

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 213/10
5295944

BETWEEN SUMMAH MARFELL
Applicant

A N D REELS LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Ralph Webster, Advocate for applicant
Helen Harrison, Advocate for respondent

Investigation Meeting: 14 September 2010 at Nelson

Date of Determination: 25 November 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This matters has had a tortured history. The statement of problem for the applicant (Ms Marfell) was filed on 16 February 2010 citing John Burton as the respondent.

[2] Mr Burton duly filed a statement in reply which amongst other things made perfectly clear that he was not the employer but a co-worker of Ms Marfell. That statement in reply was filed in the Authority on 2 March 2010.

[3] Then on 20 April 2010, Mr Burton provided further information which made clear that the employer was Reels Limited. Contemporaneously with that advice, Mr Webster for Ms Marfell provided a copy of Ms Marfell's employment agreement which referred to Reels Limited. However, the employment agreement also described John Burton as *the employer* in the first clause entitled *The Parties*. In clause 15 entitled *Declaration* the entitling reads *I, John Burton on behalf of Reels Limited, offer this employment agreement to Summah Marfell.*

[4] Further inquiry revealed that another limited liability company Reels Franchise Holdings Ltd was incorporated on 2 October 2007, had a name change on 3 November 2009 and had as its sole director Mr Burton.

[5] Accordingly, in a telephone conference involving Ms Marfell's representative Mr Webster and Mr Burton on 26 April 2010, I heard from Mr Burton directly and concluded that he was not the employer of Ms Marfell and that the employer of Ms Marfell was in fact Reels Limited. That being my considered view, I directed that the proceedings continue from then on with Reels Limited as respondent. My senior support officer arranged for the original proceedings to be re-served on Reels Limited. A further telephone conference this time involving Ms Harrison for Reels Limited was convened by the Authority on 18 June 2010 and the investigation meeting on 14 September 2010 was arranged as a consequence. Because of the subject matter involved, I determined that the best way of investigating the matter was to conduct three separate interviews, the first with Ms Marfell in the presence of her grandmother and her representative, the second with Mr Burton alone and finally an interview with Ms Harrison the Director Reels Limited, also by herself.

[6] The matter was never mediated. While the Authority considered whether a referral to mediation would assist in the resolution of the employment relationship problem raised by Ms Marfell, it was considered that the subject matter of her claim was such as to make face to face contact between her and Mr Burton in particular, an unreasonable impost on an adolescent girl. Further, given the particular factual matrix, it seemed unlikely that mediation could reasonably progress matters without Mr Burton being present. Finally, Mr Burton himself has issues of an employment relationship nature with Reels Limited further adding to the challenges if mediation were to be attempted. For those reasons then, the Authority concluded the better approach was to determine the matter rather than risk an unsatisfactory mediation which would result in the matter being referred back to the Authority in any event.

[7] Ms Marfell was employed by Reels Limited as a general hand in a Nelson burger bar. The employment was casual, requiring intermittent attendances for work between the hours of 4pm and 9.30pm Wednesday through to Sunday as required by a roster typically prepared in advance and notified to Ms Marfell, (and of course others), in advance.

[8] The essence of Ms Marfell's complaint is that she was forced to resign on 12 August 2009 as a consequence of Mr Burton committing an indecent act in front of her at approximately 12.30pm on Saturday 8 August 2009 at the workplace.

[9] Mr Burton was charged with committing an indecent act with the intention of offending Ms Marfell and on his plea of guilty was convicted and sentenced.

[10] Ms Marfell claims lost wages *from the time of termination until the re-commencement of any employment*, compensation and costs. Reels Limited resist those claims.

Issues

[11] The only issue that the Authority needs to consider is whether Ms Marfell was unjustifiably constructively dismissed from her employment and if she was, what the consequences of that action ought to be.

Was Ms Marfell constructively dismissed?

[12] It is a given in the present case that Ms Marfell was the victim of disgraceful and inappropriate behaviour from Mr Burton. No young girl should be subjected to such an affront. Mr Burton chose to rather protest his innocence in the matter and to suggest that he pleaded guilty in the criminal court because he could not afford to defend the allegation but that contention has the ring of desperation about it. I am satisfied the incident Ms Marfell complains about happened and the perpetrator of the incident was Mr Burton.

[13] Issues in this case are clouded somewhat by the misconception (held it seems not just by Ms Marfell but also by her advocate) that Mr Burton was in fact the employer. That certainly seems to have been the belief when an information was lodged with the Police about Mr Burton's disgraceful behaviour and it was plainly also the case when the employment relationship problem was first presented. In fact of course, Mr Burton was no more and no less than a co-worker. The real employer was a company styled Reels Limited and its Director Ms Helen Harrison gave evidence to the Authority.

[14] I am satisfied that Ms Harrison was at the time, and remains, horrified by the behaviour of Mr Burton. It is clear on all the evidence available to the Authority that

she had no idea about the matter until it was put in the hands of the Police, but more important than that, as the representative of the employer, she had no idea that either Mr Burton or Ms Marfell were at the work premises on the day the incident took place nor did she ever give permission for that to happen, nor was there any basis for either of them being there at the time the incident happened. Indeed, Ms Harrison was mystified both at what Ms Marfell could have been doing at work on that day when she was not rostered to work and equally mystified as to how she had been paid for the alleged work when there was no evidence of her having been paid on that day through the payroll system.

[15] It is important to try to explain the nature of Mr Burton's position, insofar as that is possible. Mr Burton was a thoroughly unimpressive witness who impressed principally with his forgetfulness. He said that he was not paid a wage but effectively was to be remunerated by what is usually called *sweat equity*. Mr Burton was given money for fees (he was training to be a chef at the local Polytechnic) and he was also (according to him) allowed access to the business out of hours to cook up food for himself.

[16] Ms Harrison, who impressed me as a straightforward and reliable witness, said that she had taken Mr Burton on because he was the son of a close friend and was looking for some direction in his life and thought that he might want to be a chef. Ms Harrison said Mr Burton had the work keys so he could attend to deliveries after hours and so could have entered the premises whenever he chose. It seems from Mr Burton's evidence that on the day the events complained of happened, he does remember collecting Ms Marfell and bringing her into work.

[17] The stark point about the day that the events complained of happened is that on that day, according to Ms Harrison (whose evidence I believe and trust) neither Mr Burton nor Ms Marfell were supposed to be on the premises at all and in her view, given that fact, both of them were effectively trespassing. Whether that puts it too strongly is beside the point; the fact remains that the employer had no knowledge whatever that Ms Marfell was in the workplace with Mr Burton alone. Ms Harrison is now horrified that that should have happened not once but, on Ms Marfell's evidence, perhaps as many as four times. Ms Harrison employed a number of young girls and was very careful about that and understood the need to keep them safe. She gave me evidence (which I accept) that she was always present when Mr Burton was rostered

to work. There were never occasions where he would have been rostered on with young female staff and she would not have been physically present in the business for the whole time that he was there.

[18] Ms Harrison trusted Mr Burton with the keys of the business and it is perfectly plain that he betrayed that trust by effectively coming and going as he pleased and by involving Ms Marfell anyway in that illicit behaviour. Clearly, Ms Marfell believed that Mr Burton was the owner; she had no idea that the owner was in fact a limited liability company of which Ms Harrison was the only Director. Indeed, she thought that Ms Harrison and Mr Burton (despite a significant age difference) were in a relationship together and were living together. Both Mr Burton and Ms Harrison assured me that nothing could be further from the truth. But Ms Marfell thought that Mr Burton was her boss in just the same way presumably as she thought that Ms Harrison was her boss. That being her view, presumably if Mr Burton told her to attend at the work place on a Saturday and then somehow arranged to pay her cash for that work, then she would simply have accepted that that was part of the normal course of events. But what happened here was that although Ms Marfell did not know it, the employer had no idea she was on the premises when she should not have been and, more particularly, on the premises with a much older male employee who also should not have been there.

[19] While I have the greatest sympathy for Ms Marfell and her ordeal, I am not persuaded there is any legal culpability on an innocent employer in this situation. Ms Harrison as the Director of Reels Limited is as much an innocent in this proceeding as Ms Marfell and I do not consider that the law requires Ms Harrison to be responsible for acts done on her premises when she has no knowledge whatever of not just the acts themselves but the very presence of the individuals in the workplace at a time when they ought not to be there.

Determination

[20] Ms Marfell's claim fails in essence because, while the events complained of happened at the workplace, they did not happen during approved working hours and thus cannot be the responsibility of the employer who knew nothing of the events until much later. Even knowledge of the events by the employer could not create culpability in my view; the fact was that neither staff member was supposed to be at

the workplace at the time and under those circumstances, the employer cannot be responsible.

[21] One can only have the greatest sympathy for Ms Marfell and the Authority extends its sympathy to her for her ordeal.

Costs

[22] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority