

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 156/08
AEA 6/06**

BETWEEN SHARON MCDONALD
Applicant

AND SPECIALITY FASHION GROUP NEW
ZEALAND LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: John Coyle for Applicant
Jim Meyland for Respondent

Investigation Meeting: 15 April 2008

Determination: 28 April 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Sharon McDonald ("Ms McDonald") says she was unjustifiably dismissed from her employment with Speciality Fashion Group New Zealand Limited formerly Miller's Retail Limited ("Speciality Fashion"). Speciality Fashion says Ms McDonald resigned from the employment.

[2] The parties were unable to resolve the differences between them by the use of mediation.

The facts

[3] Ms McDonald was employed as the store manager of Speciality Fashion's New Lynn store. She commenced that employment in September 2004. She was paid a salary of \$32,000.00 for this managerial position.

Monday 14 February 2005

[4] On Monday 14 February 2005, Speciality Fashion's regional manager Ms Donna Shannon ("Ms Shannon") telephoned Ms McDonald at the New Lynn store. Ms Shannon advised Ms McDonald she had received a complaint about Ms McDonald from a former long-serving staff member who had recently resigned. Ms Shannon says she informed Ms McDonald she would discuss matters with Ms McDonald more fully in a meeting the following week when Ms Shannon would be in Auckland. Ms McDonald did however raise with Ms McDonald allegations that Ms McDonald had not been attending to store banking on a daily basis and that she had removed store records from the store. Ms McDonald advised she had not attended to store bank daily and Ms Shannon reaffirmed the correct policy. Ms McDonald did not give a substantive response to the issue concerning the store records.

[5] Ms Shannon says she did not intend to discuss matters further but entirely at Ms McDonald's urging the discussion proceeded and Ms Shannon disclosed the former staff member had alleged Ms McDonald was rude to staff and customers and that staff had left as a result of Ms McDonald's manner.

[6] Ms McDonald says Ms Shannon said she felt Ms McDonald had an attitude problem and referred to a conversation they had previously about a customer complaint and that she had heard the same from other people. Ms McDonald says Ms Shannon then said she felt Ms McDonald was very defensive.

[7] Ms McDonald's prepared brief to the Authority at this point says "*she asked if I could work with [the former employee] if she came back I said No, I couldn't work under those conditions*". But notes made by Ms McDonald apparently in 2005 say after Ms Shannon said she felt Ms Donald was very defensive, recount the continuing discussion that "*I was shocked and upset to say the least by this stage and I said I didn't think I could continue under the circumstances. [Ms Shannon] asked if I could work with [the former employee] if she came back and I said no*". I prefer Ms McDonald's more contemporary notes and I find that she said she did not think she could continue, before the matter of the former employee returning was raised.

[8] Ms Shannon says the discussion did not proceed to discuss allegations that Ms McDonald was rude to staff and customers. I do not accept that because I am not persuaded how Ms McDonald could have learned of the allegations otherwise, she correctly recounting what Ms Shannon was in fact informed of. Ms Shannon says that after discussing the store banking and store records Ms McDonald then became very angry and abusive and told Ms Shannon the former employee could come back and have the manager's job, that Ms Shannon "could stick the job" and that she wasn't "putting up with this anymore she wasn't paid enough for this crap". Ms Shannon says that she understood Ms McDonald to have resigned by these statements. She says she then said to Ms McDonald to think about "any such action overnight as she was making a rash decision". Ms Shannon says Ms McDonald replied "No, I don't want to" and then asked if Ms Shannon "do you want it in writing?". Ms Shannon says she then asked Ms McDonald to calm down and take time to think about it. She says Ms McDonald then said she wanted to leave and expressly said she was resigning, and further "I'm obviously no good at managing staff" and that she was "too old to change".

[9] Another store manager Ms Diane Anderson ("Ms Anderson") gives evidence on oath to the Authority. She says she was present when Ms Shannon was on the telephone speaking with Ms McDonald. Ms Anderson says she heard Ms Shannon on telephone ask Ms McDonald three or four times "are you sure you want to do that?" and "you should think about it overnight" and "you're making a hasty decision." She also tells the Authority at the termination of the conversation Ms Shannon turned to her and said "Oh well, Sharon has just told me to stick your job, I'm not paid enough for this crap."

[10] Ms Shannon then says she asked Ms McDonald again "are you sure you don't want to think about it overnight" and Ms McDonald said "No". She continues that Ms McDonald asked if she had to give a months notice and said she would not be comfortable having to work out the notice period. Materially, Ms Shannon tells the Authority she then informed Ms McDonald she was accepting Ms McDonald's resignation and that she would have to arrange a replacement manager from another store and she would aim to accomplish this by the end of the week. She said she told

Ms McDonald she would call her the following day and the conversation ended with Ms McDonald's agreement to fax her written resignation that afternoon.

[11] I have no reason to doubt Ms Anderson's evidence given on oath and consequently I accept it as corroborative of Ms Shannon's evidence as to the critical part of the discussion Ms Shannon had with Ms McDonald. I therefore find that Ms McDonald said that Ms Shannon "could stick the job" and that she wasn't "putting up with this anymore [she] wasn't paid enough for this crap". I find Ms Shannon did invite Ms McDonald to reconsider and to take time to reflect overnight but Ms McDonald maintained her position.

Tuesday 15 February 2005

[12] Ms McDonald says Ms Shannon phoned her again at the store and said she had spoken to another former employee and the picture was only getting worse. She says Ms Shannon informed her there were two other complaints that Ms McDonald had taken two hour lunch breaks and had babysat her grand-daughter in the store. Ms McDonald also says Ms Shannon informed her another staff member was trying to get hold of her and that it wasn't looking good. Ms McDonald says Ms Shannon asked her what she had to say and that she said she did not know what to say and that she thought it was getting ridiculous. She says Ms Shannon repeated it wasn't looking good for her (Ms McDonald).

[13] Ms Shannon says that she had discussions with other store managers and at 4.45pm she telephoned Ms McDonald at the Lynmall store to inform her of progress. She says Ms McDonald said "Look Donna, I don't want to fuck you around but is there any way around this?". She continues that Ms McDonald then handed the telephone to another employee so that the other employee could advise Ms Shannon how she felt about Ms McDonald. The employee advised she did not have concerns about Ms McDonald and had not been for other job interviews. Ms Shannon also says Ms McDonald invited her to contact another employee (who was on leave at the time) by way of endorsement of Ms McDonald.

[14] Ms Shannon did not make any commitment to Ms McDonald and matters remained unresolved. Ms Shannon did however pursue Ms McDonald's invitation to

consult other staff. That evidences a commitment by Ms Shannon to entertain Ms McDonald's invitation to revisit the situation.

Wednesday 16 February 2005

[15] Ms Shannon spoke to the other employee on leave that Ms McDonald had suggested. Ms Shannon says that employee spoke very negatively about Ms McDonald. She says she also phoned another former employee who said she had resigned because of Ms McDonald.

Thursday 17 February 2005

[16] Ms Shannon telephoned Ms McDonald at about 9.30am. She told Ms McDonald of her discussions with two other staff members. She asked Ms McDonald if it was true about Ms McDonald taking extra long breaks and babysitting her granddaughter in the store. Ms McDonald said she had no knowledge of such matters and asked what the employer was going to do. Ms Shannon said she had accepted Ms McDonald's resignation. Ms McDonald said it was not in writing. Ms Shannon said "that's fine". Ms McDonald then said she was not going. Ms Shannon said she would take advice and get back to Ms McDonald.

[17] Ms Shannon phoned Ms McDonald again. She told Ms McDonald she had accepted Ms McDonald's resignation and would not accept a retraction. Ms McDonald asked if Ms Shannon was putting that advice in writing and when Ms Shannon said she was not, Ms McDonald said "I will be here today, the next day and the day after that."

[18] Ms Shannon took advice from the Australian office of the employer. Ms Shannon was advised to have another store manager go to the Lynmall store and to contact Ms McDonald and advise her to hand the store keys to the other manager.

[19] Later that day, Ms McDonald returned from a break and encountered another store manager. At that same time Ms Shannon had called and Ms McDonald spoke with her on the phone. Ms Shannon advised Ms McDonald to hand over the keys to the other manager and leave the store. Ms McDonald did not protest and in compliance handed over her keys and then left the store.

The merits

[20] These issues arise on the facts:-

- (i) Did Ms McDonald resign or was she was dismissed?;
- (ii) If she was dismissed was that dismissal unjustifiable?;
- (iii) If the dismissal was unjustifiable, what resolution is appropriate?.

Resignation or dismissal?

[21] Ms Shannon says Ms McDonald had resigned on two previous occasions. That is not disputed. I accept that there were difficulties with Ms McDonald's initial performance as manager. I also accept that Ms Shannon provided substantial support to Ms McDonald and on both previous occasions dissuaded Ms McDonald from leaving.

[22] I accept that Ms McDonald did say to Ms Shannon that Ms Shannon “could stick the job”. Ms McDonald also said she wasn’t “putting up with this anymore [she] wasn’t paid enough for this crap”.

[23] Ms McDonald should not have told Ms Shannon she could "stick the job". That was entirely inappropriate and unacceptable language. Admirably Ms Shannon did not react to that language. But I rather consider those statements were made in the heat of the moment and Ms McDonald was understandably upset by the matters Ms Shannon had raised with her and the manner in which they were raised.

[24] Although I accept Ms Shannon intended to have a full discussion with Ms McDonald the following week, there was a full discussion of all issues over the telephone. That was not wise and Ms Shannon ought to have done more to resist Ms McDonald's urgings.

[25] Ms Shannon did appreciate Ms McDonald's comments were made in the heat of the moment because that is why she said that Ms McDonald should think about things overnight because she knew Ms McDonald was making a rash decision.

[26] She was correct to offer that advice to Ms McDonald because Ms McDonald the following day said to Ms Shannon "look Donna I don't want to fuck you around but is there any way around this". In making that statement Ms McDonald was resiling from her earlier resignation. Ms Shannon did not make any statement committing herself to accepting Ms McDonald's retraction of her earlier resignation. I think she was obliged to deal with Ms McDonald's request unequivocally and in good faith.

[27] Although she did not make any express statement in response, she did in fact commit to making enquiries Ms McDonald had invited her to make. In doing so, I find she acted consistent with Ms McDonald's desire to remain.

[28] Unfortunately for Ms McDonald, the further enquiries of other employees Ms Shannon did make were not favourable to Ms McDonald. I infer that Ms Shannon thereafter resolved not to permit Ms McDonald to remain.

[29] I find it was unreasonable of Ms Shannon not to permit Ms McDonald to retract her resignation, a resignation which Ms Shannon herself appreciated was given in the heat of the moment as an ill-considered reaction.

[30] Ms Shannon should not have conducted an enquiry into Ms McDonald's performance in such a casual fashion. She ought to have continued as she said she intended, that is, to meet with Ms McDonald in person in the proper business environment. It was quite wrong for Ms Shannon to conduct such enquiries and present the developments of it to Ms McDonald over the telephone. Ms Shannon cannot be surprised by the actual results of her actions. It is no surprise Ms McDonald reacted in the manner she did.

[31] I find then that in the circumstances, it was unreasonable for Ms Shannon not to her permitted Ms McDonald to resile from her resignation. A fair and reasonable employer would have permitted the employee to retract the resignation. Because she did not, I find that Ms Shannon sent Ms McDonald away. On Thursday 17 February 2005 when Ms McDonald was required to hand over her keys and leave the store she

was sent away. That sending away was a dismissal. I answer the first issue that Ms McDonald was dismissed.

An unjustifiable dismissal?

[32] I now determine whether the dismissal I have found was unjustifiable. The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[33] I accept that Ms Shannon was pursuing matters of concern about Ms McDonald's performance. It was entirely inappropriate and unfair to pursue such matters over the telephone. A fair and reasonable employer would not have conducted enquiries in such a manner. I therefore find Speciality Fashion's actions were not the actions of a fair and reasonable employer. The dismissal I find is consequently unjustifiable. That is the answer to the second issue I have posed.

The determination

[34] I find that Ms McDonald was unjustifiably dismissed. She has a personal grievance. She is entitled to remedies in settlement of that personal grievance.

The resolution

[35] I am bound by section 124 of the Act to consider the extent to which Ms McDonald's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[36] I am not a position to say that the performance concerns about Ms McDonald are established. While I understand why Ms McDonald made the statements she did, the conduct of her bad language constitutes blameworthy conduct. I therefore find

that the remedies to be awarded to Ms McDonald are to be reduced by 20% for her contributory fault.

Reimbursement

[37] Ms McDonald gives evidence she did not make any application for other employment. I am not satisfied Ms McDonald took steps to mitigate her losses. **Accordingly I decline to order reimbursement.**

Compensation

[38] Ms McDonald says that following the termination of her employment she did not know what to do. She says she felt her retail career was over and her confidence was shattered. For five months after her employment ended she says she felt unable to leave her home. She was diagnosed with depression in March 2006 she says as a result of the termination of her employment and she continues to take medication for that condition.

[39] I accept that Ms McDonald has suffered humiliation, loss of dignity and injury to her feelings. Having regard to her evidence, her length of service and the nature of her personal grievance, I award her \$8,000.00 compensation, but reduced by 20% for her contributory fault. **I order Millers Retail Limited to pay to Sharon McDonald \$6,400.00 as compensation.**

Costs

[40] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Coyle is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Meyland is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority