

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 412/09
5149282

BETWEEN GINNY KEVEY
 Applicant

AND INSPIRE ENTERPRISES LTD
 Respondent

Member of Authority: James Wilson

Representatives: David Feist for the applicant
 Don Bain (Director) for the respondent

Investigation Meeting: 5 August 2009 at Auckland

Submissions received: 17 August 2008 from the applicant
 18 August 2008 from the respondent

Determination: 18 November 2009

DETERMINATION OF THE AUTHORITY

Ginny Kevey's employment relationship problem

[1] In December 2007 Ms Kevey was appointed as Day Manager at the Olive Coffee Shop which is owned and operated by Inspire Enterprises Ltd (Inspire). Her duties, as set out in her employment agreement, were to "manage the daytime business". For the first 9 or so months of her employment Ms Kevey reported directly to the directors of the company, Don Bain, Graham Wilkinson and Stephen Long. In October 2008 the directors decided to appoint Robert Hill to the position of Business Manager. Mr Hill's responsibilities included the overall management of the business including being Ms Kevey's manager.

[2] Although Ms Kevey was upset at the manner in which Mr Hill was appointed and the effect of his appointment on her role, she continued working until December 2008. In early December she sought the assistance of an employment advocate (Mr Feist) and attempted to bring her concerns to the attention of the directors. Unfortunately Mr Feist was unable to arrange a meeting to discuss Ms Kevey's concerns and on 9 December she wrote to the directors resigning from her position with effect from the 30 December 2008, specifically "*due to the fact that you have cancelled two meetings with my solicitor about my employment at Olive.*"

[3] On 19 January 2009 Mr Feist wrote to the directors of Inspire formally raising a personal grievance on Ms Kevey's behalf for *unjustified disadvantaged and constructive dismissal*. In her subsequent application to the Authority Ms Kevey sought to recover lost wages from the time of her resignation until she obtained further employment, compensation for hurt and humiliation of \$10,000, a penalty against Inspire Enterprises for the unilateral changes to her employment agreement, and legal costs.

The issues for determination

[4] The first issues for determination in this matter are whether or not the actions of Ms Kevey's employers were to her disadvantage and unjustified and whether or not those actions were so undermining of the employment relationship as to give her no option but to resign i.e. that she was constructively dismissed. If I find that Ms Kevey does have a personal grievance against her employer due to their unjustified actions and/or her constructive dismissal, it will then be necessary to determine whether or not Ms Kevey is entitled to the remedies she is seeking.

The events which led to Ms Kevey's resignation

[5] In order to determine whether or not Ms Kevey has a personal grievance it is necessary to briefly outline the series of events which culminated in her resignation. Many of the basic facts are not contested although in several instances the parties have a different recollection of the specifics.

[6] Ms Kevey says that the first few months of her employment went well. However in July or August Mr Hill was taken on for a trial period as a barista. However Ms Kevey says that he proved to be unsatisfactory and she terminated his trial one week earlier than expected.

[7] On about 14 October 2008 Ms Kevey met with the directors at a meeting which she thought was to be routine. During the meeting one of the directors suggested that they were considering employing a general manager so that they, the three directors, did not have to spend so much time involved in the day to day running of the business. Ms Kevey said that when meeting ended she was very concerned as she felt that a general manager would take away her job. Immediately following the meeting another employee told her that the directors had already informed her that they had appointed Mr Hill to the position of general manager. She was also advised by other staff that they had also been told that Mr Hill had already been appointed. Ms Kevey says that she was very upset as she believed that the directors had *sat in front of me for three quarters of an hour and lied*. Ms Kevey says that she then confronted one of the directors and he admitted that it was true that they had appointed Mr Hill but there was going to be no change in her duties, her days off or her shifts.

[8] Ms Kevey says that despite being extremely upset she continued to work as best she could. Within a couple of weeks of starting Mr Hill decided that he did not wish the night manager to start work until 5 pm and, contrary to her employment, agreement within a couple of weeks her average hours had gone up to 48 per week and subsequently went to as high as 55 hours per week.

[9] In early November Ms Kevey said she asked Mr Hill to look at her employment agreement and meet with her in order to find out exactly where she stood. She says that during that meeting Mr Hill suggested that she sign a new employment agreement or resign. She said that Mr Hill indicated that she had not lived up to the role of manager at Olive, that she was being paid far too much and that if she were to resign he would give her a reference. The following morning Mr Hill gave her a draft employment agreement for the position of senior cafe assistant.

[10] Mr Hill's recollection of these discussions is somewhat different. He says that Ms Kevey had told him that she wasn't prepared to work more than 45 hours per week without additional payment. He says that Ms Kevey asked if she could be paid an hourly rate instead of a salary and that he explained that to achieve this she would have to be employed as a senior cafe assistant. He says that there was absolutely no pressure on her to change her employment arrangements and that the discussion had been simply one of alternatives which she may wish to consider.

[11] After several incidents including changes to her duties and her roster and disagreements over hours of work for both Ms Kevey and other staff, Ms Kevey again discussed the position with Mr Hill. She says that Mr Hill said that she was not living up to her contract, that the directors should never have made promises to her regarding her hours of work and that if she wanted to stay on the current agreement her hours work would need to increase. She said she believed that Mr Hill was putting pressure on her to force her to resign and, after speaking to her family she decided to contact an employment lawyer. In early December she also visited her doctor regarding her stress levels and was given five days sick leave due to stress.

[12] There is some confusion regarding Mr Feist's attempts to arrange a meeting with Mr Kevey's employers. However it is clear that an initial, tentative arrangement was made for a meeting on Wednesday 3 December 2008 but that this was postponed due to the unavailability of at least one of the directors. Another (it seems also tentative) arrangement was made for a meeting on 10 December but again this meeting did not eventuate and one of the directors contacted Mr Feist to advise that the three directors would not be able to attend a meeting until the New Year. At about the same time one of the directors spoke to Ms Kevey and was critical of her choice of advocate. Also about this time Mr Hill advised Mr Kevey of another change to her roster. Ms Kevey says that her duties had been taken off her, she was being bullied by Mr Hill and put under pressure to sign a new employment agreement and the directors, despite their promises that her employment would not be affected, appeared to be avoiding meeting with her and her representative. Ms Kevey says that she became increasingly stressed and felt that she had no option but to resign.

Legal considerations and discussion

[13] The law regarding constructive dismissal is well-established. In 1985 the Court of Appeal in *Auckland etc Shop Employees etc IUOW v Woodworth (NZ) Ltd* (1985) ERNZ Sel Cas 136, held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and/or
- (c) A breach of duty by the employer causes an employee to resign.

[14] Mr Feist, for Ms Kevey, says that all three of these headings apply to Ms Kevey's dismissal. He says that Mr Hill suggested to Ms Kevey that she resign or accept a lower paid position, he subsequently unilaterally altered her hours of work and undermined her position in an attempt to coerce her into resignation and the directors breached their duty to Ms Kevey by unilaterally removing her management responsibilities and by refusing to meet with her to discuss Mr Hill's behaviour.

[15] The directors say, and I accept, that they had no intention of altering Ms Kevey's employment agreement or her hours of work. They simply wished to reduce the amount of time they spent in the day-to-day operation of the business. Unfortunately the manner in which they reached this decision and conveyed it to Ms Kevey fell far short of desirable. At the meeting with Mr Kevey on 14 October 2008 they deliberately misled her. It is clear that by that date they had already offered Mr Hill the new position. It is not surprising that Ms Kevey felt aggrieved and undermined by this deception. However if this had been the only difficulty, Ms Kevey would probably not have been able to mount a successful personal grievance claim against her employer. She, to her credit, continued in her position and attempted to "make the most" of the situation.

[16] While I accept that the directors did not intend that Ms Kevey's position be downgraded or that her duties and the hours of work be altered, it seems that Mr Hill had other ideas. It seems that Mr Hill, despite the directors assurances, was not happy with Ms Kevey's arrangements and made this very clear to her. While he denies

asking Ms Kevey to resign or putting pressure on her to change her employment agreement, his evidence when questioned by the Authority was equivocal. He accepted that he "may have" used words which indicated that he thought that Ms Kevey was overpaid and underperforming and that the business would be better off if she resigned or became an hourly worker. Mr Hill was Ms Kevey's manager. The directors may not have intended him coerce Ms Kevey to resign but that, I find, is what he set out to do.

[17] Finally, when she did attempt to discuss her concerns with the directors they seemed disinterested to say the least. The directors say that they were not aware of Ms Kevey's concerns. It is a little unclear as to why this was the case. Ms Kevey attempted to hold a discussion with at least one of the directors although perhaps she was not as explicit or as forceful as she might have been. It is probable that the directors were relying on Mr Hill's assurances that all was well. If Mr Hill was reporting Ms Kevey's concerns (and it appears he was not) the directors did not seem to appreciate the level of Ms Kevey's stress. Certainly when approached by Ms Kevey's representative, Mr Feist, they gave little or no priority to attending a meeting to discuss her concerns. Rather than attempting to enter into a dialogue they were critical of her choice of advocate.

[18] In the interest of fairness I should be absolutely clear: my criticism of the directors of Inspire Enterprises is that, as extremely busy businessmen they relied, understandably but, in my finding naively, on their general manager and accepted, it seems without question, his reportage of events.

Determination

[19] Ms Kevey has claimed that she was disadvantaged by the actions of her employer by the downgrading of her position by the appointment of Mr Hill. I do not accept this claim. As I have already said, I accept the assurances of the directors of Inspire that they had no intention of downgrading Ms Kevey. Their motives in appointing Mr Hill were simply to relieve themselves of the day-to-day involvement in the business. Handled properly this appointment would not have resulted in any detriment to Ms Kevey and in fact could have improved her situation. **The appointment of Mr Hill did not unilaterally change Ms Kevey's employment**

agreement and was not by itself to her disadvantage. She does not have a personal grievance against her employer in this regard.

[20] The manner in which Mr Hill's appointment was conveyed to Ms Kevey, Mr Hill's ongoing attempts to alter her hours of work and persuade her to either resigned or sign a new employment agreement, and finally the directors apparent reluctance to meet with her and her representative, cumulatively placed Ms Kevey under such stress, I find, that she had no option but to resign. **Ms Kevey was constructively dismissed and has a personal grievance against Inspire Enterprises Ltd.**

Remedies

Contribution

[21] If there is any criticism to be levelled at Ms Kevey it is that she was not forceful enough in bringing her concerns to the attention of the directors of Inspire. However given the way in which they had misled her regarding Mr Hill's appointment and the way in which her attempts to arrange a meeting with them were deflected, her lack of assertiveness in this regard is understandable. This lack of assertiveness can not be said to have contributed to the situation that gave rise to her personal grievance. **In terms of section 124 of the Employment Relations Act (the Act) I consider that Ms Kevey did not contribute towards the situation that gave rise to her personal grievance.**

Reimbursement of lost wages

[22] Ms Kevey's last day at work was 30 December 2008. She commenced a new position approximately one month later although for the first week this new position was part-time. The loss of wages from when she left her job at Inspire until she took up full-time work was \$3992 (i.e. one month at her previous salary rate plus the difference between the old rate and the amount she earned in her first, part-time, week of employment). Although Ms Kevey's new position is somewhat less than the salary she received from Inspire, I do not accept her claim for reimbursement of the difference in salary rates for ensuing the two months. **Inspire Enterprises is to reimburse Ms Kevey the sum of \$3992, less tax, as reimbursement for the wages she lost as a result of her constructive dismissal.**

Compensation for hurt and humiliation

[23] Ms Kevey's evidence, which I accept, is that she was extremely stressed by the events leading up to and resulting in her constructive dismissal. Immediately prior to her resignation this anxiety resulted in her having to take a week off work. Under the circumstances I assess the appropriate level of compensation under for this stress to be \$6000. **In term of section 123(1)(c)(i) of the Act, Inspire Enterprises Ltd is to pay Ms Kevey the sum of \$6000, without deduction, in compensation for the hurt and humiliation her constructive dismissal caused her.**

Penalty

[24] In her original statement of problem Ms Kevey requested that I impose a penalty on Inspire Enterprises (in the sum of \$10,000) for the unilateral changes made to her employment agreement. However in his closing submission's Mr Feist did not address this claim. In any event I have found that Mr Hill's appointment did not unilaterally alter Ms Kevey's employment agreement and no penalty could therefore be considered. Although Ms Kevey says that Mr Hill unilaterally changed her hours of work she appears to have accepted those changes at the time. The altered hours seem to be, for the most part, within the scope of those provided for in her employment agreement and in excess of what she had previously been working. **For these reasons I decline to impose a penalty on Inspire Enterprises**

Costs

[25] Costs are reserved and parties should attempt to settle this issue between themselves. If they are unable to do so Ms Kevey may file and serve submissions in respect to costs within 28 days of the date of this determination. Inspire will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority