



Employment Court of New Zealand

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Monteith v Hakansson WC 5/08 [2008] NZEmpC 9 (18 March 2008)

Last Updated: 28 March 2008

IN THE EMPLOYMENT COURT

WELLINGTONWC 5/08WRC 34/07

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN ESTHER JOHANNA MONTEITH

Plaintiff

AND EDITH ANNE HAKANSSON

Defendant

Hearing: 4 March 2008

(Heard at Hastings)

Appearances: E J Monteith, in person

E A Hakansson, in person

Judgment: 18 March 2008

JUDGMENT OF JUDGE C M SHAW

[1] Mrs Monteith employed Mrs Hakansson in her café in Hastings as a chef/cook. Six months later Mrs Hakansson's employment came to an end. The issue is whether she resigned or was dismissed.

[2] Following the end of her employment, Mrs Hakansson took a personal grievance to the Employment Relations Authority which found that she had been unjustifiably dismissed. The Authority ordered Mrs Monteith to pay her \$8,000 compensation, \$10,920 gross in lost remuneration, and \$886.28 gross in holiday pay plus interest at the simple rate of 9 percent per annum from the date of termination of her employment on 21 July 2006 until paid.

[3] Mrs Monteith has challenged that determination. The case proceeded as a de novo hearing.

[4] Both parties represented themselves at the hearing. No other witnesses were available to be called about the events which had occurred over the period of Mrs Hakansson's employment. The evidence given by each party was much in dispute. The hearing was devoted largely to disputes about Mrs Hakansson's performance whilst she was employed. Mrs Monteith harboured a number of specific complaints about Mrs Hakansson's performance during her employment. She felt that she had used the phone too often, that she spent too long in food preparation, that she had tried to change the way things were done at the café, including introducing different recipes and the like, and that she had treated Mrs Monteith disrespectfully. These allegations are strongly denied by Mrs Hakansson. However, apart from providing a background to the events which occurred at the end of her

employment, none of this evidence was directly relevant to the central question of whether Mrs Hakansson resigned or was dismissed.

The facts

[5] The Authority member succinctly described the situation as follows:

2. *Ms Hakansson found the working environment unpleasant because of difficulties she had with Mrs Monteith and other workers. On the other hand, she enjoyed the work itself and needed the income provided to her for 40 hours per week on average.*
3. *While there had been general staff meetings about discontent amongst staff, these meetings did not specifically address any particular concerns about Ms Hakansson's behaviour.*
4. *On Friday, 21 July 2006, Ms Hakansson had an argument with another worker about the use of a mop. Ms Hakansson became irritated and, having had no lunch or tea break that day, decided to leave her job ten minutes early. She told Mrs Monteith as she left, verbatim:*

“Going a little early – I’m out of here – See Ya.”

[6] For present purposes, it is enough to note that, whether the complaints were justified or not, Mrs Monteith was unhappy with Mrs Hakansson's presence at her workplace and that, at least on their attitudes towards each other at the hearing, their personalities strongly clashed.

[7] This job was one of three positions held by Mrs Hakansson. She was in considerable debt as a result of guarantees she had given to secure her son's financial obligations. Her hours of employment at the café fitted in with her other jobs and was essential to her meeting her financial commitments.

Termination of employment

[8] Near the end of her last day of employment, Mrs Hakansson had a heated discussion with a co-worker called Abby. An hour earlier, she had packed up some of her personal things she was taking home that afternoon including some of her personal recipe books she had been using at work. She and Abby were tidying up and mopping the floor. The argument was about how the floor mop had been put away. Voices were raised and Mrs Monteith came in from the café to tell them to be quiet. Mrs Hakansson accepted that she was within her rights to do that.

[9] Mrs Hakansson said that all her work had been completed 10 minutes before her finishing time. She picked up her things and walked out of the door saying “*going a little early, I'm out of here, see ya.*” She was no longer angry with Abby and denied storming out as Mrs Monteith alleged. Mrs Hakansson did not know that Mrs Monteith had arranged an after work meeting with the rest of the staff.

[10] Mrs Monteith rang Mrs Hakansson shortly after she arrived home. She accused her of walking out and asked why she had not stayed for the meeting. Mrs Monteith talked to her about the bad atmosphere at work. Mrs Hakansson said this made her cross and she said tongue in cheek to Mrs Monteith “*oh well, if nobody likes me maybe I should leave.*” Mrs Hakansson denied that Mrs Monteith asked her to repeat that so that the rest of the staff could hear or that she asked if it was her last words. Mrs Hakansson said she told Mrs Monteith that if she was going to leave she would have given written notice.

[11] Mrs Hakansson then asked for the balance of her pay for the week. Because the café was having financial difficulties over the winter, Mrs Monteith had been paying wages in bits and pieces, as money became available. Mrs Hakansson was owed \$200 wages for that week. They arranged that she would call into the café that evening on her way to her next job. Before she left home, Mrs Monteith's lawyer rang her. Mrs Monteith said he had happened to come by the café on another matter and she had asked him to phone Mrs Hakansson.

[12] Mrs Hakansson said the lawyer told her she had walked out and that her \$200 was ready to be collected. She told the lawyer that Mrs Monteith couldn't do that and if she did she wanted her holiday pay as well. He told her Mrs Monteith said she wasn't entitled to holiday pay.

[13] Mrs Hakansson went back to the café at about 6pm. Mrs Monteith told her she would not give her the \$200 unless she returned the key of the business. Mrs Monteith could not remember in evidence if Mrs Hakansson had told her she would not give the key back because she was coming back on Monday. She did, however, tell Mrs Hakansson that if she didn't give the key back she would have to change the security code and would ring Chubb to do that.

[14] Mrs Hakansson said she left without leaving the key and took her \$200. Mrs Monteith denies screaming “*Liar, liar you are not getting in on Monday.*” Mrs Hakansson said “*See you in Court*” and left.

[15] During the weekend, Mrs Monteith's husband rang Mrs Hakansson. Mrs Monteith says she had discussed the situation with him but she did not ask him to phone and did not know anything about the phone call. Mr Monteith asked Mrs Hakansson what was going on and she told him she hadn't walked out and she would be at work on Monday.

[16] On Monday morning at the usual time Mrs Hakansson arrived for work. Mr Monteith and Abby were waiting on the street. Mrs Monteith had asked her husband to go there to open up. It was the first time she had done this.

Normally, Mrs Hakansson opened up but Mrs Monteith said she told her husband that in view of what had happened on Friday she didn't think Mrs Hakansson would be coming back but the shop had to be opened and if she happened to be there he was to tell her to go away.

[17] Mrs Hakansson said Mr Monteith called to her from across the street "*don't go near the café for your own sake, just stay away.*" Mrs Hakansson told him that she had to go to work but if she was going to be locked out she wanted him to sign a statement to say she had been refused entry. She then returned to her home which was nearby, wrote out the statement, and returned but Mr Monteith would not sign it.

[18] Since the termination of her employment Mrs Hakansson said her confidence had been knocked. It was hard to hold her head up in a town where a lot of people knew her. It took her 6 months and about 20 applications to find another job that fitted in with her other two part time positions. Because of the loss of her job she was unable to work her way out of her debts and was made bankrupt.

Dismissal or resignation?

[19] The [Employment Relations Act 2000](#) does not define what amounts to a dismissal but the ILO Convention 158 defines termination as "*termination of employment at the initiative of the employer*" and this has been adopted by the Court^[1]. As the Authority noted, *Boobyer v Good Health Wanganui*^[2] contains a comprehensive discussion of resignation. In the absence of a clear and unambiguous resignation, an employer is not entitled to seize on words not intended or capable of amounting to a resignation especially where an employee makes it clear that resignation was not intended.

[20] In this case, where there was an outburst by an employee at the end of a week's work following an argument with another employee, Mrs Monteith's call to Mrs Hakansson soon after she left work is evidence that she was not sure of Mrs Hakansson's intention. She said she rang to clarify her intentions. It is probable that in that call Mrs Hakansson clarified that she was not resigning. Certainly during the call with the lawyer she told him she had not resigned although the discussion about the payment of holiday pay could have led to some ambiguity. I am satisfied from Mrs Hakansson's account and, in the absence of any evidence to the contrary, that Mrs Hakansson only raised holiday pay when the lawyer told her Mrs Monteith said she had walked out.

[21] Any doubt about the situation is, however, resolved by what happened when Mrs Hakansson came to collect her \$200. Her refusal to surrender her key and her advice that she would be at work on Monday was the clearest expression of her intention to remain in employment. I am satisfied that Mrs Monteith was in no doubt at that stage that Mrs Hakansson would return to work on Monday. She took the step of having her husband being present on the Monday morning to tell her to stay away. That act amounted to the termination of Mrs Hakansson's employment at the initiative of Mrs Monteith.

[22] I am satisfied that Mrs Hakansson was dismissed by Mrs Monteith.

Justification

[23] There was no evidence at all that Mrs Monteith was justified in the way she dealt with Mrs Hakansson at the end of her employment. I acknowledge her concerns and perceptions about Mrs Hakansson's performance and that their relationship was at breaking point. It was open to Mrs Monteith to deal with that situation in a fair and reasonable way by issuing her a warning or by offering her an opportunity to leave with dignity and with sufficient notice to obtain another job. Mrs Monteith did not act in the manner expected of a fair and reasonable employer. I find that Mrs Monteith screamed her out of the café on Friday afternoon and then prevented her entry for work on the Monday morning. I find that the dismissal was not justified.

Remedies

[24] I am completely in agreement with the determination of the Employment Relations Authority both as to outcome and remedies. The orders of this Court are the same as those made by the Authority and for the same reasons.

Orders

[25] Mrs Monteith is to pay Mrs Hakansson as follows:

1. \$8,000 compensation under s123(1)(c)(i);
2. \$10,920 gross in lost remuneration; and
3. \$886.28 gross holiday pay (plus interest at the simple rate of 9 percent per annum from 21 July 2006 until paid).

[26] The sum of \$886.28 paid into Court by Mrs Monteith is to be released to Mrs Hakansson in part payment of these orders.

Costs

[27] Both parties acted for themselves. There is no order for costs.

Judgment signed at 2.00pm on 18 March 2008

[1] *Wellington Clerical Workers IUOW v Greenwich* [1983] ACJ 965 at 974; (1983) ERNZ Sel Cas 95 at 103

[2] WEC 3/94, 24 February 1994

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