

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 277  
5351576

BETWEEN

MARY LONG  
Applicant

A N D

MICHAEL GREEN trading as  
PETMART  
Respondent

Member of Authority: M B Loftus

Representatives: Stephen Thomas, Advocate for Applicant  
Michael Green on his own behalf

Investigation meeting: 23 November 2011 at Nelson

Submissions Received: 24 November 2011 from Applicant  
5 December 2011 from Respondent

Date of Determination: 18 December 2012

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] The applicant, Mary Long, claims she was unjustifiably dismissed from her employ with the respondent, Michael Green, on 10 April 2011.

[2] Mr Green denies the allegation and asserts Ms Long departed of her own volition.

**Background**

[3] Ms Long was engaged as a shop assistant by Mr Green to work in his Richmond shop in September 2009. She was initially engaged on a part-time basis but became full time in February 2010. In March 2011 Mr Green opened a second shop in Stoke.

[4] Ms Long claims Mr Green was rarely at the shop and she therefore had frequent cause to telephone him. She claims he would often yell at her while on the phone and this occurred more frequently in the latter months.

[5] Ms Long goes on to say

*Almost every occasion when I phoned Michael I was subjected to what I felt was religious harassment, with Mr Green saying "Hail" when he became aware it was me calling. Biblical subjects were often referred to and Mr Green told me that my belief was wrong.*

[6] Mr Green states Ms Long never complained about the greeting *hail* and responded with laughter to another he used, *Mary, Mary*. He denies Ms Long was subjected to frequent dissertations about biblical issues and can only remember one such discussion. This occurred during the last week of her employment which was the week before Easter. The discussion was stimulated by that event.

[7] Mr Green responds to the allegation he used derogatory greetings by saying Ms Long frequently called him *Mickey Mouse* and Mrs Green *Mother Hubbard*.

[8] Ms Long denies the *Mickey Mouse* claim but accepts the *Mother Hubbard* attributing it as a reference to Mrs Green's *lovely home baking*.

[9] On 27 March 2011 Ms Long was asked to work at the Stoke store, which she did. This meant she would now be working alongside Mr Green which, she claims, made her feel uncomfortable.

[10] Ms Long goes on to say

*During the time I worked at the Stoke shop, a shop I was unfamiliar with in terms of stock layout, I was repeatedly challenged about my ability to do a good job and experienced multiple verbal attacks. I was told that I had an inability to perform my tasks and that I was only at the Stoke store because I made Mrs Green's life a misery at the Richmond store.*

*At another stage Mr Green told me that I was useless and that a five year old could do better.*

[11] Mr Green accepts Ms Long was at the Stoke store due to a difficult relationship with Mrs Green. He goes on to say

*On the last day of Mary Long's week in Amesbrook [the Stoke establishment] she was asked why she had not recorded a customer's loyalty information and she replied she didn't know. It was explained to Mary Long that she was being dishonest with the customer's and she was reminded that she needed to be thorough as our business was based on being fair and honest with our customers.*

*Mary Long was reminded that her performance had deteriorated over time and that she needed to resort to her earlier performance when she was given full-time employment ... Mary Long became extremely angry and jumped at the opportunity to go back to the Richmond store to assist Maureen, my wife.*

[12] A short while thereafter Mr Green was in the Richmond store. While there he was telephoned by a customer who wished to return a dog harness. When checking the original sale he found various harnesses had been incorrectly priced. Mr Green says he spoke to Ms Long about the pricing irregularity but she was indignant and claimed she was not responsible. He goes on to say that when asked why she had sold an item below the current stock record price, she replied she felt she was obliged to sell it at whatever was the marked price. Mr Green says he then asked why the irregularity had not been brought to his attention and Ms Long replied she did not know.

[13] Mr Green goes on say:

*Mary Long was asked had she checked the range for correct pricing and she said no it was not her problem. Mary Long was told that she had an obligation to report irregularities so that they could be corrected and that she needed to give an undertaking to improve her methods or alternatively I would have to give her notice.*

*Mary Long responded 'Put me on notice', to which I asked for the telephone to be handed to Maureen, my wife, and the conversation was related to Maureen.*

[14] When asked how the conversation had concluded, Mr Green's response was *it hadn't*.

[15] Ms Long's version of events is

*By 10 April 2011, after another verbal attack about a sale, which I felt was completely unjustified, I was told to improve my shoddy work or be put on notice. In a state of shock and reflecting on what I had been enduring I decided to be put on notice; even though I felt it was completely unwarranted...*

[16] And that was effectively that. When Mrs Green got off the telephone Ms Long was already packing her belongings and advised, as she departed, that if her work practices were not appreciated she was going.

[17] Ms Long's version is that Mrs Green advised it was not her fault, don't work out the notice period and return the uniform. She says she understood it was at that point she had been dismissed.

[18] Mrs Green denies that. She says *This is a blatant corruption of the events*. Her understanding of the conversation between Ms Long and her husband, gleaned from his description recited during the telephone conversation they had just ended, was Mr Green had told Ms Long she needed to improve her work methods or she would be put on notice. She adds she knew Ms Long had not been dismissed as Mr Green consulted her on all staff matters and he had not suggested that had happened. Mrs Green denies telling Ms Long she need not work her notice - she hadn't been given notice. Mrs Green stated Ms Long simply said that as she could not do her job properly, she was going to leave immediately.

[19] Several days later Ms Long came into the store and returned items of uniform and shortly thereafter the grievance was raised.

### **Determination**

[20] The claim is Ms Long was dismissed. The alternate, not initially contended in the statement of problem but canvassed in some depth in her closing submission, is that the dismissal was constructive.

[21] That potentially raises three issues for determination. They are:

- a. Was Ms Long dismissed on 10 April 2011;
- b. If not, was her departure in circumstances that could be found to amount to a constructive dismissal; and
- c. If the answer to either (a) or (b) above is yes, can Mr Green justify the termination?

[22] The applicant's initial claim was that she was actually, as opposed to constructively dismissed – she was put on notice.

[23] An actual dismissal implies the employer terminated the employment through an overt act. There is an affirmative uttering that amounted to advice of termination. The evidence simply does not support such a claim. As Ms Long herself now states – *I decided to be put on notice*. It was Ms Long’s decision to bring the employment to an end and not Mr Green’s with that being further confirmed by the fact she is now arguing this was a constructive, opposed to actual, dismissal.

[24] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal 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.
- c. A breach of duty by the employer causes an employee to resign.

[25] Whilst a simplistic summary of significantly more complex law, the assumption underlying the concept of constructive dismissal is actions or words of the employer amounted to a breach of duty which induced a subsequently proffered resignation.

[26] There must also be a causal link between the breach and the tendering of the resignation (*Z v A* [1993] 2 ERNZ 469). A simplistic view is the employee found him or her self in a position where s/he felt there was no option but to depart. Even if there was a breach, and that is debatable (see 30 and 31 below), Ms Long faces a significant problem in meeting this requirement.

[27] The claim, as filed, does not contemplate an assertion she was constructively dismissed. Ms Long does not therefore contend a breach, let alone attempt to link it to her subsequent departure.

[28] Ms Long is also under a duty to establish the fact of dismissal, or in this instance, that Mr Green’s conduct amounted to dismissive or repudiatory behaviour (refer *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965. There the Court stated that for a dismissal to be constructive:

*It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.*

[29] Here she relies upon a claim Mr Green was *bullying her about her performance without following a correct and fair process*. She also alleges he engaged in insulting behaviour and the two combined amounted to a failure to provide a safe workplace.

[30] The evidence does not, in my view, support these contentions. First, and while Mr Green clearly harboured some reservations about Ms Long's performance, there is no evidence he embarked upon a disciplinary process, let alone one he conducted in an unfair way. Even according to Ms Long it got no further than *give me a guarantee you will improve or do I have at look at putting you on notice* (or words to that effect). Not only is he entitled to raise his concerns, he is required to do so. An employer acting fairly should always raise issues with an employee so as to allow them to be considered and addressed – that is one of the thrusts of the duty to act in good faith as required by s.4 of the Act.

[31] There is then the issue of the alleged religious abuse. The alleged greetings were made (Mr Green accepts that) but it is difficult to consider they amounted to dismissive or repudiatory conduct. The strongest comment Ms Long made about them when answering questions was she found them inappropriate but she accepts she never found them serious enough to raise and that the general atmosphere was *fine*. This, I conclude falls a long way short of the type of conduct contemplated as serious enough to support a claim of constructive dismissal.

[32] Indeed, and in such circumstances, I conclude there is insufficient evidence to even contemplate exercising the powers granted by s.122 and contemplating whether or not Mr Green's actions amounted to an unjust disadvantage.

## **Conclusion**

[33] Ms Long claimed she was dismissed by an overt act of the employer. That clearly did not occur.

[34] In the alternate, she claims she was constructively dismissed. The onus falls upon her to establish the fact of dismissal before Mr Green can be called upon to justify it.

[35] Whilst a very simple summary of considerably more detailed law, constructive dismissal occurs in circumstances where the applicant is forced/coerced to resign by the actions of his or her employer. For the reasons discussed above, I conclude Ms Long has failed to convince me she was in such a situation.

[36] Her claim therefore fails.

### **Costs**

[37] It is normal that costs follow the event but the successful party, Mr Green, was unrepresented at the investigation meeting and resides locally. That means recoverable costs are limited. In order to avoid additional effort or expense, and given a costs award can be reviewed, I choose to dispose of the issue and order that costs lie where they fall.

M B Loftus  
Member of the Employment Relations Authority