

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 112/09  
5144239

BETWEEN                      JANE HOPKINSON  
   Applicant  
  
AND                              COOK SADDLE SALOON  
   Respondent

Member of Authority:      James Crichton  
  
Representatives:            Shayne Boyce, Kevin Murray, Advocates for Applicant  
   Alyn Higgins, Counsel for Respondent  
  
Investigation Meeting:    23 June 2009 at Christchurch  
  
Determination:             23 July 2009

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**DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

[1]    The applicant (Ms Hopkinson) alleges that she was unjustifiably constructively dismissed by the respondent (the Saloon), treated with bad faith in breach of s.4 of the Employment Relations Act 2000 and also the subject of unjustified actions by the Saloon causing her disadvantage.

[2]    The Saloon denies any wrongdoing and says that Ms Hopkinson resigned suddenly and without notice leaving the Saloon in some real difficulty.

[3]    Ms Hopkinson was employed by the Saloon on and from 30 August 2008 as the head chef at the Saloon.

[4]    In effect, the Saloon wanted another senior person on site to assist in the overall management of the enterprise. The Saloon was managed by Ms Shelley Scott and Ms Scott's evidence was that, by reason of her family commitments, she sought

to recruit a head chef who could participate fully in the overall management of the business.

[5] Ms Hopkinson's first tasks were to review the kitchen operation and give it a thorough spring clean. Then, in conjunction with Ms Scott, Ms Hopkinson planned and introduced a new menu. There were some tensions around this new menu and its implementation and I will refer to them shortly.

[6] Ms Hopkinson had a permanent home in Motueka and she arranged a roster which had her working 10 days on and four days off so that she could return home to Motueka to spend time, initially with her partner (although he subsequently moved to Fox Glacier where the Saloon was located), and her two daughters who remained in the Nelson district.

[7] The evidence suggests that this roster arrangement was only partially successful in meeting all of Ms Hopkinson's needs. Certainly, on 3 October 2008, she had a tearful discussion with Ms Scott in which she indicated that she would need to resign, at least in part because of the difficulties she was having in balancing her family obligations and her obligations to the Saloon.

[8] Ms Scott told Ms Hopkinson that she could not simply resign because, amongst other things, her employment agreement required the giving of notice and Ms Scott encouraged Ms Hopkinson to take some extra time off with her family over the weekend and then return to work the following week.

[9] That is in fact what happened with Ms Hopkinson finishing her shift on Saturday, 4 October 2008, travelling home to Motueka and spending Sunday, 5 October 2008 with her children.

[10] A staff meeting had been organised for Monday, 6 October 2008 at 3pm. This meeting was to be a full staff meeting and was designed to iron out *the crinkles before the school holidays* as Ms Scott told me.

[11] Ms Hopkinson's evidence before the Authority was unequivocal that she planned and intended to be back on the job so as to attend the meeting at 3pm on Monday, 6 October 2008. She was overheard making that commitment by another witness and Ms Scott understood that that was the position as well. Ms Scott was adamant that attendance at the meeting was not optional because Ms Hopkinson was

not so much a player as the key player in respect of the implementation of the new menu and the consequences of it. Interestingly, in the first statement of problem filed in the Authority in this matter, Ms Hopkinson says something quite different. In a handwritten document entitled *Summary*, she includes the following bullet point:

- *I have four witnesses [to the saloon] on my day off insisting I drive back for a meeting she had called without my knowledge or agreeance [sic].*

[12] I am absolutely satisfied on the evidence I heard that the statement I have just referred to is mistaken and that Ms Hopkinson knew perfectly well that the meeting had been called before she left Fox Glacier and that she was required to be there.

[13] On Sunday, 5 October 2008, Ms Hopkinson became aware that she had been summoned to a meeting with her bank manager at 11am on Monday, 6 October 2008. She was at the time in reduced financial circumstances and it is clear that the bank was putting pressure on her in respect of meeting her obligations. In the late afternoon of that day, Ms Hopkinson thinks that she sent a text to Ms Scott telling her that she could not attend the staff meeting the following day because of the meeting in Motueka with the bank manager. Neither Ms Scott nor Ms Hopkinson could be absolutely sure which of them initiated the text messaging but it is clear that Ms Scott received a message from Ms Hopkinson to the effect that Ms Hopkinson would not be present at the staff meeting on Monday, 6 October 2008.

[14] Ms Scott's evidence was that it was *not acceptable* that Ms Hopkinson was *going to miss that meeting as the staff was paid to be there*. She said the meeting had been planned in advance, that Ms Hopkinson had been well aware of it when she left Fox Glacier and that she was expected to be there, not just because of her obligations to her employer but also because all the other staff were reliant on her presence as the principal architect of the changes to the menu.

[15] There was effectively a discussion by text messaging between Ms Scott and Ms Hopkinson with Ms Hopkinson giving evidence that she found the messages from Ms Scott stressful and rude and Ms Scott denying that she was anything other than direct. It is common ground that the text messaging ended with Ms Hopkinson telling Ms Scott by text that she would need to get advice which she did the following morning by talking to the Department of Labour.

[16] Ms Hopkinson thought about matters overnight and, having spoken with the Department of Labour on the Monday morning, she determined to resign immediately (notwithstanding the Department of Labour's advice not to do so), and she faxed her letter of resignation to Ms Scott that day so Ms Scott had it by the time the staff meeting happened.

[17] That letter of resignation, a copy of which has been made available to the Authority, makes clear that Ms Hopkinson will not work out her notice and lists a large number of grievances with the Saloon, none of which had been previously raised with the employer. The allegations include tampering with Ms Hopkinson's timesheet, *continual abuse and humiliation* in front of staff and customers, contradictory changes by management which confused staff, belittling of Ms Hopkinson's professional integrity, favouritism in drawing up rosters, and an inability to consult with Ms Hopkinson where appropriate.

[18] The letter concludes with a claim for a settlement to resolve the matters. There was further correspondence between the parties and, after the matter remained unresolved, the matter came before the Authority.

### **Issues**

[19] It will be convenient to consider, first of all, whether Ms Hopkinson has been constructively dismissed and, secondly, whether she has any other personal grievance or has been subject to bad faith behaviour by the employer.

### **Was Ms Hopkinson constructively dismissed?**

[20] I am satisfied on the evidence before the Authority that Ms Hopkinson was not constructively dismissed. The traditional questions to be asked in a constructive dismissal case revolve around whether the employee was given the offer of resignation instead of dismissal, whether there was a course of conduct by the employer with the dominant purpose of driving the employee out or whether there was a breach of duty by the employer so serious as to entitle the employee to walk away from the employment.

[21] Neither the first nor the second of those issues are in play in the present case. There is no evidence whatever that the Saloon gave Ms Hopkinson the option of resigning instead of being dismissed; indeed all the evidence suggests that the Saloon

desperately wanted the relationship to work and, until the end of the relationship, regarded Ms Hopkinson highly. Similarly, and for much the same set of reasons, there is no evidence either that the employer undertook a course of conduct designed to force Ms Hopkinson to quit. All the evidence suggests that the Saloon was committed to the relationship.

[22] That leaves only *the breach of duty* case as a possible basis for underpinning an allegation of constructive dismissal. I do not think there is any evidence to support this leg either. Ms Hopkinson relies on a number of complaints about the Saloon and its manager, Ms Scott which she effectively discloses for the first time in her letter of resignation.

[23] I have considered each of the allegations that Ms Hopkinson makes and reflected carefully on the evidence. Even taken together as a package, I do not think that the evidence before the Authority produces anything like the necessary matrix to support an allegation that a breach or several breaches of duty by the Saloon allowed Ms Hopkinson to effectively repudiate the employment agreement and walk away.

[24] Indeed, I am not satisfied that any of Ms Hopkinson's complaints disclose any breach of duty at all by the Saloon. The first and the predominant cause of the dismissal was the alleged inappropriate texting by Ms Scott. There is no evidence before the Authority about just what that texting constituted. The closest that I got to understanding just what was said was an observation by Ms Hopkinson's daughter who, having told me she could not remember what the texts said, then went on to say that she thought one of them had been something about Ms Scott needing Ms Hopkinson to be there and that her behaviour was not good enough. Ms Hopkinson Jnr then indicated to me that the texting got *bitchier* after that.

[25] Ms Scott acknowledged that she may well have said something of the sort referred to by the younger Ms Hopkinson and she said that she thought she would have said something to the effect that it was not acceptable that Ms Hopkinson was not going to be present, but she denied saying anything rude or dismissive and she thought that she was entitled to say what she did. I agree.

[26] This was a situation where the parties both knew that the meeting was happening, both knew that it was important and both knew that the timing of it was also important because of the upcoming school holidays. In the end, as Ms Scott

observed during her evidence, Ms Hopkinson made a choice to deal with personal matters (no doubt important in themselves) when she should have been at work and it is not unreasonable for Ms Scott to be somewhat put out by Ms Hopkinson's failure to attend a meeting which was plainly central to the bedding in of the new menu arrangements. In resigning her employment on 6 October 2008, Ms Hopkinson was simply carrying through with the threatened resignation of 3 October 2008, and for the same reasons.

[27] Next, Ms Hopkinson complains about her timesheet being *interfered with*. Ms Scott's evidence (which I accept), is that Ms Hopkinson's timesheets, which she checked along with all the other employees, were manifestly wrong claiming for hours of work which Ms Hopkinson simply had not performed. Ms Scott checked the start and finish times by reference to the security cameras which monitored all of the entry points to the Saloon and adjusted Ms Hopkinson's timesheets appropriately. That seems to me perfectly proper. Wage workers are required to keep adequate records of their time and a failure to do so (as in this case) invites precisely the sort of action that Ms Scott undertook and I find as a fact that she was perfectly entitled to do what she did. So again, I do not find any breach of duty by the employer.

[28] Ms Hopkinson says that Ms Scott was never there and that when she was, she was bad tempered and aggressive. Not surprisingly, Ms Scott denies those claims and brings evidence from a young chef who worked with Ms Hopkinson who, amongst other things, said that he had never heard Ms Scott speak inappropriately to any member of staff, including Ms Hopkinson. Furthermore, Ms Scott makes the point that she has had a number of staff who have worked for her for a number of years and that she doubts that would be the case if she was as mercurial and ill tempered as Ms Hopkinson makes out.

[29] I do not think Ms Scott has behaved inappropriately. In the present case, even if what Ms Hopkinson alleges was true (and I do not accept that on the evidence), then my finding would be the same that there is no breach of duty by an employer occasionally speaking firmly or directly to a staff member or even being inconsistent or mercurial. There can be no counsel of perfection in matters of this kind.

[30] The suggestion Ms Hopkinson makes that her professional integrity was called into question by Ms Scott is also resisted by Ms Scott's evidence. Ms Scott told me that she effectively gave Ms Hopkinson *carte blanche* in the kitchen and encouraged

her to re-do the menu which is in fact precisely what happened and it was the implementation of that new menu which was going to be discussed at the abortive meeting on 6 October 2008. When I questioned Ms Hopkinson about this allegation, she seemed to find difficulty in accepting that there may be circumstances in which the employer's view must, of necessity, prevail just because the employer was the employer. I do not think this allegation is made out.

[31] Ms Hopkinson also alleged that there was favouritism in the drawing up of rosters but she presented no tangible evidence of this and Ms Scott denied the allegation. I take that matter no further.

[32] Finally, Ms Hopkinson alleged that Ms Scott was never there at the workplace but that allegation is without substance either. It is clear from the evidence that the two women effectively worked opposing rosters so that there was always one of them on duty at any one time. That was the whole point of the recruitment of Ms Hopkinson. It follows that for much of the time that Ms Hopkinson would have been on duty, Ms Scott would not have been; and when she was on duty, she would have worked in different parts of the business. Neither party alleged that Ms Scott ever worked in the kitchen so the contention that Ms Scott was never there seems to fly in the face of the other known facts. Furthermore, if Ms Scott was never there, it is difficult to know how Ms Hopkinson can have observed Ms Scott allegedly behaving badly. I am not satisfied this claim is made out either.

[33] In my judgment, none of the matters alluded to in Ms Hopkinson's letter of resignation are sufficient in themselves to constitute a potential breach of duty by the employer and indeed I am not satisfied that there is any evidence at all that the employer breached its obligation to Ms Hopkinson, either by dint of any of the matters Ms Hopkinson specifically refers to or indeed any other way.

### **Was Ms Hopkinson unjustifiably disadvantaged?**

[34] Because I have made a finding that there has been no breach of duty at all by the Saloon, it follows that I am unable to find any basis on which Ms Hopkinson has suffered disadvantage as a consequence of unjustifiable actions of the employer. There are, in my opinion, no unjustifiable actions of the employer and any disadvantage which Ms Hopkinson has suffered is a consequence of her own decisions freely made.

## **Determination**

[35] I am satisfied on the evidence I have heard that Ms Hopkinson has neither a personal grievance as a consequence of a constructive dismissal nor a personal grievance as a consequence of having suffered an unjustified action. In my view, the evidence supports the conclusion that Ms Hopkinson chose to resign her employment because the balancing of her work obligations and her personal obligations (in particular her duty to her family) simply became too much for her and in consequence she chose to resign her employment.

[36] I do not think that the Saloon and its manager, Ms Scott, did anything to facilitate or encourage that decision and I do not think the evidence supports a conclusion that there has been any breach of duty by the Saloon, either in respect of the matters specifically referred to by Ms Hopkinson in her letter of resignation or indeed in other respect covered by the evidence. For the same reasons, the alleged breach of Section 4 of the Act is also not made out.

## **Costs**

[37] In the particular circumstances of this case, I have decided to deal with the question of costs in this determination.

[38] Ms Hopkinson will have her own costs to meet and while in the normal course of events the completely successful party might expect to receive a contribution to their costs from the unsuccessful party, this is a case where the Authority is entitled to take judicial notice of the fact that, on the evidence, Ms Hopkinson has limited means, and on that basis an award of costs against her would be simply punitive and arguably not able to be met in any event.

[39] Accordingly, costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority