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Menzies v New Zealand Bio Grains Limited (Christchurch) [2016] NZERA 319; [2016] NZERA Christchurch 122 (26 July 2016)

Last Updated: 30 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 122
5579941

BETWEEN SHELLEY MENZIES Applicant

AND NEW ZEALAND BIO GRAINS LIMITED

Respondent

Member of Authority: Vicki Campbell

Representatives: Georgina Burness for Applicant

Harry Lowe for Respondent

Investigation Meeting: 12 July 2016

Additional Information

Received: 13 and 22 July 2016

Determination: 26 July 2016

DETERMINATION OF THE AUTHORITY

A. Ms Menzies has not established that New Zealand Bio Grains

Limited embarked on a course of conduct with the deliberate and dominant purpose of coercing her to resign.

B. There will be no order for costs.

Employment relationship problem

[1] Ms Shelley Menzies claims she was unjustifiably constructively dismissed from her position as a packer for New Zealand Bio Grains Limited (Bio Grains). Bio Grains denies the claim and says Ms Menzies resigned voluntarily from her employment.

[2] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act) this determination has not recorded all the evidence received from Ms Menzies and Bio Grains but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[3] Bio Grains is certified to supply and mill organically grown grains, flours, pulses, nuts and other organic products to clients in all parts of New Zealand. The products are supplied in packets ranging from 500gm bags to bulk purchases in 25kg bags.

[4] Bio Grains is a small family owned business which employs six employees. Mr Harry Lowe and Mrs Mary Lowe, both of whom are the directors (Mr Lowe being the Managing Director) and the major shareholders of Bio Grains, plus two other employees are full time. The remaining two employees are part time, one of whom was Ms Menzies.

[5] Ms Menzies started working for Bio Grains on 20 November 2013. Both Ms Menzies and Mr Lowe agree that the terms and conditions of Ms Menzies employment were set out in a written employment agreement. The Authority has received an unsigned copy of the applicable agreement.

[6] Ms Menzies says that during her employment she was subjected to bullying by another employee and Mrs Lowe. Ms Menzies says that although she raised concerns with Mrs Lowe about the behaviour her concerns were not addressed.

[7] Ms Menzies says the failure to address the bullying issues in the workplace, resulted in her becoming unwell which, combined with the passing of her mother on

21 May 2015 and the subsequent grief, led her to conclude that she had no option but to resign from her employment.

[8] Ms Menzies resigned on 12 June 2015 giving one weeks' notice. Ms Menzies

last day of employment was 19 June 2015.

[9] This matter relates to notes being left by one employee to another employee. The use of notes is a common form of communication in Bio Grains.

[10] The most common form of communication between the night shift and the day shift workers was through the use of notes left at the end of each shift to inform the next shift of matters that needed attending to. This is a system that has been in place since the 1980s. The two shifts do not overlap because the night shift finishes at

10pm and the day shift starting the next morning at 7.00am, although Ms Menzies did not start until 8.00am. The day shift finished at 2.00pm and the night shift started one hour later at 3.00pm.

[11] Ms Menzies was employed as a packer and worked on the day shift. Ms Tania Manning was employed as a packer and worked predominantly on the night shift. Ms Manning has been employed at Bio Grains since 2010.

[12] Mr Lowe told me that he had seen the notes which were left on the work bench. The notes were not just left for Ms Menzies but for all staff including Mr Lowe. Ms Manning's uncontested evidence is that once she was told Ms Menzies found her notes to be offensive, she reduced her reliance on the notes and on at least one occasion asked Mr Lowe to check a note she proposed leaving for Ms Menzies to ensure it did not contain anything that might offend her.

[13] Mr and Mrs Lowe viewed the notes as a communication tool, a training tool and a way to ensure the systems were being followed consistently between the day shift and the night shift.

The Law

[14] Ms Menzies resigned from her employment on 12 June 2015. Ms Menzies claims her resignation was in law a constructive dismissal. A constructive dismissal is an apparent resignation which is, in reality, an employee's response to an act or omission of the employer of such significance that it amounts to a repudiation of the contract of the employment and entitles an employee to accept that repudiation by resigning the employment.

[15] The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*¹ identified categories of constructive dismissal and stated that the concept includes but is not limited to cases where:

- a) The employer gives the employee a choice between resigning or being dismissed.
- b) The employer embarks on a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c) A breach of duty by the employer leads an employee to resign.

[16] Ms Menzies says it was the second category of constructive dismissal that led to her resignation. The Employment Court held in *Jeffries v Adis International Ltd*:²

Constructive dismissal cases often involve a series of events over a period of time and no single event may be sufficiently serious as to enable the employee to treat the contract as repudiated but the cumulative effect may reach that point.

[17] If I conclude that there has been a constructive dismissal, I must then determine objectively whether it was justifiable in terms of the statutory test of justification under [section 103A](#) of the Act. To this end, the employer must satisfy me that its

actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time.

Issues

[18] The issue for determination is whether Ms Menzies' constructive dismissal claim is made out and if so, what if any, remedies should be awarded.

Credibility

[19] Ms Menzies has provided the Authority with her diaries which she says she wrote up during her employment relationship. Having read the diary notes in full I

have gained an impression that Ms Menzies had no respect for her employer, in

¹ [\[1985\] 2 NZLR 372](#), (1985) ERNZ Sel Cas 136 (CA).

² AC 69/06, Employment Court Auckland, 7 December 2006, Travis J at [12].

particular Mrs Lowe. Ms Menzies frequently refers to Mrs Lowe in the most intemperate ways and uses profanities to describe actions and her feelings.

[20] Ms Menzies told me that the notes were her own personal thoughts and accepted that the notes contained exaggerations. She told me that she was trying to make a good story.

[21] Under normal circumstances I would treat the diary notes as supporting evidence of the employment relationship however in this case I have given the notes little weight except to the extent that they confirm the evidence given by Bio Grains. During the course of the investigation meeting, Ms Menzies conceded that a number of the notes were not accurate and comments attributed to Mrs Lowe did not happen. By way of example:

a) Ms Menzies records that she took a days' sick leave on 11 June 2015. The diary note records that during the day she had lunch with friends and family and then attended on Ms Anne Kerr, a Registered Psychologist working for Rural Canterbury Primary Health Organisation. Ms Menzies has recorded that she spent approximately two hours with Ms Kerr. At the investigation meeting Ms Menzies denied she had lunched with her family and could not explain why the diary note records that she did.

b) Diary notes dated 8 and 9 May 2015 record Ms Menzies as telling Mrs Lowe that she "...had enough of the shit..." and, in response to a remark from Mrs Lowe that there was no note that day "...bullshit Mary...". At the investigation meeting Ms Menzies told me she did not swear at Mrs Lowe and in particular did not say the words she attributes to herself in the recorded diary note.

c) In a diary note dated 13 March 2015 Ms Menzies records that while working with Ms Manning packing 5kg bags she did not like Ms Manning telling her that she should not pack the 5kg bags the way she was packing them. Ms Menzies records that she told Ms Manning "...for f...k sake. Do it yourself then." At the investigation meeting Ms Menzies told me that while that is what she wrote in the diary it was not true.

[22] The diary notes formed the basis of Ms Menzies evidence. Due to the inaccuracies contained within the notes where the evidence between the parties is disputed I have preferred the evidence of Bio Grains.

Course of conduct

[23] Ms Menzies says she was subject to bullying behaviour by Ms Manning, who worked on the night shift and that the failure by Mr and Mrs Lowe to address the issue about the notes led to her resigning on 12 June 2016. In addition to that, Ms Menzies says that on 30 March 2015 she was sent home by Mrs Lowe because Mrs Lowe believed she had whooping cough.

[24] There is no statutory definition of *bullying* in New Zealand, although the WorkSafe New Zealand guidelines on work place bullying defines it as *repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety*. The Authority is not obliged to adopt this definition, but it is useful.

[25] While Ms Menzies relies on the notes as constituting bullying conduct there were also two other events that occurred during Ms Menzies' employment and which Ms Menzies has raised in her correspondence. The first was an issue with respect to her suffering a work accident in 2014 and the second when her hours were reduced in January 2015.

[26] I asked Ms Menzies about both incidents during the investigation meeting and she confirmed that neither of these incidents are relied on by her as part of her claim that Bio Grains embarked on a course of conduct with the deliberate and dominant purpose of coercing her to resign. Ms Menzies acknowledged at the investigation meeting that she had agreed to the reduction in her hours during January 2015.

[27] In 2009 Ms Menzies was referred to a Brief Intervention Service for assistance with anxiety associated with health issues. Since that initial referral Ms Menzies has made intermittent contact with provider Ms Kerr, on an as needed basis for support

and guidance during times of stress and pressure.

[28] In October or November 2014 Ms Menzies mother became ill. It was at this time in November 2014 that Ms Menzies reinstated contact with Ms Kerr and reported

feeling sick and having disrupted sleep. Ms Menzies put this down to the work environment.

[29] I have seen three notes left by Ms Manning for Ms Menzies prior to her decision to resign from her employment. The notes were:

a) **20 March 2015** – *“Hi Shelley, Could you please not highlight stuff that we don’t have. That just has an “NA” next to it. We highlight things that need to be packed to complete an order. I’m finding it a pain in the butt as that is just ntw how it’s done. Thanx .”*

b) **7 April 2015** – Ms Manning wrote on an order for a customer *“check oily bags”*.

c) Unknown – *“Good morning Shelley. I left 10 bags 5kgwt, Monday to complete, this St Martine order you only did 5. So there is another 5 to go. Harry has loaded 7 bags, should be 8 all up. Thanks, have a great day.*

”

[30] The words *“what a clown”* were written on a packing slip. Ms Menzies says these words were left by Ms Manning and were about her. Ms Menzies has not established that Ms Manning wrote this note or that it was intended for her.

[31] A note left for Ms Menzies on 10 June 2015 has not been provided to the Authority but it was common ground that Ms Manning had left a note for Ms Menzies about the correct way to pack flour.

[32] 19 June 2015 was Ms Menzies’s last day of employment. On 18 June 2015 she wrote a note on the cleaning schedule which contains the directions for employees about the cleaning to be completed at the end of each shift. Ms Menzies wrote: *“Try scrubbing bench with hot soapy water!”* It isn’t clear on the note but Ms Manning assumed the note was intended for her.

[33] In retaliation Ms Manning wrote a note in response which she accepted at the investigation meeting was sarcastic. Ms Menzies received the note on 19 June 2015, her last day. The note reads:

Thanks Shelley, I haven’t laughed so hard in ages. You say scrub bench? You, who packed flour into grotty oily bags then into boxes with mouldy orange stuck to the sides. Anyhow, I digress, what I meant to say is, don’t let the door hit you in the butt on the way out. Good bye and good luck.

20 March Note

[34] Ms Menzies says that when she arrived at work on 20 March 2015 she found a note on the desk telling her not to highlight items that were not in stock. Ms Menzies says she was so upset with the note that she raised it with Mrs Lowe. Ms Menzies left work after discussing the note with Mrs Lowe and becoming upset.

30 March incident

[35] On 30 March 2015 Ms Menzies arrived at work to find the note left by Ms Manning. Ms Menzies says that when she arrived at work she was coughing a lot and Mrs Lowe told her that she did not want her at work because she had whooping cough. Ms Menzies describes Mrs Lowes treatment of her as *“nasty”*.

[36] Mrs Lowe told me that when Ms Menzies arrived at work Ms Menzies told her she thought she had whooping cough. Mrs Lowe’s evidence, which I have accepted as being more likely than not, is that as whooping cough is highly contagious she told Ms Menzies that she wouldn’t want her at work if she had whooping cough and that if she did have it then she needed to go and get checked out at the doctor.

[37] In all the circumstances this is a reasonable response from an employer who is concerned about the health and safety of their staff.

[38] It is common ground that Ms Menzies left work immediately and sought the assistance of her doctor who later confirmed she had a chest infection.

[39] When her partner Mr Lyndon Hurring arrived home at lunch time Ms Menzies was crying and upset. Ms Menzies told Mr Hurring that she could not stand working at Bio Grains any longer. Mr Lyndon decided to take matters into his own hands and attended the offices of Bio Grains to confront Mr and Mrs Lowe.

[40] When Mr Hurring turned up at Bio Grains he was unknown to Mr and Mrs Lowe. There were a number of customers in the office and so after he explained who he was and his relationship with Ms Menzies he was invited to meet with them in the staff tea room.

[41] Mr Hurring met with Mr Lowe and was eventually joined by Mrs Lowe. Mr Hurring raised the issues regarding the notes being left by Ms Manning and demanded that Ms Manning be instructed to stop writing notes and to raise any concerns about Ms Menzies work with them.

[42] During this discussion Mr Hurring raised with Mr and Mrs Lowe the concept of constructive dismissal advising them of how constructive dismissal arises and expressed his opinion that the notes indicated Ms Menzies was being pushed out of her job.

7 April note

[43] Ms Menzies says that she arrived at work on 7 April 2015 to find oil all over the bench where she undertook her packing duties. Ms Menzies was sure she had cleaned the bench and that the bags she had packed did not have oil on them. Ms Manning had written on the order that it needed to be checked for oil on the bags.

[44] The system used at Bio Grain requires the person packing the product to confirm it has been checked and is correct by initialling the order sheet after packing. I have accepted the uncontested evidence from Mr Lowe that Ms Menzies would not initial the order sheet which meant that her packing had to be checked by someone else. This was usually done by someone in despatch.

[45] In this case, because there had been an oil spill on the bench it seems reasonable for the need to check for oil on the bags be noted. I am also satisfied that the note was not intended for Ms Menzies but rather for the person in despatch who would check the order.

Other notes

[46] I have no evidence about the note written on the unknown date except for its existence. Having read the note it seems reasonable to me that Ms Manning would be communicating where the packing was at so that Ms Menzies could continue with the packing of that product when she arrived at work.

[47] On 8 May 2015 Ms Menzies walked out of work before completing her shift. Ms Manning had left a note for Ms Menzies questioning why an order from 7 May

2015 had not been completed. Ms Menzies says she told Mrs Lowe about the note and was angry about it. At the investigation meeting Ms Menzies told me she was not angry with Ms Manning about the note but she was angry that there was not enough stock for her to complete the order on 7 May 2015. That she had had enough and left.

[48] On 9 May 2015 when she arrived at work Mrs Lowe enquired about the previous day. Ms Menzies told Ms Lowe that she had a guts full of the notes left for her.

[49] Ms Menzies says that Mrs Lowe called her "*bloody ignorant*" and Ms Menzies left the work place. Mrs Lowe's evidence, which I have preferred is that Ms Menzies left the work site and as she was heading across the road to her car she told her she was being ignorant and that she should come back and sit down to talk about matters.

[50] Ms Menzies ignored Mrs Lowe's request and continued to leave work for the day. Mr Lowe was concerned about Ms Menzies leaving work and visited her at home that afternoon to check on her welfare. Mr Lowe told me he spoke with Ms Menzies at length about the notes and he tried to explain to Ms Menzies that the notes were an important form of communication. Ms Menzies told Mr Lowe that she did not want to come back to work, however, after discussion Mr Lowe convinced Ms Menzies to return to work and give it another shot.

[51] The note dated 10 June 2015 related to the fact that Ms Menzies had incorrectly packed flour. Ms Morag McCorquodale gave evidence that soon after she commenced working for Bio Grain she witnessed unpleasant behaviour from Ms

Menzies towards Mrs Lowe. Although Ms McCorquodale got her dates wrong I am satisfied that it was on 10 June 2015 that Ms McCorquodale was working at a computer with Mrs Lowe when Ms Menzies came into the room where they were working, slammed something down on the desk behind them and yelled "I am f**ken sick of the b**sh*t Mary". Ms Menzies had slammed the note from Ms Manning on the table.

[52] Ms McCorquodale gave evidence that she had seen the flour packed by Ms Menzies and it had been packed incorrectly. The correct method of packing the flour is by laying the bags flat. Ms Menzies had not done that and her packing had resulted in the bags becoming crumpled and soiled in the box.

[53] It was common ground that Mrs Lowe did tell Ms Menzies that she should not "*get her knickers in a twist*" something Ms Menzies says is further evidence of her being bullied.

Determination

[54] I have considered all of the evidence relating to the matters raised by Ms Menzies. I find the use of the notes in the workplace was an accepted practice and was a critical form of communicating in a situation where two people are doing the

same job but do not work at the same time and whose start and finish times did not overlap.

[55] I am satisfied Mr and Mrs Lowe raised Ms Menzies concerns about the tone and content of the notes with Ms Manning and after that Ms Manning endeavoured to ensure her notes were not offensive when she had to leave one. Ms Manning conceded at the investigation meeting that before being told about Ms Menzies concerns two of her notes did demonstrate the frustration she was experiencing in Ms Menzies not following correct systems when packing orders.

[56] Ms McCorquodale gave evidence that on her first day of work for Bio Grains on 18 May 2015 Ms Menzies spoke about Ms Manning in an intemperate manner swearing about a note that she had left after a previous shift. Ms McCorquodale says she was shocked to hear Ms Menzies speak about another employee in this way especially given that it was her first day of work.

[57] From about October or November 2014 Ms Menzies was dealing with a major event in her life when her mother, with whom she had a very close and significant relationship, became terminally ill. Although Ms Menzies says that it was her work situation that was causing her distress it is difficult to see how this was the only factor. Ms Kerr has confirmed that Ms Menzies experienced distress associated with the failing health and impending loss of her mother prior to late May 2015 and then grief/bereavement following the death of her mother after 21 May 2015.

[58] After walking out of work on 10 June 2015 Ms Menzies did not attend work on 11 June 2015 and was absent due to sick leave. That night, after spending time with Ms Kerr, Ms Menzies decided to resign from her employment with Bio Grains and wrote a letter of resignation which she took to work with her on 12 June 2015.

[59] When Ms Menzies attended work on 12 June 2015 Ms Lowe reminded her that she had taken a lot of time off. Ms Menzies reminded Mrs Lowe that her mother had passed away and she was suffering from stress. A discussion followed which ended with Ms Menzies telling Mrs Lowe that she wanted to hand in her notice and would finish up on 19 June 2015.

[60] Mrs Lowe reminded Ms Menzies that notice needed to be in writing. Ms Menzies returned to her car and retrieved her written letter of resignation confirming notice of one week as required by clause 14.1 of the employment agreement.

[61] Ms Menzies has failed to establish to my satisfaction that any of the incidents relied upon either individually or collectively caused her to resign. I find Bio Grains did not embark on a on a course of conduct with the deliberate and dominant purpose of coercing Ms Menzies to resign. Quite the opposite, they raised Ms Menzies concerns about the notes with Ms Manning, assured Ms Menzies that the notes were an important part of the communication process, encouraged Ms Menzies to leave notes of her own and were supportive of Ms Menzies during her mothers' illness.

[62] For the sake of completeness I find the final note left on 19 June 2015 did not contribute to Ms Menzies decision to resign from her position with Bio Grain.

[63] I am unable to be of any further assistance to Ms Menzies in this matter.

Costs

[64] Although Ms Menzies was represented at the investigation meeting she incurred no costs for this representation. Bio Grains was not represented and the parties acknowledged at the end of the investigation meeting that there would be no issue as to costs.

Vicki Campbell

Member of the Employment Relations Authority