

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 59/08
5101764

BETWEEN

JULIE JOHNSON
Applicant

AND

THE TRAVEL PRACTICE
LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Amanda Abbott, Counsel for Applicant
Dennis Price, Advocate for Respondent
Investigation Meeting: 14 April 2008 at Christchurch
Determination: 7 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Johnson) alleges that she was unjustifiably constructively dismissed from her employment by the respondent (The Travel Practice).

[2] The Travel Practice resists that claim and contends that Ms Johnson resigned of her own volition.

[3] Ms Johnson was employed from 4 April 2007 until 12 June 2007 as a *Junior Processor*.

[4] The employment was covered by a written employment agreement but this was not executed by the parties immediately the employment commenced, it being dated 20 April 2007.

[5] There is a dispute about the hourly rate which Ms Johnson ought to have been paid; she understood she was offered and accepted \$20 per hour in her initial

interview with Mr Price but the employment agreement provides for \$18.80 per hour and it is that latter rate which she was actually paid.

[6] Ms Johnson gave evidence that she returned to the workforce after sixteen years absence in a job at the retailer Jean Jones where she worked for approximately three months before she was offered and accepted the position at The Travel Practice.

[7] Ms Johnson is apparently an experienced traveller and had recently completed a training course at a training institution, but had never before worked in the travel industry. It was an ambition of Ms Johnson to do so.

[8] Ms Johnson and Mr Price the Managing Director of The Travel Practice were known to each other and had an existing friendly relationship when the job offer for Ms Johnson to work at The Travel Practice was made.

[9] Ms Johnson gave evidence that there were, almost immediately, difficulties in the employment. She was discouraged, she said, about Mr Price's behaviour in the workplace and in particular his language and his uncertain mood.

[10] Ms Johnson was also concerned at the absence of training for her in her new role. She had never worked in a travel agency before and I noted above, had been absent from the workforce for sixteen years until comparatively soon before she accepted the position at The Travel Practice. She was not familiar with the booking system that The Travel Practice operated and the evidence suggests that she increasingly felt out of her depth.

[11] The evidence of The Travel Practice's witnesses suggests that Ms Johnson was not coping either and Mr Price gave evidence that, as the person who had hired Ms Johnson, he increasingly felt that she was not fulfilling his aspirations for the role in which he had placed her.

[12] Accordingly, on 12 June 2007, three members of the management team of The Travel Practice met to discuss how to get better performance from Ms Johnson and determined to place her under the direct control of a senior staff member Ms McGregor-Little. That meeting decided that Mr Gray who was the Administration Manager would talk to Ms Johnson about this change in her role.

[13] Mr Gray met with Ms Johnson later that same day with a view to carrying out those instructions. In fact, the meeting took a change of direction with Mr Gray and Ms Johnson discussing Ms Johnson's unhappiness in the workplace, her feeling of being superfluous, being a liability and her conviction that she should seek employment elsewhere.

[14] Mr Gray made what he described as a *spur of the moment* decision and, rather than indicate to Ms Johnson what it had been agreed it would discuss with her, namely the proposed new role within The Travel Practice, proceeded to explore with Ms Johnson whether it would be better if she left the work place.

[15] There is dispute between Ms Johnson and Mr Gray about who initiated the discussion about Ms Johnson leaving; Ms Johnson is very clear that Mr Gray made the suggestion first and that she felt she was under pressure to go, while Mr Gray was equally adamant that while the conversation was a free flowing one, it was Ms Johnson's initiative that she leave the workplace.

[16] The discussion in Mr Gray's office ended with Ms Johnson absenting herself on the footing that she would work out a period of notice. After leaving Mr Gray's office, Ms Johnson headed for the toilets in distress. On the way, she met with Ms McGregor-Little who, it seems, tried to comfort Ms Johnson. There was some exchange between the two women with Ms Johnson being adamant that she took from the exchange that Ms McGregor-Little knew that Ms Johnson was to lose her job before it had even happened.

[17] Ms McGregor-Little on the other hand was equally clear that she would not have said anything to that effect because she genuinely did not know that that would be an outcome of the discussion between Ms Johnson and Mr Gray. She confirmed and I accept that there was nothing in the first meeting on the day between the three members of the management team which would have led her to believe that Ms Johnson's job was in jeopardy or that Ms Johnson would be *forced out*.

[18] However, Ms Johnson was left somehow with the view that Ms McGregor-Little knew more about her situation in advance than she ought to have and accordingly, Ms Johnson returned to Mr Gray and indicated to him that she wished now to leave immediately. That is in fact what happened.

Issues

[19] Ms Johnson alleges that by reason of Mr Price's moods and bad language and by reason of The Travel Practice's failure to adequately train her, she increasingly came to dread the employment and became more and more unhappy in the workplace. The Authority needs to establish whether in either of these respects, The Travel Practice breached its obligations to Ms Johnson.

[20] The second issue for determination is whether Ms Johnson was in fact unjustifiably dismissed by Mr Gray in the discussion that the two had in Mr Gray's office on 12 June 2007. There is no suggestion that Ms Johnson was conventionally dismissed; the allegation is that she was constructively dismissed in that her resignation was in truth not given freely.

Mr Price's behaviour in the workplace

[21] Ms Johnson complains that Mr Price regularly used bad language and that his mood changes were such as to frighten and unnerve her. She complains also that Mr Price had a similar effect on other staff and implies that other staff were too frightened to complain about it.

[22] Conversely, Mr Price alleges that Ms Johnson was herself guilty of using bad language and there was other evidence from Ms McGregor-Little that Ms Johnson used inappropriate gestures in the workplace to the extent that those gestures were themselves offensive to Ms McGregor-Little.

[23] Ms McGregor-Little also indicated in her evidence before the Authority that she had worked with Mr Price for many years and had got used to his way of operating which she described in a rather kindly fashion as *eclectic*. Ms McGregor-Little accepted that other staff might find Mr Price's way of working unusual.

[24] Ms Johnson was new to the workplace being the only new staff member taken on by the business in six years; in addition, as I have already made clear, Ms Johnson was herself only a very recent returnee to any workplace and as a consequence may have been more susceptible to unusual behaviour.

[25] I am absolutely satisfied that both Mr Price and Ms Johnson used bad language in the workplace. Both admit as much and in those circumstances, it seems

difficult to sheet home to the employer culpability for earthy language when the complainant herself acknowledges using similar means of communication.

[26] In relation to Ms Johnson's allegation that Mr Price was bad tempered and mercurial, I have reached the conclusion based on the evidence I heard that this probably was an accurate enough representation of the position. Mr Price said that he was not bad tempered but he acknowledged that he got frustrated from time to time. I think Ms McGregor-Little's description of Mr Price's behaviour as *eclectic* and her acknowledgement that *some staff did find (Mr Price's) manner different* enables me to reach the conclusions that I do.

[27] However, the fact that Mr Price's manner was less than perfect cannot, in my view, of itself ground a basis for complaint. It is clear from the case law that employees cannot expect their employer to be perfect, nor even to particularly like or respect their employer. The issue will always be whether there is a proper basis for a finding that the employee has had his or her legitimate employment rights breached by action of the employer, not whether or not the employer's behaviour is likeable.

Constructive Dismissal?

[28] Ms Johnson says that she was constructively dismissed by Mr Gray on behalf of The Travel Practice when the latter called her into his office on 12 June 2007 ostensibly to discuss with her the proposed change in her duties.

[29] I have reached the conclusion that Ms Johnson has made out her claim for a constructive dismissal for the reasons which I now enumerate.

[30] The most puzzling aspect of this case is why Mr Gray chose not at any point to indicate to Ms Johnson the nature of the employer's proposals in respect to her new work conditions. Instead, the meeting between Mr Gray and Ms Johnson got embroiled in discussing Ms Johnson's unhappiness in the workplace, her feeling of being surplus to requirements, her feeling of being a liability to The Travel Practice and her interest in seeking alternative employment. I am absolutely satisfied on the evidence I heard that all of those matters were canvassed in the meeting between Ms Johnson and Mr Gray and that having heard those quite negative views from Ms Johnson, Mr Gray referred to making a *spur of the moment* decision not to refer to the proposed new opportunity for Ms Johnson in the workplace.

[31] One can only try to imagine what the result might have been had Ms Johnson known about that proposal. If, as The Travel Practice contend, the impetus for the resignation came from Ms Johnson then it is difficult to see how she would have felt impelled to resign if she had known about The Travel Practice's new proposal for her work. Clearly, she was terribly keen to develop a career in the travel industry and this opportunity seemed to be really important to her. She said in her evidence (and I accept) that despite her unhappiness, she wanted to work through the difficulties and continue to try to make a go of it. I frankly prefer that view of events to the view advanced by the employer that it was Ms Johnson herself who raised first the possibility of her leaving the workplace.

[32] I think it more rather than less likely that it was Mr Gray who initiated that suggestion and thus set up the possibility of a constructive dismissal.

[33] However, even if I am wrong about which party took the initiative in raising the prospect of severing the employment relationship, I am satisfied on the balance of probabilities that, by failing to mention the new work opportunity (as it appears he was asked to do) and instead by concentrating on Ms Johnson's negative thoughts about the workplace and her difficulties in it, Mr Gray, to use the memorable phrase of counsel for the applicant, *left open the door* to a constructive dismissal occurring.

[34] It seems inconceivable, given Ms Johnson's enthusiasm for this opportunity, notwithstanding the difficulties that she says she experienced, that she would not have grasped this re-worked job description with both hands if she had been told about it. That being the position, I am impelled to the conclusion that this was in truth a dismissal and not a resignation.

[35] On my analysis of the facts that I heard through the evidence of the witnesses, I am satisfied that this is an example of those cases where there is a straightforward breach of duty by the employer. It is clear that everybody at the workplace knew that Ms Johnson was unhappy and was having difficulty fitting in. Given that she had been away from work of any description for sixteen years and had never worked in the travel industry at all, that seems hardly surprising. That the employer should try to re-jig her work so as to deal with some of her concerns seems entirely appropriate and responsible. However, Mr Gray, in his delegation by his colleagues to advise Ms Johnson of the employer's proposal failed to deliver the message and as such I am satisfied that The Travel Practice was in breach of its duty to Ms Johnson to the extent

that even if, in truth, Ms Johnson had actually resigned her position, that resignation was achieved in the context of a fatal failure by the employer to provide Ms Johnson with the information on which she could have made a decision to remain in the employment and indeed on which she would be likely to have made a different decision had she been in possession of that information.

Determination

[36] I am satisfied that Ms Johnson has a personal grievance by reason of having suffered a constructive dismissal at the hands of The Travel Practice. Accordingly, Ms Johnson is entitled to remedies.

[37] As I am required to do by s.124 of the Employment Relations Act 2000, I have reflected on the extent to which Ms Johnson may have contributed towards the situation that gave rise to her personal grievance and then to reflect on whether a reduction in the remedies that would otherwise be awarded ought to be made. I have reached the conclusion that Ms Johnson bears no responsibility whatever for the circumstances giving rise to her personal grievance and accordingly it is not necessary for me to consider further the question whether she ought to have any reduction in the remedies that I would otherwise award.

[38] Ms Johnson is entitled to compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 for hurt, humiliation and injury to her feelings as a consequence of the unjustified dismissal. I award Ms Johnson the sum of \$4,000.00 under this head.

[39] Ms Johnson is also entitled to reimbursement of lost wages as a consequence of the dismissal. The calculations for the lost wages provided in the statement of problem proceed on the footing that Ms Johnson's hourly rate was \$20 per hour. In fact, there was no evidence before the Authority that she was to be paid \$20 per hour other than her bald assertion; the agreement which both parties signed gives her hourly rate as \$18.80 per hour and I have calculated her lost wages on that lower figure. On that basis then and using the same principles set out in the statement of problem, Ms Johnson is entitled to \$3,875.08 gross in respect to her lost wages.

[40] Lastly, Ms Johnson should be reimbursed the \$70 filing fee for the matter to be heard in the Authority.

[41] I direct that The Travel Practice Limited is to pay to Ms Johnson in the following sums:

- (a) Compensation of \$4,000.00 net;
- (b) Lost wages of \$3,875.08 gross;
- (c) \$70 net filing fee.

Costs

[42] Costs are reserved. The parties are directed to try to resolve the question of Ms Johnson's costs between them but failing any agreement, each party is to file and serve a memorandum setting out their submissions on costs with Ms Johnson to file her submission first and the respondent employer to have 14 days from the date of receipt of Ms Johnson's submissions to file their response with the Authority and serve that on Ms Johnson's counsel.

James Crichton
Member of the Employment Relations Authority