

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Marie Yvonne Le Page Marsh (Applicant)
AND Inghams Enterprises (NZ) Ltd (Respondent)
REPRESENTATIVES Roger Marsh, for Mrs Marsh
Hugh Fulton, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 19 July 2005
SUBMISSIONS RECEIVED 19, 27 July and 1 August 2005
DATE OF DETERMINATION 29 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Marie Marsh was employed by Inghams Enterprises (NZ) Ltd (“Inghams”) from 13 July 1994 until 21 May 2004. Mrs Marsh worked as a telesales operator in Inghams call centre at its corporate office then located in Auckland. In this role Mrs Marsh took orders for chicken products from retailers located throughout the South Island. She says during her employment with Inghams she was subject to workplace bullying and was left with no option but to resign from her employment. Mrs Marsh says this resignation amounts to an unjustified constructive dismissal and/or an unjustified action causing disadvantage. Mrs Marsh also seeks redundancy compensation because subsequent to her leaving Inghams the Auckland office was closed resulting in redundancies among the telemarketing staff. Inghams says Mrs Marsh was treated fairly and reasonably throughout her employment and her resignation was voluntary.

[2] To determine this employment relationship problem the Authority must consider whether events before Mrs Marsh’s resignation breached the terms of her employment agreement to such a serious and reasonably foreseeable extent that her resignation should properly be considered a dismissal.

Did Mrs Marsh resign or was she dismissed?

[3] Mrs Marsh tendered her resignation from Inghams by letter dated 17 May 2004. The letter concludes:

“Regrettably given my long association as an employee with Inghams I advise I am serving notice of terminating my employment with the Company in accordance with contract conditions and further advise I will be pursuing a claim via the Employment Court for the failure by management to address the continual instances of humiliation and stress causing what can only be considered an improper constructive dismissal.”

- [4] Mrs Marsh says the following are the instances of humiliation and stress referred to:
- (i) derisory and disrespectful treatment by telesales supervisor Jackie Knott:
 - in December 1998 Ms Knott called Mrs Marsh a “faithless friend” in front of other staff;
 - Ms Knott frequently yelled at Mrs Marsh across the telesales room and held up her hand indicating “speak to the hand”; and
 - Mrs Marsh had been told by co-workers Ms Knott made unkind remarks behind her back when Mrs Marsh received a car as a birthday present.
 - (iii) changes in work method:
 - the appointment of a full-time sales rep for the South Island in mid-2000 increased Mrs Marsh’s workload; and
 - changes to sales and delivery patterns following the appointment of the full-time sales rep impacted adversely on Mrs Marsh’s ability to perform her job.
 - (iv) unfair treatment:
 - in early 2004 Natasha Taylor, who succeeded Ms Knott in the role of telesales supervisor, unreasonably declined a leave application made by Mrs Marsh;
 - (v) unfounded accusations of attending work under the influence of alcohol:
 - on 18 December 2000 Ms Knott accused Mrs Marsh of being under the influence of alcohol while at work and required her to attend the company doctor;
 - Inghams failed to implement Mrs Marsh’s request on 18 December 2000 that a formal grievance procedure be put in place to deal with the bad feeling between Mrs Marsh and Ms Knott;
 - on 24 December 2001 Ms Knott again accused Mrs Marsh of being under the influence of alcohol at work;
 - on 3 January 2002 Ms Knott wrote to Mrs Marsh setting out concerns regarding her being under the influence of alcohol at work; and
 - during the work 2003 Christmas function Mrs Marsh was given a breathalyzer.
 - (vi) unjustified criticism of work performance:
 - in March 2004 James Armitage, sales administrator, spoke with Mrs Marsh about her work performance; and
 - on 14 March 2004 Mr Armitage meet with Mrs Marsh regarding her work performance and issued her with a document entitled “written warning”.
- [5] Mrs Marsh told me she did not raise her concerns about Ms Knott’s treatment of her directly with Ms Knott or with anyone in management at Inghams.
- [6] With regard to the changes in work method caused by the appointment of the full time sales representative, Mrs Marsh said she and her then supervisor, Ms Taylor, satisfactorily worked out a schedule to deal with the changes. Mrs Marsh said she did not raise any concerns with Ms Taylor or other management about the impact on her workload subsequently.
- [7] Mrs Marsh said she did not raise any concerns with Inghams about the declining of her leave application in early 2004.
- [8] With regard to the accusations of attending work under the influence of alcohol, at the

meeting on 18 December Mrs Marsh's husband Roger Marsh raised implementing the personal grievance procedure to deal with what he described as the bad feeling between Mrs Marsh and Ms Knott. Mark Dodd, finance manager, attended the meeting with Mr and Mrs Marsh and Ms Knott on 18 December 2000. He recalled Mr Marsh saying he wished to raised a personal grievance on Mrs Marsh's behalf but that he did not hear further from Mrs or Mr Marsh regarding the matter. Mrs Marsh confirmed she did not raise the matter again with Inghams.

[9] There was no impediment to Mrs Marsh pursuing a personal grievance in relation to Ms Knott's accusation that she had attended work under the influence of alcohol if she so wished. She did not do so and the responsibility did not lie with Inghams to pursue her personal grievance.

[10] Mrs Marsh did not raise any concern with Ingham's about the letter of 3 January 2002.

[11] Mrs Marsh was given the breathalyzer at the end of year work function during an exchange of gifts among co-workers known as a Secret Santa. Mrs Marsh said the Secret Santa was organised by the employees. She said it was very embarrassing to receive a breathalyzer in this way but did not raise any concerns with Inghams about the matter.

[12] Mrs Marsh did not raise any concerns about Mr Armitage raising performance concerns with her in March 2004 or the manner in which he raised those concerns.

[13] Mr Armitage told me he did not intend the meeting on 14 May 2004 to be a disciplinary meeting and that was the reason he did not ask Mrs Marsh to bring a representative with her or tell her the detail of the customer complaint which had prompted the meeting. He said he had already spoken with Mrs Marsh informally twice regarding her performance and that when a customer complaint came in he wanted to write a letter to Mrs Marsh to emphasis the seriousness of the matter with her.

[14] Mr Armitage drafted a letter addressed to Mrs Marsh and called the meeting to present that letter and go through it with her. The letter was titled "written warning" and the final paragraph states:

We need your customer service, and by this I mean, your phone manner, accuracy of order taking, politeness, attitude and a willingness to "go the extra mile" to help customers, to improve immediately. Failure to do so, may result in your employment with Inghams Enterprises being terminated."

[15] The letter put Mrs Marsh on notice that if her performance did not improve there could be disciplinary consequences up to and including dismissal. The contents of the letter were communicated to her during the meeting; Mr Armitage told her he had concerns about her performance, presented her with the letter, and went through it which sets out his concerns and the possible disciplinary outcomes. For these reasons I find the meeting of 14 May 2004 was disciplinary in nature.

[16] Mrs Marsh's concerns about the manner in which the warning was presented and the nature of the warning are well founded; without fair notice of the meeting and its purpose Mrs Marsh did not have an opportunity to have a representative present or to seek advice, she was not told the detail of the customer complaint and so could not respond and she was not given an opportunity to comment. The decision to issue Mrs Marsh a written warning was unjustified given the meeting was clearly disciplinary in nature, was constituted in breach of the express provisions of the employment agreement to allow a representative to be present and Mrs Marsh was not given an opportunity to comment on the complaint.

[17] Mrs Marsh said she was very upset by the meeting, went home that evening and decided to

tender her resignation the following day, which she did. Mrs Marsh worked out her notice period.

Determination

[18] A claim of constructive dismissal requires the claimant to establish they had no option but to resign as a consequence of breaches of their employment agreement so serious that it was reasonably foreseeable they would resign. Mrs Marsh's claim of workplace bullying concerns discrete incidents ranging over a considerable span of years. As I have recorded above Mrs Marsh did not raise or pursue her concerns with Inghams about her treatment until after her resignation. In deciding not to raise the issues Mrs Marsh denied Inghams the opportunity to address her concerns. I am not satisfied on the evidence received that the behaviour described amounts to a pattern of conduct over time conceived with the view to giving Mrs Marsh no option but to resign. Further no tangible link has been established between the incidents complained of and the warning on 14 May which immediately proceeded Mrs Marsh's decision to resign. The issuing of a written warning in the circumstances described did not show Inghams did not intend to be bound by the employment agreement. That Mrs Marsh worked out her notice period indicates she did not hold this view either. For these reasons I find Mrs Marsh was not constructively dismissed.

[19] The written warning was issued to Mrs Marsh in breach of the employment agreement and duty owed to Mrs Marsh to constitute a disciplinary meeting fairly, in accordance with accepted standards of procedural fairness. Mrs Marsh was distressed by this meeting and she was disadvantaged her in her employment. In relation to the 14 May 2004 meeting and issuing of a written warning Mrs Marsh has established a personal grievance for unjustified action causing disadvantage.

Remedies

[20] For the reasons set out above I do not accept Mrs Marsh was constructively dismissed. It is not necessary to consider the remedies Mrs Marsh has sought in relation to the claim of constructive dismissal, including the claim for redundancy compensation.

[21] Having established a personal grievance for unjustified action causing disadvantage Mrs Marsh is entitled to a consideration of remedies in relation to that personal grievance. Mrs Marsh has sought compensation for hurt and humiliation caused as a consequence of her unjustified warning. She gave evidence that she was upset by the meeting and felt she had no option but to resign.

[22] Mrs Marsh is entitled to an award to compensate her for the hurt feelings suffered as a consequence of the warning and I set that amount at \$2000 pursuant to section 123(c)(i) of the Act.

Costs

[23] Costs are reserved. If the parties wish the Authority to determine this issue they should file and exchange written memoranda within 21 days of the date of this determination with a further 14 days for and replies to be filed and exchanged.

Marija Urlich
Member of Employment Relations Authority