

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Lyn Leslie (Applicant)
AND Kate Sheppard Lifecare Centre Ltd (Respondent)
REPRESENTATIVES Ian Thompson, Advocate for Applicant
Michael Kirkland, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 14 June 2005
DATE OF DETERMINATION 20 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

- [1] The applicant (Ms Leslie) says that she has suffered an unjustifiable action of the employer to her disadvantage and/or that she has been unjustifiably constructively dismissed.
- [2] The respondent (Kate Sheppard) denies those allegations.
- [3] The parties attended mediation but were unable to resolve their differences.
- [4] Ms Leslie was employed as a cook by Kate Sheppard on 1 January 2002. An individual employment agreement does not seem to have been signed until 14 June 2002 and there was a variation executed on 13 January 2004.
- [5] In June 2003 Kate Sheppard appointed Karen Harris as operations manager. Ms Harris formed a view that the growth of Kate Sheppard, and particularly the commissioning of a new 100 bed wing, required some changes in the organisation structure of the business.
- [6] Accordingly, Kate Sheppard determined to recruit a food services manager and Ms Leslie was encouraged to apply for that position.
- [7] Ms Leslie was unsuccessful for that position. The unchallenged evidence of Ms Harris was that during the interview for the position of food services manager, Ms Leslie had asked whether, if successful, she would get a pay increase and she was told that she would get a “substantial” pay increase.
- [8] Having been unsuccessful in the application that she made for the food services manager position, Ms Leslie was offered the position of first cook (although in fact there seems to have been little difference between the first cook and an ordinary cook).

[9] Ms Leslie's evidence was that about this time, she was offered a better position at another rest home and that to help her make a decision she asked to meet with Ms Harris, Kate Sheppard's operations manager. She says this meeting took place in August 2003 and she was adamant that Ms Harris promised her "a substantial pay rise". She says that it was on the basis of this important discussion that she decided to accept the position of first cook at Kate Sheppard rather than take the position in the alternative rest home that she had been offered.

[10] Ms Harris remembers having a discussion with Ms Leslie in August of 2003 although her evidence was clear that she did not remember being told about an alternative position and critically, she was absolutely adamant that she had not promised a substantial increase in respect to the position of first cook.

[11] Indeed Ms Harris' evidence and the evidence of all of the witnesses from Kate Sheppard was quite explicit that there would be no possible basis on which a "substantial increase" could have been justified for the position of first cook because in effect, although the position attracted the curious qualification of the word "first" before the word "cook" it was actually a less onerous position than the position which Ms Leslie had previously occupied which was simply styled "cook".

[12] Ms Harris' evidence was that the new position involved less responsibility, a change from split shifts to straight shifts but while maintaining the same income level.

[13] Ms Harris' evidence (again unchallenged) was that once an appointment had been made to the position of food services manager (the position that Ms Leslie had unsuccessfully applied for), Ms Harris had no further discussion with Ms Leslie about pay increases.

[14] Tony Carter was appointed food services manager and he gave explicit evidence about the significant difference between the earlier (and comparatively onerous) position of cook which Ms Leslie occupied and the much less challenging position of first cook which she subsequently occupied.

[15] Mr Carter's evidence satisfied me that Ms Leslie was mistaken in her belief that her new position had greater responsibility than her old.

[16] Basing her argument exclusively on the promise which she believes was made in August 2003 by Ms Harris, Ms Leslie made a series of attempts to get the employer to give her the substantial pay rise which she believed she had been offered. She wrote to Mr Carter on 24 October 2003 raising a number of matters one of which was the alleged promise of a pay rise.

[17] In that letter, Ms Leslie draws attention to the fact that she actually received a modest pay increase of 25c an hour but she clearly did not regard that increase as being the "substantial" pay rise that she says she had been promised by Ms Harris.

[18] She indicates in her letter that she thinks she is entitled to a rise to a figure of somewhere between \$15.75 and \$16.50 an hour. However Mr Carter's evidence to me was that fully qualified chefs working in Christchurch hotels would be paid in the region of \$16.50 to \$18.50 an hour so those figures that Ms Leslie seems to be relying upon are probably not realistic.

[19] There was no response to that letter from Ms Leslie and Kate Sheppard's witnesses all acknowledged that that was at the very least, discourteous to Ms Leslie but Kate Sheppard's managers each thought the other was dealing with the matter.

[20] Having not had a response, Ms Leslie wrote again on 23 January 2004. Not surprisingly this letter is more strident in tone, referring to legal advice being taken if the matter is not resolved

promptly, but again referring to a request for a wage increase to an hourly rate of between \$15.75 and \$16.50.

[21] Ms Leslie got a response to this letter dated 3 February 2004. That letter politely says that Ms Leslie has had all the increases that she is going to get and that the employer is not in a position to pay her any more than she is presently being paid. Ms Leslie's evidence was that having received that letter from the employer she immediately resigned giving two week's notice. Ms Leslie's evidence was that she could no longer work in that environment given what had happened.

Issues

[22] The three issues that I am required to determine are :

- (a) Was there a promise made to Ms Leslie in August 2003 that she would get a substantial increase in pay as a consequence of accepting the position of first cook?; and
- (b) Was Ms Leslie constructively dismissed from her employment?; or
- (c) Was Ms Leslie the subject of an unjustifiable action to her disadvantage?

The August 2003 meeting

[23] Both Ms Leslie and Ms Harris acknowledge that there was a meeting between them in August 2003 but their recollection of that meeting is in all other respects entirely different.

[24] Ms Harris remembers the meeting but has no recollection of being told about another job opportunity that Ms Leslie might have had and she emphatically denied making any promise about an increase in remuneration for Ms Leslie.

[25] Ms Leslie's evidence was that she had asked for the meeting because she had another job opportunity and that she told Ms Harris about that other job opportunity and that Ms Harris promised her a "substantial" pay increase.

[26] Whatever happened at that meeting, Ms Leslie certainly left with the conviction that she had been promised something because she relied on that meeting as a basis for attempting to progress her claim for a pay increase until the point at which she resigned (either voluntarily or otherwise) in February 2004.

[27] Curiously, it was not until around the time that Ms Leslie resigned her employment that Ms Harris first denied that any promise of a wage increase had been made. This was in a letter to Ms Leslie's then representatives dated 9 February 2004. Even this observation is hardly a ringing denunciation of the suggestion that a wage increase had been promised, but Ms Harris did agree with me at my investigation meeting that this was the first time that she had distanced herself from the suggestion that she had made a promise of a wage increase.

[28] The other relevant consideration of course is the emphatic evidence of the employer's witnesses that a wage increase for Ms Leslie could not possibly be justified. There were in effect two pieces of evidence that I was offered. The first was evidence of the wage rates pertaining in the Christchurch community for similar work and on that basis, Ms Leslie was already being well paid.

[29] Second, and perhaps more significant, was the evidence which made clear that far from Ms Leslie having more responsibility, the fact was that in her new job of first cook, although it had a

grander title than simply “cook”, the responsibility of the new role was actually less and this was graphically demonstrated in the evidence of Mr Carter who methodically went through the responsibilities of the old position and compared them with the responsibilities of the new. I found his evidence to be clear and absolutely persuasive.

[30] One final piece of evidence which I thought was significant was the evidence that at the time that this August 2003 discussion took place, Ms Harris gave evidence that she in fact had no budgetary allocation for wage increases because in effect the budgets had yet to be set. She told me in answer to one of my questions that she did not get an operational budget until the month of September and so while she could theoretically have considered an increase for the employee, that would only have been possible if there was a clear case of more responsibility.

[31] In my view then it is difficult to understand how Ms Harris could have made the promise that she is alleged to have made and while I certainly would not wish to imply that Ms Leslie was untruthful in her evidence (I do not believe she was) I do think that she was mistaken in her belief that she was promised a substantial increase when she was appointed to the first cook position. I think the only promise of a substantial pay increase that was made to her was a response to her question when she was interviewed for the food services manager position when she was told by Ms Harris that if she were appointed, that position would attract a substantial pay increase.

[32] In my view then there was no promise made to Ms Leslie in August 2003 that she would get a substantial increase in pay as a consequence of accepting the positions of first cook.

Was Ms Leslie constructively dismissed from her employment?

[33] In the absence of a finding in Ms Leslie’s favour regarding the August 2003 meeting with her employer, the argument for a constructive dismissal rather retreats into the mist.

[34] Had Ms Leslie been able to satisfy the Authority that such a promise had in fact been made then she might have been able to take the further step of convincing me that, by virtue of the promise having been made and not been acted on, the eventual refusal of the employer to, as it were, meet the employers obligations in the matter was in effect a repudiation of the contract.

[35] Even that chain of logic is in my view drawing rather a long bow but I do not need to consider it because in the absence of a finding of a promise that Ms Leslie can rely upon, the rest of the argument simply does not stand up.

[36] No doubt Ms Leslie had lost all trust and confidence in the employer given her belief that a promise had been made to her but given the lack of evidence of that promise having been made and indeed the fact that it is highly unlikely that a sensible employer would have made such a promise given the factual matrix, Ms Leslie’s claim must fail.

[37] While it may be true to say that Ms Leslie’s resignation was caused by the employer’s conduct in my opinion that conduct was not capable of being analysed as a breach of the employer’s duty.

[38] Further, I do not think that Ms Leslie’s resignation could be reasonably seen by Kate Sheppard as being foreseeable and so no part of the test for a constructive dismissal is made out.

Was Ms Leslie the subject of an unjustifiable action?

[39] That leaves only Ms Leslie’s claim for an unjustifiable action to her disadvantage and again, given my finding about the August 2003 meeting, it seems to me impossible to find an unjustifiable action to Ms Leslie’s disadvantage unless Ms Leslie is able to satisfy the Authority that the promise

of a pay increase was actually made. Given that she has not succeeded in that regard, her claim for an unjustifiable action of the employer to her disadvantage must of necessity also fail.

Determination

[40] Ms Leslie's claim that she has suffered an unjustifiable action of the employer to her disadvantage and/or that she has been unjustifiably constructively dismissed both fail in their entirety.

[41] Costs are reserved.

James Crichton
Member of Employment Relations Authority