

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 104/10
5148562

BETWEEN

MARIE HARRIS
Applicant

A N D

TALLEY'S GROUP LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Anjela Sharma, Advocate for Applicant
Graeme Malone, Counsel for Respondent

Investigation Meeting: 12 February 2010 at Nelson

Determination: 30 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Harris) alleges that she was unjustifiably dismissed from her employment by the respondent (Talley's) and further claims that she was disadvantaged by unjustifiable actions of the employer. Talley's deny wrongdoing of any kind and in particular deny unjustifiably dismissing Ms Harris at all, alleging that the contract came to an end by frustration rather than any action of the employer.

[2] Ms Harris suffered an event of atrial fibrillation while working on 7 May 2008 and as a consequence of that medical event, she was hospitalised. Ms Harris claims that that was the first such event of atrial fibrillation but that contention is not accepted by Talley's whose evidence is that Ms Harris had admitted that there had been previous such events which she had treated herself. As Ms Harris was employed on board Talley's fishing vessel, the fact that Ms Harris had suffered this complaint was, at the very least, an event which Talley's felt required further follow up and inquiries.

[3] Ms Harris concluded a voyage on 28 March 2008. Voyagers for the vessel she was engaged on were typically for around 35 days. At the end of this voyage there was a five week lay-off and by 4 May 2008, the vessel was being readied for sea again. It was during this period when the vessel was being prepared for sea that Ms Harris suffered atrial fibrillation. She was admitted to Nelson hospital and promptly stabilised. Ms Harris attributes the ailment to stress occasioned by her allegation that she was being bullied by the cook (she worked partly as a galley hand).

[4] Ms Harris assumed that she would return to her seafaring duties after her recovery from atrial fibrillation, but received medical advice to the effect that she would never be able to return to sea.

[5] The legal position is that mariners are required to comply with the Maritime Rules which, pursuant to Part 34 of the then applying Rules, required clearance from an approved medical practitioner for any seafarer who was either evacuated from a vessel for health reasons or subject to health incapacity for over one month.

[6] The short point is that Ms Harris never obtained and provided to Talley's a medical clearance from an approved medical practitioner, although she provided information from other medical practitioners which she says is equivalent to the requirement of the Maritime Rules. However, the Maritime Rules are explicit that only an **approved** medical practitioner can give such a clearance and as a matter of fact Ms Harris was unable to obtain such a clearance from such a practitioner. Indeed, worse than that, when Ms Harris attended at the rooms of Dr Barber, one of Nelson's **approved** medical practitioners for this purpose, Dr Barber had refused her clearance and told her that she should not go back to sea at all.

[7] The position of Talley's is that the failure of Ms Harris to ever provide a clearance medical certificate as required by the Maritime Rules ultimately frustrated the employment agreement and eventually led inextricably to the termination of Ms Harris' employment by frustration. Notwithstanding that, Talley's evidence is that they offered Ms Harris the opportunity of working for them in shore-based jobs and she refused.

[8] Co-existing with Ms Harris' claim that she was unjustifiably dismissed by Talley's because of her medical condition is a claim that Ms Harris suffered disadvantage as a consequence of Talley's failure to deal with allegations of bullying

which Ms Harris says she brought to Talley's attention. Ms Harris' evidence is that she worked as a galley assistant with a number of cooks. In her first two years of employment, the relationships that she had with the supervising cooks were generally good, although there was one incident that she described in her evidence where she felt herself getting stressed as a consequence of the cook's behaviour.

[9] However, in December 2007 a new cook was appointed to the vessel and Ms Harris's evidence is that that relationship never went particularly well. She says that she felt *bullied and intimidated by his manner* and also had difficulties because the cook would not facilitate her ability to perform her other shipboard duties as a medic. The effect of this limitation, according to Ms Harris, was that she worked many more hours than was normal and she says this put her under additional stress.

[10] Ms Harris reports various conversations that she had with senior personnel at Talley's concerning her shipboard relationships. First her evidence discloses that she spoke to one of the skippers on her vessel about the difficulties in her relationship with the cook and she says that the skipper told her to *just zip it*, meaning presumably to simply put up with the situation because the skipper considered the cook was generally a good one. Furthermore, Ms Harris says that she had conversations with both Mr Hazlett, the General Manager of Talley's Deep Sea division and Ms Plum, the Human Resources Manager, in which she reported the difficulties in the shipboard relationships. In particular, her evidence suggests that those discussions with Mr Hazlett and Ms Plum related to her ability to perform the medic function as well as being a galley assistant.

[11] Talley's say that while they had various discussions with Ms Harris during her employment, at no stage did she ever raise bullying as an issue with any Talley's manager. Talley's policies and procedures are clear that in relation to shipboard issues, a complaining staff member must first raise the matter with their immediate superior (in this case the Master of the vessel) and then subsequently if no steps are taken, with a land-based senior manager. In Ms Harris' case, Talley's evidence is that if she spoke to a skipper of her vessel and he told her to *just zip it* (and that is not conceded) then that exchange would suggest that the skipper was not prepared to take any steps and on that footing, Ms Harris should have immediately referred the matter to land-based management. Although Ms Harris' evidence is that she *could not have done much more in letting my employer know about the stresses I was experiencing in*

my job as a result of the cook, Talley's say that none of the allegations of bullying or harassment or overwork were ever made to Tony (Mr Hazlett) or I (Ms Plum) and that she did not raise any issue of unrealistic expectations or harassment or bullying by the cook, skipper or anyone else.

[12] Further than that, Ms Plum makes the point that after Ms Harris' episode of atrial fibrillation when she and Ms Harris were having significant exchanges about that issue, she (Ms Plum) specifically asked Ms Harris about bullying because Ms Harris had presented an ACC form seeking compensation and alleging that Ms Harris was suffering from an anxiety state occasioned by work overload and *bullying from a colleague*. Ms Plum took the letter up with Ms Harris assertively and sought evidence of the bullying complained of. Ms Plum got the firm impression that Ms Harris was simply using that expression to bolster her ACC claim and that Ms Harris was not actually asserting that she had been bullied at all. Ms Plum was quite prepared to attest in her evidence that Ms Harris had denied that she was bullied when pressed, and that all Ms Harris would say was that her department manager did not understand her other work obligations.

[13] Despite this, Ms Plum investigated the situation further by talking to the skipper of the vessel. He thought Ms Harris' workload had been normal, denied that he had ever had a conversation with Ms Harris about bullying, and said that he had not seen any evidence of bullying or had heard any rumours about it on the vessel.

[14] The matter proceeded to the Authority in the usual way after the unsuccessful mediation failed to resolve the employment relationship problem between the parties.

Issues

[15] There are two issues for investigation by the Authority. The first is whether Ms Harris was bullied in her employment and whether that was properly dealt with by the employer. If proved, this issue grounds Ms Harris' claim of disadvantage. The second issue is whether Ms Harris was unjustifiably dismissed from her employment as a seafarer.

Was Ms Harris unjustifiably disadvantaged in her employment?

[16] I am satisfied that Ms Harris was not disadvantaged by unjustifiable actions of Talley's. The essence of Ms Harris' complaint under this head is that she was bullied, she complained about that bullying appropriately, and Talley's did nothing.

[17] For their part, Talley's say they were never advised of bullying by Ms Harris and while there were issues in her employment of a personal nature, when Ms Harris raised these matters with management, they were dealt with effectively and efficiently. Talley's say the first occasion on which they were formally advised of Ms Harris' allegations of bullying was in the present proceedings and given that they were served with the statement of problem well outside the 90 day window from the events complained of, they do not consent to the matter being raised out of time.

[18] I think the evidence on this matter is crystal clear. I am satisfied on the evidence I heard that Ms Harris never raised any bullying allegation with Talley's during the currency of her employment and that the only occasion on which it was formally put to Talley's was in the filing of the statement of problem. I do accept that Ms Harris spoke to one of her skippers about her concern that she was being bullied, but given that that individual effectively told her to put up with it, what she should have done next was to raise the matter with Talley's management as her employment agreement makes clear.

[19] I was impressed with the straightforward evidence given by Talley's management that bullying and harassment in any of its forms was simply not tolerated and was dealt with quickly and effectively. I am satisfied that had Talley's become aware of the complaint raised by Ms Harris they would have dealt promptly with the matter.

[20] I am particularly drawn to this conclusion because I accept Ms Plum's evidence that, when the latter was confronted with an ACC claim on 9 June 2008 prepared for Ms Harris which referred to bullying, Ms Plum asked Ms Harris for details of the alleged bullying and was clearly told it was more a lack of understanding by her department manager than actual bullying. Ms Plum told me, in answer to a question at the investigation meeting, that she formed the view that Ms Harris had effectively been *put up to it* in the completion of the ACC form on the

basis that unless there was a serious basis for her anxiety, she was unlikely to qualify for compensation.

[21] There is no evidence from Ms Harris to undermine the firm and clear testimony of Talley's that they were never told that she was being bullied and that had they been told, they would have dealt with it promptly and effectively. It follows that I am not persuaded that Ms Harris has suffered any disadvantage by reason of any unjustified action of Talley's.

Was Ms Harris unjustifiably dismissed?

[22] I am also not satisfied that Ms Harris was unjustifiably dismissed. The legal position is very clear. In terms of Ms Harris' obligations under the Maritime Rules, in the particular circumstances of her health at the relevant time, she was required to obtain a clearance to return to sea from a medical practitioner approved for that purpose. The short point is that she never did so. She obtained a variety of medical opinions from other practitioners including eminent men in their field, but none of the opinions advanced on her behalf met the qualifications in the law and thus Talley's was simply unable to continue with her employment in a seafaring capacity.

[23] Notwithstanding that, Talley's went out of their way to try to interest Ms Harris in shore based duties, but without success. I find that Talley's were under no obligation to do that but as a good and fair employer they took those extra steps in an effort to retain Ms Harris's services as she was seen to be a good employee who had useful skills and a good work ethic. However, it was a matter for Ms Harris to accept those offers or not, and she chose not to, as she is absolutely entitled to.

[24] For their part, Talley's were under a legal construct not to allow Ms Harris to return to seagoing duties without the appropriate medical clearance from an approved medical practitioner and that clearance was never provided. At the point at which the employment relationship ended on 5 November 2008 I am satisfied that the employment agreement between the parties had simply become frustrated. Of course, as his Honour Judge Couch remarked in *A Farmer v. A Worker* [2009] 1 ERNZ 7-

Frustration of contract occurs by operation of law. ... once a contract is frustrated, the parties are immediately discharged from any further performance of it.

[25] This was just such a position. Ms Harris had been seen by a certified medical practitioner pursuant to the Maritime Rules. That practitioner's advice both to Ms Harris and to Talley's was that Ms Harris would not be able to go to sea again. I am satisfied that Ms Harris was told on a number of occasions by Talley's that without that clearance to return to sea, she simply could not be engaged for a voyage. That Ms Harris then proceeded to obtain a variety of other medical views does not assist her case at all because none of those alternative views were views of a certified medical practitioner within the terms of the Maritime Rules. Unless and until Ms Harris had provided Talley's with a clearance to return to sea from a certified medical practitioner, she was simply unable to fulfil her seagoing duties and Talley's would have been in breach of the law in allowing for her to recommence those duties.

[26] Ms Harris advances other arguments in support of her cause. She alleges first that the certified medical practitioner who deemed her unfit for seagoing duties did not conduct a proper investigation and assessment of her. She also claims that she was not aware that other practitioners in the immediate vicinity were able to certify her as fit for sea (that is that the practitioner that Ms Harris actually saw (Dr Barber) was not the only certified medical practitioner in the Nelson district).

[27] Dealing with the second of those allegations first, it is common ground that neither of the parties knew that there were other certified medical practitioners in the Nelson area. Certainly Ms Harris did not know and I am satisfied that Talley's did not know either. Had they known and failed to tell Ms Harris that that was the position, then she might have been able to rely on that failure. I am satisfied that Talley's simply did not know that there were other options available.

[28] However, the important point to emphasise here is that it is not Talley's obligation to obtain certification; the obligation rests on the seafarer and even if there was an erroneous belief that only one medical practitioner was certified in the Nelson district, commonsense would suggest that other parts of the country were served by other certified medical practitioners. It follows that even if there were an erroneous belief that there was only one certified medical practitioner in Nelson, any reasonable inquiry would have established that there are other such practitioners in adjoining districts such as Marlborough or Christchurch or Wellington, for instance.

[29] As to the suggestion that Dr Barber did not conduct a proper investigation of Ms Harris, I am satisfied it is not part of the Authority's role to make comments about

a matter such as this. First, the Authority has heard no evidence from Dr Barber and accordingly it would be grossly improper to reach any conclusion based on Ms Harris' view alone. Second, the Authority is hardly in a position to make judgements about professional medical matters. In this respect, Ms Harris is like any other patient; if she is unhappy with the advice, treatment or investigation that she has been subject to by a particular medical practitioner, then she should seek a second opinion from a similarly qualified medical practitioner.

Determination

[30] It follows from the foregoing analysis that Ms Harris' claim fails in its entirety.

Costs

[31] Costs are reserved.

James Crichton
Member of the Employment Relations Authority