

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Judith Anne Mann (Applicant)
AND Cannon Hygiene NZ Limited (Respondent)
REPRESENTATIVES Len Andersen, Counsel for Applicant
Paul McBride, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 20 October 2005
DATE OF DETERMINATION 31 January 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Mann) was employed by the respondent, Cannon Hygiene NZ Limited (Cannon), as a service employee based in Dunedin. Ms Mann alleges that she was constructively dismissed by Cannon when they reduced her hours to a level that was uneconomic for her to continue working for them.

[2] Cannon denies the allegation of constructive dismissal and says that the resignation of Ms Mann was voluntary, and that it came part way through a restructuring process which Cannon had initiated with a view to try and address Ms Mann's employment needs.

[3] Ms Mann's job title was Deep Cleaner/Installer and she commenced work with Cannon on 12 May 2003, working under a written Employment Agreement.

[4] The Agreement specifically refers to the employment being part-time in nature and goes on to stipulate that *...the employee is required to work the necessary hours to discharge the duties contained in ... her job description*. Schedule 2 of the Employment Agreement refers to the hours of work being *approximately 25 hours per week*.

[5] About three months after Ms Mann commenced her employment with Cannon, she agreed to Cannon's request that she increase her hours because of the resignation of a co-worker. The evidence was that she worked full-time for a period until a new employee was recruited.

[6] As the job title implies, the work Ms Mann was required to do had two component parts, one involving the cleaning of sanitary equipment and one involving the installation of dispensers of one sort or another, in toilets and rest areas.

[7] When Ms Mann was first employed, the unchallenged evidence was that the bulk of her work was on the cleaning side, but there were installations required from time to time. It seems common ground that Cannon never stipulated that Ms Mann was to spend any specific amount of time each week on any particular task and, once Cannon recruited a replacement worker for the colleague who had left the job, Ms Mann and the new worker reached an informal arrangement to share the duties for their own best advantage.

[8] The new worker, whose name was Moana Herriott, had sore knees and that made the deep cleaning work that the job required difficult. Similarly, Ms Mann had difficulty with the installation work. She told me that she felt *very intimidated by doing it and very diffident doing it*. She said she was not comfortable or confident with installations and did not have the manual dexterity to do it satisfactorily.

[9] Accordingly the arrangement that Ms Mann came to with Ms Herriott seemed to suit both of them because Ms Mann did more of the cleaning and Ms Herriott did more of the installations. However, it seems that with the passage of time that arrangement, while it may initially have been satisfactory to both parties, became less satisfactory to Ms Herriott. In the end there were discussions between Ms Herriott and Cannon because Ms Herriott was increasingly working longer hours than she either had contracted to work or was willing to work. As a consequence of those discussions between Ms Herriott and Cannon, Cannon's Branch Manager, John Neill, decided to initiate discussions with Ms Mann.

[10] Although Cannon alleges that from March 2004 Ms Mann's performance had become unsatisfactory in relation to installation work, it is by no means clear that Cannon satisfactorily drew that to Ms Mann's attention until some time much later. This is so despite the contentions by the Branch Manager, Mr Neill, that he *raised ... issues with Judy (Ms Mann) on many occasions between May 2003 and October 2004*.

[11] Mr Neill then mentions three specific instances in the following terms:

By way of example only, discussions and associated training for Judy occurred on 3rd March 2004, the 20th July 2004 and 15th September 2004.

[12] None of these instances seemed to have registered with Ms Mann whose evidence was that *...things went well between September 2003 and September 2004*.

[13] There was a staff appraisal of Ms Mann on 29 March 2004 which Ms Mann regards as being a positive and successful appraisal, while Mr Neill regards it as flagging Cannon's anxiety about an area of her performance.

[14] Arguably, both of them are right. The numerical rating of Ms Mann's performance against targets such as quality, achievement, job skills and knowledge and the like, almost invariably rate Ms Mann as better than average and in 7 out of 10 of the categories that she is marked against, Ms Mann is assessed by her Manager, Mr Neill, as being in the top category of a choice of four.

[15] Conversely, Mr Neill has annotated the performance appraisal with four written observations at different points in the appraisal, each of which expresses a degree of reservation about her performance, particularly in the problematical area of her doing installations of equipment.

[16] Ms Mann indicated in her evidence that there had been no complaints in the performance appraisal about installation work that she had undertaken. Mr Neill disagreed with that statement and said that they had discussed examples of poor installations carried out by Ms Mann and the dissatisfaction that that work created, but Mr Neill readily admitted that that was an oral discussion and that it was not referred to in the written record of the performance appraisal.

[17] In any event, when Cannon eventually decided that it had to address the deficits that it perceived in Ms Mann's work, it summoned her to a meeting by letter dated 27 September 2004. Ms Mann refers to the receipt of this letter as *a bolt from the blue*.

[18] The meeting proposed by this letter took place on 1 October 2004 and by common consent it focused on the fact that Ms Mann was not comfortable doing installations, something which again by common consent, Cannon were well aware of.

[19] There were further meetings on 8 October and 18 October at which the focus shifted to trying to identify a workable structure which would enable Ms Mann's employment relationship to continue, but would also ensure that Cannon's legitimate work performance expectations were met.

[20] In her brief of evidence, in the context of these ongoing discussions, Ms Mann has this to say about those discussions:

At the time it was my understanding that Cannon and I were trying to work together to get a structure that could be put in place so that I could work the hours I wanted to but would not have to do installations. I did not understand that Cannon was seeking to reduce my work hours if I did not agree to any reduction. At the time this was going on John Neill said to me not to stress about what was happening as he was trying to put something into place that would work.

[21] Emanating from these meetings came the rough sketch of a plan which would have had Ms Mann doing only cleaning work and relief servicing but having her base hours reduced significantly to 10 or 15 hours a week. Cannon's evidence very clearly is that that base span of hours was to be augmented by other pieces of suitable work from within the group and that at the point at which Ms Mann resigned, that exercise was still being actively undertaken. In effect Cannon say that Ms Mann pre-empted the satisfactory resolution of the plan by resigning and/or by rejecting other suggestions which Cannon made to augment the hours which could be promised in respect to the part of her existing job involving cleaning of sanitary appliances.

[22] At the meeting on 18 October 2004, Cannon say that Ms Mann refused to contemplate anything other than a continuation of "the status quo" while Ms Mann says that she was never told (until presumably this meeting of 18 October) that there was no option of continuing with "the status quo".

[23] It is important to note that Ms Mann's reference to the continuation of "the status quo" is really a reference to her conviction that she could continue to perform the part of her role that she enjoyed and was good at and avoid the installation part when it is the precisely the avoiding of installation work which was causing the employer continued disquiet.

[24] At the 18 October meeting, it would have been clear to a dispassionate observer that both parties sought to retain the employment relationship but the solution that each proffered to achieve that was unacceptable to the other.

[25] Ms Mann was advancing what she persisted in referring to as "*the status quo*" (an arrangement where she and Ms Herriott job shared such that Ms Herriott did more than her share of the installations and Ms Mann did more than her share of the deep cleaning).

[26] Conversely, Cannon sought to re-design Ms Mann's job so that she only did the sort of work that she wanted to do (except in exceptional circumstances) but the effect of that was to reduce her base hours to 10 to 15 hours per week. Cannon understood that that would be unacceptable to Ms Mann because she had made that absolutely clear at the earlier meeting on 8 October. Accordingly,

Cannon sought to add to those base hours by picking up cleaning work from other parts of the group or by suggesting that Ms Mann did other work that she was capable of from within the group.

[27] Ms Mann says that at the meeting on 18 October she *repeated her objection to any reduction in working hours*. Cannon says that what Ms Mann did at the 18 October meeting was to refuse all of their suggestions for adding to the base 10 to 15 hours that they could guarantee from her existing job such that none of their attempts to build up Ms Mann's hours to an acceptable level to her was welcomed by Ms Mann.

[28] By letter dated 20 October 2004, Cannon wrote to Ms Mann and indicated their view that they must either proceed with the new structure (that is the new structure proposed by them) or contemplate dismissing Ms Mann because ... *you do not want to perform the installation part of your job, and wherever possible avoid doing it*.

[29] There was then a further letter from Cannon to Ms Mann on 26 October in which Cannon indicated its intention to proceed with the revised structure and it is common ground that on that day, Ms Mann indicated to Cannon verbally that she would resign at some point in the future. Ms Mann drafted a letter of resignation dated 19 November 2004 and her employment actually ended on 26 November 2004.

Issues

[30] The issues that require determination are as follows:

- What were Ms Mann's contractual obligations;
- What advice did Ms Mann give Cannon about her willingness to perform certain functions;
- Ms Herriott's involvement;
- Did Cannon follow a proper process;
- Are the elements of a constructive dismissal made out?

The contractual obligations

[31] Under the heading hours of work, the individual employment agreement between the parties refers to a *part-time position* and talks of the employee working the hours necessary to discharge the obligations contained in the job description.

[32] The First Schedule to the Employment Agreement defines the position as a *Deep Cleaner/Installer*.

[33] The Second Schedule to the Employment Agreement sets out the job description and under the subheading *hours of work*, refers to approximately 25 hours per week.

[34] In the same schedule and under the heading *duties of service employees* there is a list of 21 obligations of the role but nowhere is there reference to any specific obligations in relation to the installation of appliances.

[35] Similarly, under the heading *duties* in the Employment Agreement proper, there is reference back to Schedule 2 which contains the job description (to which I have just referred) and a general provision giving Cannon the opportunity to reasonably request other duties of the employee from time to time.

[36] It follows that there is no particular guidance to be derived from the Employment Agreement.

Installation work

[37] Ms Mann gave evidence that she felt *very diffident* and was neither comfortable nor confident in doing installation work. She said that she did not have the dexterity to do the job and it was mostly the sanitisers *that gave her grief*. Ms Mann acknowledged to me in giving her oral evidence that she did have *lots* of problems doing installations.

[38] Ms Mann also readily accepted that Cannon needed to address her installation work, but she claimed that the company never told her that there were complaints from customers (something that Cannon denies).

[39] Although it is not described or defined, or in any way delineated, in the Employment Agreement, the very name of the position contemplates that there will be installation work and Ms Mann readily conceded that it was a requirement that she perform some installations.

[40] It seemed from the evidence from both parties that this installation work happened on a reasonably unprogrammed sort of basis and also that it grew over the time that Ms Mann was employing from being a relatively small part of her duties on an hour by hour basis, to being a much more significant part or potential part of her weekly obligations.

[41] Ms Mann gave evidence that she had told Mr Neill of Cannon that she was more suited to the deep cleaning part of the work than to the installation work. She also gave evidence that she did not refuse to do installations but said to the employer that she was *not comfortable* doing installation work. She said that she never refused to get further training in installation work.

[42] Mr Neill in his evidence agreed that Ms Mann never refused to do installations, but he claimed that she would avoid doing them (something Ms Mann denied). There was a dispute on the evidence between the parties in that Mr Neill was very clear that Ms Mann had refused additional training.

[43] So we have a situation where, prior to the commencement of Cannon's attempt to resolve matters, there is by common consent an understanding that Ms Mann never refused to do installations but had told her employer that she was not comfortable doing them and preferred the other part of her role.

The involvement of Ms Herriott

[44] Because she did not enjoy and felt uncomfortable doing installations, and because she understood Ms Herriott preferred doing installations to doing deep cleaning, Ms Mann had some discussions over time with Ms Herriott with a view to dividing up the work so as to suit both of them.

[45] The effect of this arrangement was that Ms Herriott did more of Ms Mann's allocated installations and Ms Mann did more of Ms Herriott's deep cleaning work.

[46] It is this arrangement which Ms Mann calls throughout her evidence “*the status quo*”. However, it was not, it seems, a “status quo” which Cannon approved of although it is clear from Mr Neill’s evidence that Cannon knew about the arrangement.

[47] Cannon were particularly anxious about the arrangement when it became clear to Mr Neill that Ms Herriott was unhappy with that arrangement. In his evidence (para.5.2) Mr Neill says:

While Judy (Ms Mann) was suggesting that Moana (Ms Herriott) was happy with that (he means the so-called “status quo” arrangement) Moana (Ms Herriott) was telling us very clearly that she was not. One complaint that Moana (Ms Herriott) made was that the extra hours mean that she was missing out on her children’s school activities.

[48] Mr Neill goes on in his evidence (which I accept) that the extra installation work that Ms Herriott was doing was creating *substantial difficulty for Ms Herriott* and that there were occasions when Ms Herriott was not able to do the additional installation work and when Mr Neill himself had to do it.

[49] Fundamentally though, Mr Neill was saying that the company could not *as a matter of business risk have all of our eggs in one basket*. He means that the company needed to have more than one person on the team in Dunedin ready, willing and able to competently perform installation work.

[50] Mr Neill’s evidence is equally clear (and again I accept it) that while he was happy with some flexibility between Ms Herriott and Ms Mann, he never agreed to vary the employment of Ms Mann by changing any duties and his bottom line was that he needed both women to be able to do both the installation work and the deep cleaning work as required.

Did Cannon follow a proper process?

[51] By letter dated 27 September 2004, Ms Mann was summoned to a meeting to *discuss your recent performance of installations*. The letter goes on to refer to some particular installations that were allegedly problematical, then lists a series of problems with those installations and then discusses Ms Mann’s rights to be represented and to have an opportunity to explain *her side of the story*.

[52] The letter includes the following clause: *This is not a disciplinary meeting*

[53] Ms Mann’s evidence was that when she received this letter, she was *quite mortified* and she agrees that she may have said to Mr Neill at that point *do you want me to resign?*

[54] Ms Mann’s evidence (which I accept) was that she told the meeting, which took place on 1 October 2004, that she did not feel confident doing installations and that she would much prefer it if her job had been entirely deep cleaning.

[55] A second meeting took place on 8 October at which it was proposed by Cannon that Ms Mann’s role change to be just a deep cleaning role, but the hours for that reduced to 10 to 15 hours per week, which was not enough for Ms Mann to live on. According to Mr Neill’s evidence, he had since the 1 October meeting been reviewing the options and he had come up with this proposed new structure which meant that in effect a new position of deep cleaner/relief servicer would be created and that Ms Mann would be placed into that position. On top of that, a new position, effectively Ms Mann’s old position, would be created and filled.

[56] Of course the problem with the new position was the reduction in hours and Mr Neill had worked diligently to try to identify additional hours to make the position viable for Ms Mann.

[57] According to Mr Neill's evidence (which was not challenged by Ms Mann) there were a number of alternative suggestions put forward by Cannon to augment the base hours, all of which Ms Mann rejected.

[58] There was a further and final meeting on 18 October at which there was further debate about Cannon's proposed re-structure. By common consent, Ms Mann continued to state her objection to any reduction in working hours, but also, it seems, rejected each and every one of the suggestions Cannon had made to add to the base hours already proposed. Ms Mann said in effect that she wanted "*the status quo*" to remain, that is Ms Herriott doing the installation work and Ms Mann doing almost nothing but deep cleaning work with only the occasional installation.

[59] It was at this point that Cannon through its Branch Manager, Mr Neill, made it clear that this so-called "status quo" option was not an option from the company's perspective and, it was because it was not an option from the company's perspective that it was necessary to have the conversation at all.

[60] Cannon then wrote to Ms Mann by letter dated 20 October 2004. This is not a well crafted letter. Cannon seek to minimise the influence of this document, but it is plain that it is the precipitating event for Ms Mann indicating to Cannon her intention to resign.

[61] Ms Mann's evidence (which on this point I accept) was that the letter gave two possible solutions, the first of which was that Ms Mann accepted the proposed restructure, or, in the alternative, if Ms Mann was not disposed to do that, then Cannon ... *would need to consider giving ... notice of termination of ... employment.*

[62] I need to form a view about whether Cannon worked through a proper process in dealing with this issue. The first point is that clearly, Canon was entitled to make changes to the way in which its work place operated to facilitate the prosecution of its business affairs. It was perfectly proper for Cannon to undertake changes because of its disquiet about Ms Mann's reluctance to do installation work.

[63] To initiate the process, Cannon wrote to Ms Mann on 27 September 2004. In my opinion, that letter set the scene for the interactions between the parties. Critically, the letter makes clear that, although the employer has concerns about Ms Mann's recent performance of installations, the meeting that they propose is not a disciplinary meeting. However, the letter then goes on to encourage Ms Mann to bring a support person who might be a lawyer, advises her that minutes will be taken and indicates to her that her work performance will be discussed but that she will be given an opportunity to present *her side of the story.*

[64] I accept counsel for Ms Mann's submission that the proposed meeting referred to in the 27 September letter was set up in effect on a confused basis. On the one hand, Ms Mann is told it is not a disciplinary meeting so there is to be no presentation of a disciplinary allegation or series of allegations, of which Ms Mann can respond to in a measured way. But on the other hand, Ms Mann is encouraged to speak frankly about the work that she does want to do and the work that she does not want to do.

[65] Of particular significance is the fact that it is not until the third meeting between the parties (that is the meeting on 18 October) that Cannon reveal that the so-called "status quo" option is not acceptable to the employer. In my opinion, this is fatal to the process which Cannon adopted

because, without that piece of information available to Ms Mann at the very beginning of the discussions, she is simply not in full possession of all the information material to her situation.

[66] In my view, that error by Cannon is compounded by the ill judged letter of 20 October, which on a dispassionate reading of it, quite plainly says that either Ms Mann accepts the restructure proposed by Cannon or she may be subject to dismissal.

Is constructive dismissal made out?

[67] For reasons that I have just advanced, in my view Ms Mann has successfully met the test for a constructive dismissal. She has been encouraged to engage with her employer, allegedly because of the employer's concerns about an inadequacy in her work performance and yet she is told that the nature of the proposed interaction is not disciplinary in nature. She is encouraged to participate fully but never told until the final meeting between the parties, after interactions over three weeks, that the so-called "status quo" option is not acceptable to Cannon.

[68] Then she is confronted with a letter which, as well as intending to summarise the employer's proposed restructure, gives her the option of accepting a new role with a dramatic reduction in guaranteed hours or possibly facing the reality of dismissal.

[69] Confronted with that letter, Ms Mann indicated to Cannon, her intention to resign (and the evidence suggests that the letter of 20 October 2004 was the proximate cause of her indication that she would resign). Ms Mann subsequently made good on that indication and finished her service with Cannon on 26 November 2004.

[70] It follows that I find that Ms Mann does have a personal grievance by way of an unjustified constructive dismissal from her employment.

Contribution

[71] Because I have found that Ms Mann has a personal grievance, I am required by the statute to consider the question of contribution, and I now do so.

[72] In my opinion, Ms Mann has indeed contributed to the circumstances in which she finds herself and which are directly in play in her application before the Authority.

[73] Most particularly, I find contribution proved in respect to her categorical refusal to contemplate any of the proposed devices which Cannon suggested as a way of adding to the hours of work it was able to guarantee her as a consequence of the proposed restructured arrangement.

[74] The unchallenged evidence of Cannon was that Ms Mann turned down a number of possible devices for providing her with extra hours so that she would have a liveable wage. These included suggestions made by Cannon and even on their evidence (which I accept) suggestions made by Ms Mann's own representative at the meetings with Cannon which Cannon was prepared to consider.

[75] In refusing to even contemplate those suggested means of adding to the hours which Cannon were able to guarantee in a new structure, Ms Mann clearly contributed to the very root of the personal grievance. Had Ms Mann been prepared to contemplate the possibility of pursuing the new structure and picking up the additional hours able to be offered from one or more other sources, she might well have been able to reach a negotiated arrangement with Cannon which would have avoided the personal grievance altogether.

[76] I determine that Ms Mann's contribution is 50%.

Determination

[77] Notwithstanding my findings of fault against Cannon, I wish to record that I was impressed with the honesty and integrity of John Neill, Cannon's Manager, and I accept that the evidence he gave was truthful and straightforward. I also want to make clear that in my opinion, his motivation throughout was entirely honourable. I think Mr Neill set out to try to resolve a situation which was unacceptable to the employer and he hoped to do this without losing the services of Ms Mann. Mr Neill seemed as distressed as anybody that he had ultimately been unsuccessful in that regard.

[78] I have found that Ms Mann does have a personal grievance by reason of an unjustified constructive dismissal and I direct that Cannon pay Ms Mann the sum of \$2,500 being compensation payable under s.123(1)(c)(i) of the Employment Relations Act 2000 abated by the 50% contribution that I have already determined. Were there no contribution, her award under this head would have been \$5000.

[79] I also direct that Cannon is to pay to Ms Mann a contribution to her lost wages of \$568.75 being the loss Ms Mann carries in her new job when compared to her position at Cannon for a period of three months, but again abated by 50% as a consequence of the contribution I have found. Were there no contribution, the contribution to lost wages would have been \$1137.50.

Costs

[80] Costs are reserved.

James Crichton
Member of Employment Relations Authority