

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 230/10
5166179

BETWEEN EMMA JAN GYENGE
 Applicant

AND CLIFFORD LAMAR LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Jan Gyenge, advocate for Applicant
 Clifford Harris, advocate for Respondent

Investigation Meeting: 22, 23 September and 21 October 2009

Determination: 17 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the employment of the applicant Ms Emma Gyenge by the respondent Clifford Lamar Ltd. The investigation has looked closely at the termination of that employment in January 2009 and the situation in the workplace during the months leading up to that.

[2] Ms Gyenge claims that she was constructively dismissed by Clifford Lamar and seeks to have her personal grievance resolved. She asks for remedies including compensation for hurt feelings, humiliation and distress, and reimbursement of wages lost as a result of her contended dismissal.

[3] Clifford Lamar denies that Ms Gyenge was dismissed by it and opposes her claim on the basis that she elected to resign her employment. The employer claims to recover costs incurred in training Ms Gyenge as an apprentice hairdresser.

[4] Mediation undertaken by the parties did not resolve the employment relationship problem.

[5] Ms Gyenge was employed by Clifford Lamar from December 2006 as a Technician in the company's hair salon at Tauranga. She was aged 17 when she started.

[6] A written employment agreement was signed by Ms Gyenge and Mr Clifford Harris who is a director of Clifford Lamar Ltd and managing director of the business.

[7] While employed Ms Gyenge entered into a training agreement with Clifford Lamar in accordance with the requirements of the hairdressing industry training organisation. Under that agreement 94% of her training during the three year apprenticeship was to take place at the Clifford Lamar salon and the remainder at the Polytechnic.

[8] On 5 January 2009, in writing, Ms Gyenge tendered her resignation, to be effective from 31 January.

[9] A few days before Ms Gyenge resigned she had written a letter to Mr Harris setting out several issues she said had remained unresolved and were affecting her. The first issue was about a request Ms Gyenge had repeatedly made over several months to have 27, 30 and 31 December 2008 off as annual leave. Her request had been declined by Mr Harris, most recently on 24 December, because those days fell during one of the busiest times of the year for the salon and Ms Gyenge was needed there to ensure it could function.

[10] Ms Gyenge in her letter referred to this issue as follows:

The issue of my leave request has been very poorly handled and highlights the ongoing communication problems that are occurring and Cliff your inability to discuss issues with me in a businesslike fashion.

[11] Following her resignation and after she had finished on 31 January 2009 at the end of the notice period, Ms Gyenge received a letter from Mr Harris expressing his best wishes to her for the future. She also received an invoice for \$4,438.12 on account of training costs claimed by Clifford Lamar.

[12] Ms Gyenge replied to Mr Harris on 10 February and advised that she had been to see a lawyer and taken advice about her situation. That advice was not to pay the invoice.

[13] Mr Harris wrote back referring to the following provision of the employment agreement:

13.3 In the event that the Employee terminates the employment with the Employer within a period of six months of completing a training course, the Employee will be required to reimburse the Employer the full costs of such training course and of any certification obtained.

[14] When the discounted cost of training invoice remained unpaid, Mr Harris sent Ms Gyenge an invoice for the full amount of \$5,069.24, which he said was due for immediate payment.

[15] There was further correspondence between Mr Harris and Ms Gyenge about the invoiced training costs, with the latter asserting that she had signed the employment agreement under duress and had not been treated fairly.

[16] At the same time, on 18 March 2009, Ms Gyenge wrote to Mr Harris raising a personal grievance for constructive dismissal.

[17] In the letter she referred again to the issue of taking leave over the Christmas/New Year period and to the several other concerns set out in her letter of 27 December.

[18] Together with her grievance Ms Gyenge set out in her letter the compensation she was claiming from Clifford Lamar to resolve it. This included \$10,000 for humiliation, loss of dignity, and injury to feelings, intimidation and disadvantage. There were other fees and costs relating to her training and transfer of her apprenticeship and the loss of remuneration through not being able to work the same number of hours at a new position she had by then found as a hairdresser. She also claimed compensation for not having progressed to become a Stylist by October 2008 and consequently missing out on being rewarded for that advancement with increased pay for the last four months of her employment.

[19] Including the claim for \$10,000 compensation, the total amount Ms Gyenge sought was over \$17,000.

[20] In a statement in reply Mr Harris on behalf of Clifford Lamar Ltd denied that Ms Gyenge had been dismissed. He maintained that she had always been paid correctly and given proper breaks. Mr Harris commented that the training costs

invoiced to Ms Gyenge after she had resigned had been “*a catalyst*” for the constructive dismissal claim.

[21] By way of counterclaim Mr Harris sought an order from the Authority requiring Ms Gyenge to pay a total of \$5,069.20 in reimbursement of fees and training costs owed under clause 13.3 of the employment agreement.

The claim of constructive dismissal

[22] The concept of constructive dismissal has been held by the Courts to include a number of situations in which an employee appears to have resigned. One of those is where an employer gives an employee an option of resigning or being dismissed. There is no suggestion that Ms Gyenge’s case is in that category and I am quite satisfied, from the evidence collected during the Authority’s investigation, that Mr Harris presented no such option or ultimatum to Ms Gyenge. His wish and intention was always for her to continue being employed by Clifford Lamar.

[23] A second category of case is where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign. Again, Ms Gyenge’s case has no features putting it that category. The evidence shows no sign of Mr Harris having designed his behaviour at any time to force Ms Gyenge into leaving.

[24] A third category of constructive dismissal is where a breach of duty by the employer leads an employee to resign. In the leading case on this type of constructive dismissal, *Auckland Power Board v. Auckland Local Authorities Union* [1994] 1 ERNZ 168 at 172, the Court of Appeal held that in considering the circumstances of a resignation, the first relevant question was whether it had been caused by a breach of duty on the part of the employer. All the circumstances of the resignation have to be examined and not just the terms of the notice or other communication whereby the employee has tendered resignation.

[25] If there is found to have been a breach of duty causing the resignation, the Court of Appeal held next question is whether the breach 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, or, in other words, whether a substantial risk of resignation had been reasonably foreseeable in the light of the breach of duty and its seriousness.

[26] There are a number of major duties under an employment agreement that an employer may breach. There is a term to be implied into any employment agreement that the employer will 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.

[27] In the *Auckland Power Board* case (above) the Court of Appeal held that to constitute a breach of this implied term it is not necessary to show that the employer intended any breach. The function of a tribunal such as the Authority, the Court held, is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. As was said in another case, the conduct of the parties has to be looked at as a whole and its cumulative impact assessed.

[28] In other cases examining the concept of constructive dismissal, it has been held that there is a distinction to be made between inconsiderate and impolite conduct on the part of an employer causing unhappiness or resentment to an employee and dismissive or repudiatory conduct, reasonably sufficient to justify the employee's termination of the employment relationship,.

[29] I find that the issue over Ms Gyenge being declined her request to take leave during the last days of 2008 before New Year was, at worst, inconsiderate conduct on the part of the employer but did not amount to any breach of duty that by itself would have justified Ms Gyenge's termination of the employment relationship.

[30] On the best view the employer's conduct over the leave issue was in accordance with its rights under the employment agreement at clause 14.3, which provided that the timing of leave could be a matter for agreement between employer and employee, although Clifford Lamar was not to unreasonably withhold its consent to any timing proposed by Ms Gyenge.

[31] In my view, the declining of the request for leave cannot be viewed as unreasonable in the circumstances, where Clifford Lamar required Ms Gyenge to help out during its busiest time of the year. Ms Gyenge agreed in her evidence that the holiday period was the best time for the business to gain new clients. Clifford Lamar could reasonably have expected her co-operation to help in that regard.

[32] However, although this was the issue that came to a head immediately before the resignation in early January, the leave issue cannot be looked at in isolation from other concerns that Ms Gyenge had raised in the months before resigning.

[33] Those issues were summarised by Ms Gyenge at the end of her 27 December letter, as follows:

The issue of daily breaks needs to be rectified.

My hours and wages need to be administered correctly.

I feel you have let me down with my cutting training.

I am a loyal hardworking employee and I deserve to be treated fairly and not intimidated.

It disappoints me the lack of interest you are taking in my career.

Product sales should not be included in targets if there is not product in stock to be sold.

Cliff, I had hoped after our meeting in October that my working environment at Clifford Lamar would have seen noticeable improvements by now.

I look forward to the issues being resolved.

[34] The evidence of Ms Gyenge, Mr Harris and Ms Anna Harris and Ms Candice Haycock in particular was given to the Authority about these issues.

[35] Insofar as there were differences between Ms Gyenge and the other witnesses, I consider that the situation was as set out in the letter dated 31 December 2008 written and signed by Ms Anna Harris, salon manager. In it she comprehensively addressed to Ms Gyenge “*all the points you brought up in your letter.*”

[36] Ms Harris addressed the issues from the point of view of the employer endeavouring to manage a business and also the employees including Ms Gyenge who worked in it. Ms Harris asked Ms Gyenge in the letter to put forward her proposals as to how she would have the employer handle these things in the future.

[37] Ms Harris’ view of the situation was that Ms Gyenge had been told to take the required breaks but could not be forced to if she did not want to. In evidence Ms Harris said she had asked Ms Gyenge to take her daily breaks, and Ms Gyenge confirmed that Ms Harris had “*preached*” to staff to take their breaks.

[38] As to the complaint of lack of communication, Ms Harris advised that Ms Gyenge could talk to Mr Harris and herself and Candice Haycock, Artistic Director of the salon, and referred to documented communication there had been about matters of concern raised.

[39] Ms Harris reminded Ms Gyenge that she was not part of the management of the business and that a lot of the issues discussed by the management team were private and confidential.

[40] As to the issue of hours being changed and pay being affected, Ms Harris said:

Dilemmas, when we have staff that won't listen to what we put in the book monthly and weekly. On the odd occasion we have run behind and assured you if you wanted to stay behind your pay has gone through for those hours. If this ever happens in the future on such late notice please don't feel like you have to stay.

[41] Ms Harris concluded her letter with the following:

In summary, we believe we will never run things the way you or any other staff member would like us to. Indeed this is not our job it is for us to run the salon the way we see fit as we are the only ones who can see all the angles. Please remember this, and we have always and always will be fair and fulfil our obligations. Please reply to what you would have done in the past and what you would do in the future. We will look at this and come to a conclusion.

[42] Ms Gyenge agreed in her evidence that some of her issues had arisen from the way that Clifford Lamar had exercised its management discretion to make changes, such as assigning Ms Haycock to be her trainer. Ms Gyenge found this to be inappropriate because Ms Haycock was only one year more advanced than her, but Ms Gyenge conceded the change was a matter for management.

[43] A representative of the Hairdressing Industry Training Board gave evidence that Clifford Lamar had complied with its training obligations under the apprenticeship agreement.

[44] Ms Gyenge also agreed that it was a matter for management and not her as to whether she was ready by October 2008 to work on the floor of the salon, another issue she had.

[45] Ms Gyenge agreed that Ms Harris had also “preached” cleanliness to staff, a further issue she had.

[46] The Authority is satisfied that Ms Gyenge did become concerned and dissatisfied with a number of issues and made her concerns known to management. However, I find that those concerns did not arise from any matter that amounted to a serious breach of duty by the employer, or any breach at all.

[47] In my view, with this claim Ms Gyenge has argued for a standard of perfection and harmony in the workplace not taking reasonable account of differences between individuals expected to work together, in relation to their age, experience of the work and of employment and life generally. Ms Gyenge, though very intelligent and highly motivated, may well have misunderstood the silences and moods of those whom she worked with and who were required to train her. She was one of a number of employees that Cliff and Anna Harris were responsible for in their management of Clifford Lamar, and she could not reasonably expect that they would be constantly attentive to her needs. While it is clear that Ms Gyenge felt at times isolated, excluded and treated with indifference, there is no evidence that the Harris' intended to make her feel unwanted in this employment. She agreed no one had told her that.

[48] In summary, I consider from the evidence that this was not a case of constructive dismissal. Such breaches of duty as there may have been were not such as to amount to any serious breach, as required before a resignation can be held to be a constructive dismissal. Undoubtedly Ms Gyenge felt, as she said, that her workplace was unpleasant and uncomfortable, but as a matter of fact and degree I find there was no serious breach of duty to justify the claim that her resignation had been a constructive dismissal.

Determination

[49] The Authority therefore determines that Ms Gyenge was not dismissed, constructively or in any other way, from her employment and does not therefore have a personal grievance in that regard.

Counterclaim

[50] Ms Gyenge has opposed the counterclaim on the basis that the clear intent of her employment and apprenticeship was that she would not bear any training costs.

[51] Although the employment contract that she was presented with did not reflect that intent she signed her consent to be bound by clause 13.3. I do not find from the evidence that Ms Gyenge signed under duress, as she claims.

[52] I find that clause 13.3 of the agreement is clear and the situation that arose when Ms Gyenge resigned in January 2009 was within the contemplation of that provision. Ms Gyenge was required to reimburse Clifford Lamar the full cost of the training course and certification she had obtained.

[53] The counterclaim is made out and I therefore order Ms Gyenge to pay Clifford Lamar those costs of \$5,069.24. I decline to order the payment of interest on that sum.

Action of bad faith by Mr Cliff Harris towards Ms Gyenge

[54] For the purposes of s 181 of the Employment Relations Act, should that provision be invoked in the future, the Authority refers to the untrue statements Mr Harris admitted he had made about Ms Gyenge's father who became involved on her behalf in the employment relationship with Clifford Lamar.

[55] After Ms Gyenge had commenced the investigation in the Authority by lodging a statement of problem, Mr Harris responded on behalf of Clifford Lamar in the usual way by lodging a statement in reply, a copy of which was sent to Ms Gyenge. In a reasonably detailed annexed statement signed by Mr Harris and addressed to the Authority, he accused Mr George Gyenge of calling him to his face on 24 December 2008 a "*black #!**", or a black cunt as was clearly suggested to have been the actual words of abuse.

[56] Mr Harris accused Mr Gyenge of making this "*racist comment*," as he called it, to him twice during a conversation at the hair salon on 24 December, and also accused him of abusing him generally about his refusal to allow Ms Gyenge the requested time off at the end of the year.

[57] In his evidence Mr Gyenge absolutely refuted the accusation when questioned by the Authority. Mr Harris then said he was no longer making an issue of the allegation, before finally confessing that it was untrue.

[58] Mr Harris had allowed his lies about Mr Gyenge to stay on the record over the weeks that followed the lodging of the statement in reply, and he maintained those lies as being the truth right up until Mr Gyenge was being questioned during the investigation meeting.

[59] Mr Harris implied that as a Jamaican from the United Kingdom he had been a victim of racism, but lying about others being the perpetrators of that may simply encourage racial prejudice. Mr Harris claimed he had found it offensive to be called a black cunt. No doubt he would have been offended, had his statement been true. What was doubly offensive on the part of Mr Harris was his lying about Mr Gyenge and the lies themselves.

[60] I consider that this was an act of bad faith towards Ms Gyenge, as the untrue statement was about her parent who was acting as her representative in matters directly to do with the employment relationship. I have no doubt Ms Gyenge was humiliated and distressed to read a false accusation impugning her fathers character and to also see lying maintained during the investigation meeting to the point where her father had to be questioned about the alleged racist remark before Mr Harris eventually confessed to making it up.

[61] Mr Harris will have to face any consequences that may yet occur as a result of his act of bad faith towards Ms Gyenge, a party to an investigation before the Authority.

[62] To the extent Mr Harris deliberately made and maintained a false statement during the investigation, he failed to facilitate the Authority's investigation.

Costs

[63] Professional employment relations advocates were not involved in this investigation, at least directly, and I therefore make no order as to costs.