>

[7] Mr Pahl produced rosters with the hours and days she would work each week. He would assign her tasks for example developing sales of educational toys. Her resignation letter was addressed to Mr Pahl.

[8] Mr Pahl filed a statement in reply. He alleged the Authority had no jurisdiction because Ms Gray's wages were paid to the bank account of her trust, the Minehaha Trust. No issue was raised regarding the identity of her employer. Mr Pahl failed to attend the hearing. No evidence has been produced showing Characterland NZ Limited was her employer either.

[9] Given the evidence supports Mr Pahl as the employer, his absence at hearing and lack of objection about the identity of the employer, the Authority determines the employer was Mr Pahl.

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<sup>1</sup> See above at [97] *Golden Plains Fodder Australia Pty Ltd v Millard* [2007] SASC 391, (2007) 99 SASR 461 at [35] and [69].

### **Can the hearing continue in absence of the employer?**

[10] There is a preliminary issue regarding the absence of Mr Pahl at the investigation hearing. The Authority has the power to proceed if a party fails to attend a hearing “*without good cause shown*” (clause 12 of Schedule 2 of the Act):

[11] No good cause has been shown for the failure to attend.

[12] The statement of problem was served on Mr Pahl on or about 22 June 2012. A statement in reply has been filed by Mr Pahl 9 July 2012.

[13] A teleconference on 10 October 2012 was convened setting down the investigation meeting. Mr Pahl failed to attend the teleconference. Notices for the investigation meeting and the directions made at the teleconference were couriered to the parties.

[14] The Authority’s support officer attempted to contact Mr Pahl on the morning of the investigation meeting to ascertain his whereabouts. He was told by Mr Pahl “*the company was in liquidation*” and “*a liquidator was appointed.*” It would appear Mr Pahl relied upon Characterland’s liquidation to avoid the necessity of turning up at this hearing. This does not show good cause.

[15] In view of the above efforts, the Authority is satisfied it may continue to hear this matter.

### **Was Ms Gray constructively dismissed?**

[16] Ms Gray resigned on or about 15 November 2011. The issue is whether this amounts to constructive dismissal.

[17] Constructive dismissal includes, but is not limited to, cases where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign or there is a breach of duty by the employer causes an employee to resign<sup>2</sup>. The essential questions in constructive dismissal cases are<sup>3</sup>:

- (a) What were the terms of the contract?

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<sup>2</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

<sup>3</sup> *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich & Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 112-113.

(b) Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

[18] In answering the first question, the Authority must examine *all the circumstances of the resignation* not merely the terms of the notice or other communication whereby an employee has tendered the resignation. If there was a breach, the next question is *whether a substantial risk of resignation is reasonably foreseeable, having regard to the seriousness of the breach*<sup>4</sup>.

[19] It is an implied term of employment contracts employers' act fairly and reasonably towards employees.<sup>5</sup> It is also an implied term employers' provide a safe workplace and not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.<sup>6</sup> This includes providing a workplace free from harassment and bullying behaviour.

[20] The allegation of tension between the Pahls creating tension for Ms Gray is insufficiently detailed for the Authority to determine the truth or otherwise of this allegation.

[21] The demotion from store manager to shop assistant was a breach of the terms of her employment. She had been hired as a store manager. To unilaterally demote her to store assistant was to change her terms and conditions of her employment. Although the demotion did not affect her wages and reduced her duties, Ms Gray perceived it as dissatisfaction with her performance. It reduced her status amongst her work colleagues to the same level as another 17 year old shop assistant. There was no explanation or opportunity to discuss or agreement about the demotion. Ms Gray did not think it was right but did not know what else to do.

[22] Mr Pahl's subsequent directions not to touch any of the stock, Mrs Pahl's aggressive behaviour, her dismissal in front of sales reps and customers and negative comments about her performance in front of others, Mr Pahl's non-responsive behaviour when she raised concerns even when she told him *you are pushing me*

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<sup>4</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA).

<sup>5</sup> *Turner v Ogilvy & Mather* (1995) 4 NZELC 98,354; [1995] 1 ERNZ 11

<sup>6</sup> See above

*against the wall* indicating the possibility of her resignation, was conduct Ms Gray alleges caused her resignation.

[23] The behaviour took place within a very short space of time - 9 to 12 November 2011 - against the background of Mr Pahl's business failing. Ms Gray spoke about falls in sales and the failure of teachers education toys evening.

[24] The demotion followed by Mr Pahl's subsequent behaviour compounded matters. When she raised her concerns Mr Pahl was non-responsive. He did not explain the demotion nor apologise for his behaviour. The imminent failure of a business does not negate an employer's obligation to treat his employees fairly and reasonably.

[25] The Authority determines Ms Gray was constructively dismissed. There were breaches of the implied terms Mr Pahl act fairly and reasonably towards Ms Gray and provide a safe workplace free from bullying. The breaches were serious enough for an employer to reasonably foresee Ms Gray's resignation.

[26] Ms Gray has not been able to secure any paid work. She has applied unsuccessfully for retail jobs. She was given no pay slips but produced a schedule based on her bank statements showing her earnings over the past 12 months inclusive of the wage arrears claims below was \$10,836.00. The Authority determines she has lost remuneration and orders Mr Pahl pay Ms Gray \$2,709.00 (3 months pay at \$903 per month) pursuant to s128(2).

[27] Ms Gray seeks compensation for hurt and humiliation pursuant to s123(c)(i) of \$6,000. The amount of compensation must be *referable ... to the harm done by the employer's breach*<sup>7</sup> and should *not contain any element of punishment*<sup>8</sup>. There is no medical evidence of injury. Ms Gray was distressed by the behaviour but this appears to have been temporary. An award of \$5,000 is an appropriate level of compensation in these circumstances.

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<sup>7</sup> *New Zealand Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 340 (EmpC)

<sup>8</sup> *STAMS v Denhards Bakeries Co (No 2)* [1991] 3 ERNZ 941 (EmpC)

### **What wage arrears are owed?**

[28] Ms Gray claims wage arrears of \$4,392.12.<sup>9</sup> The Authority determines the wage arrears are due and owing.

[29] The Authority further determines Ms Gray is entitled to interest on all of the above orders of 5 % from the date of termination being 15 November 2011 until payment.

### **Costs**

[30] As the successful party Ms Gray is entitled to a contribution towards her costs. She was self-represented but incurred disbursements such as the filing fee of \$71.56. Mr Pahl is ordered to pay \$71.56 as a contribution towards Ms Grays costs.

Tania Tetitaha  
Member of the Employment Relations Authority

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<sup>9</sup> Refer Applicants Statement Ab Fab Toys – Marlene Gray for calculation.