

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Donna Marie Levay (Applicant)
AND H and J Smith Limited (Respondent)
REPRESENTATIVES Mary-Jane Thomas, Counsel for Applicant
Janet Copeland, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 3 November 2004
DATE OF DETERMINATION 10 May 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant claims she has been unjustifiably constructively dismissed from her employment with the respondent in March 2002. The respondent denies that Mrs Levay was dismissed either actually or constructively saying she resigned voluntarily and unexpectedly. Mrs Levay seeks compensation in the sum of \$20,000.00.

What Caused the Problem

[2] The applicant began working for H and J Smith's Invercargill store as a display artist on 2 July 1990. She says she used a spray adhesive in the course of her work which gave rise to shortness of breath. Following a visit from the then Health Department, the employer was directed to install an extractor fan and provide protective clothing and equipment for staff using this product.

[3] In 1993 the applicant transferred to the company's Gore store. During her employment there, a decision was made to renovate the store leading to a reduced need for window displays. The employer asked Mrs Levay to assist the painting contractors and she agreed "as at the time I was bring up 3 children and felt it was either do this work or be made redundant." The applicant undertook a wide range of tasks in the course of this store's redecoration but predominantly was involved in painting and decorating.

[4] Following an operation in August 1998, the applicant returned to work and sought late duties as she had been told she was not to lift or stretch until given medical clearance. The manager was absent at the time but had left a note for the applicant directing her to sand and paint pelmets. Concerned for her job security, Mrs Levay undertook these tasks.

[5] At some point after July 2000 a new manager Carole Morton took over the Gore store and the applicant sought a vacancy in the section called McKenzie Country. She was appointed and gained

an additional 10 hours work per week. Mrs Levay continued to do whatever display work was required of her in the store and appears to have enjoyed keeping her hand in. She was also required to do Christmas display work in the Queenstown, Te Anau and Balclutha stores.

[6] In 2001 the applicant had been involved in a project known as “Home Expo”, and as the 2002 event was approaching, she asked Mrs Morton for a “list of duties” regarding the event as she “didn’t think it was fair to be put under extra pressure without reward for my artistic input.” The request for the list of duties was made in a meeting between the two on 4 March 2002. The following day a further meeting took place between the respondent and the applicant at 9:30am at which Mrs Levay proposed a list of tasks she was to undertake at the Home Expo and complained that she was being asked to do two jobs. Mrs Morton pointed out that relief was rostered for McKenzie Country while the applicant was engaged with the Home Expo. Mrs Morton’s diary notes reflect her frustration at the situation but makes no reference to behaviours which could indicate repudiation of the employment agreement by the applicant.

[7] At the time of this meeting, the respondent was unaware that the applicant had attended an employment interview at Guthrie Bowron on the 4th of March 2002. The applicant was advised that she had succeeded in securing that position on the evening of 5 March 2002 and tendered her resignation to the office the following morning, 6 March 2002.

The Issues

- [8] The matters the Authority is required to determine are; was the meeting
- a) alleged to have led to the applicant’s resignation held on the 5th or 6th of March 2002; and
 - b) did the respondent’s actions at that meeting amount to a repudiation of the employment agreement; and
 - c) at what point did the applicant accept another position; and
 - d) do the alleged actions of the respondent in relation to work required of the applicant involving the renovation of the Gore store amount to a personal grievance;
 - e) and if remedies are warranted what amounts are justified in all the circumstances.

The investigation meeting

[9] In an investigation meeting endowered with more red herrings than kedgerie, several critical facts were established by documentary evidence. They were that the meeting at which the behaviour of the respondent is alleged to have entitled the applicant to repudiate the employment agreement took place on 5 March 2002; that the applicant accepted the position with a new employer on 5 March 2002; that the applicant resigned giving 1 weeks notice on 6 March 2002; and that a further meeting took place on 8 March 2002 to determine whether the applicant was set on resigning. Mr Brian Lavender, a senior sales person from the Gore store, was present at the final meeting as a company witness.

Analysis and Discussion

[10] It is clear that while Mrs Levay had had issues with her employer in the course of her employment few, if any, were brought to her employer’s attention at or close to the time of their occurrence. Apon reviewing the evidence relative to these incidents, and more particularly the dating of them, I find that the applicant, while undoubtedly aggrieved by the events, is time barred by statute in bringing them before the employer at this late stage.

[11] The events at the 9:30 meeting on 5 March are not uncommon where participants have differing points of view. It is clear Mrs Levay was discontented given her perception that she was

being asked to do two jobs and that she wanted her display skills to be acknowledged. The applicant was entitled to her views and to put them to her employer. Mrs Morton's response appears to have been to state that the Home Expo would go ahead in all the stores whether Mrs Levay agreed to be involved or not. In taking such a position, Mrs Morton was not being provocative, merely stating that the show had to go on.

[12] Her view that the applicant was unhappy in her employment appears justified on Mrs Levay's own evidence in which she produced a facsimile she sent to her union representative. "She (Mrs Morton) went on to say Donna if you are not happy here I suggest you find employment elsewhere." It is also clear that the applicant terminated this meeting. "I got up and said I didn't have to listen to anymore and left. I feel it's a case of her telling me to leave because she can no longer use my display skills to her advantage."

[13] On the applicant's evidence as presented there is no reasonable ground on which the employer's behaviour at that meeting could sustain a claim of unjustifiable dismissal either actual or constructive, given the well established principles.

[14] Mrs Levay tended her written resignation to the store office on 6 March 2002. Mrs Morton was absent that day at a managers' meeting and the following day the chief executive of the company was visiting the Gore store and took up her attention at that time. Having received Mrs Levay's resignation Mrs Morton called a further meeting on 8 March 2002 at which Mrs Morton asked the applicant if she wanted to resign.

[15] The evidence of the applicant, Mr Morton and Mr Lavender confirms that Mrs Levay was asked if her resignation was "still on the table". Mr Lavender says in his evidence, "Carole (Mrs Morton) actually asked Donna this twice and in both instances Donna stated that the resignation was on the table and that resigning was what she wanted to do. There was no acrimony in this meeting but rather Carole was trying to make sure that Donna was comfortable with her decision. It certainly was not a meeting where Donna was left with no option other than to resign."

[16] The brief evidence of Mr David Groom was significant in that he stated "I interviewed Donna on Monday 4 March for a job with us. I have attached a copy of my diary for that week which confirms this. The next day, that is 5 March 2002, I contacted Donna and confirmed with her that she had the job and that she would start on trial from 25 to 29 March 2002 working 12 to 5:30 pm plus a Saturday roster and that her pay would be \$10 per hour. Again I refer to the attached copy of my diary which confirms this." This evidence clearly establishes and accurately the fact that prior to her resignation on 6 March 2002, the applicant had already secured and accepted a position with another employer.

The Determination

[17] Having considered the evidence placed before the Authority I find the applicant was not constructively dismissed but having accepted another position the previous evening, tended her resignation on 6 March 2002 giving 1 weeks notice of termination.

[18] I take the view that in giving 1 weeks notice the applicant was not reaffirming the employment relationship, but simply stating when it would end.

[19] In respect to the alleged post dismissal action of the respondent which is said to have prevented the applicant from continuing her work at SIT, having found the applicant was not dismissed but resigned, I am unable to assist in resolving the opposing views of the parties on this

specific matter. This is solely on the grounds that the matter arose after the employment relationship had ceased.

Remedies

[20] Given my findings as set out above, I do not need to address remedies.

Costs

[21] Costs are reserved. The parties are encouraged to resolve this matter between themselves should it be necessary Mrs Copeland is to file a memorandum with the Authority and serve a copy on Mrs Thomas. Mrs Thomas is to have a further 21 days from receipt of Mrs Copeland's memorandum to lodge and serve her memorandum in reply.

Paul Montgomery
Member of Employment Relations Authority