

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 151  
5400552

BETWEEN Frances Newman  
Applicant  
  
AND Hard Left Limited  
Respondent

Member of Authority: G J Wood  
  
Representatives: M King for the Applicant  
M Guest for the Respondent  
  
Investigation Meeting: 16 July 2013 at Christchurch  
  
Submissions Received: 16 July 2013  
  
Determination: 26 July 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Mrs Frances Newman, claims that she was unjustifiably constructively dismissed by the respondent (Hard Left/the Bealey Hotel) when one of its principals, Ms Debbie Dekker, told her that she had to retire that day or in two week's time. Hard Left accepts that Ms Dekker did ask Mrs Newman when she was planning to retire, but that it never required her to retire at any time. Instead it considered that in the context of potential disciplinary proceedings an indication from Mrs Newman about her retirement date would have determined whether or not a disciplinary investigation process was going to be required.

**Factual discussion**

[2] Mrs Newman worked at the Bealey Hotel in Arthurs Pass for over 20 years, in its restaurant. She had worked for Hard Left under its principals Mr & Ms Dekker for

around 3½ years, since they took over the running of the hotel. Mrs Newman was in receipt of National Superannuation and had previously informed the Dekkers that once she had saved up for a new car she would be retiring. However, after purchasing a new car she never raised the prospect of retirement with the Dekkers. Unknown to them, however, Mrs Newman was intending to retire in the winter of 2012, unless the Dekkers wanted her to stay on. Mrs Newman accepted in evidence that she was likely to retire within a month to six weeks of the date she actually left Hard Left's employment.

[3] While the facts of what happened between 15 and 19 June 2012, that led to Mrs Newman leaving Hard Left's employment appear to be disputed, it was clear following concessions by both Mrs Newman and Ms Dekker, and areas where Mrs Newman simply could not remember what had happened, that the following account of facts is that most likely to be correct on the balance of probabilities, i.e. what was more likely than not.

[4] Ms Dekker was away for the day in Christchurch on Friday, 15 June 2012. On her return that evening she received a call from her daughter, who was distressed that her husband's employer had allegedly effectively been turned away from lunch at the Bealey and had been treated in a somewhat dismissive and rude manner by Mrs Newman. Mrs Newman accepted that she had not prepared properly for lunches at the Bealey that day, despite being responsible for it. She denied being rude to the customers, but the effect of the lack of meals being available and Mrs Newman's attitude to that meant that they left unfed and dissatisfied.

[5] Ms Dekker was quite angry about the complaint and was motivated by two main factors. First, she believed that Mrs Newman was taking advantage of her and Hard Left and wished to ensure that this did not happen again. Second, although she was cognisant that disciplinary action could follow from such errors by Mrs Newman the Friday before, she did not wish to pursue a disciplinary process if Mrs Newman was intending to retire soon.

[6] Ms Dekker approached Mrs Newman on Monday 18 June 2012 about these matters in an indirect fashion, in that she first asked Mrs Newman how lunch had gone on Friday, and was told it was very quiet. Mrs Newman said there were just a few people in for coffee.

[7] Ms Dekker then raised that she had had a complaint about the lunch, namely that the customers were told that lunch was over, even although it was not even 12.30pm. She told Mrs Newman that they had been told that no soup was available and yet Mrs Newman knew that there was soup in the chiller. I accept that Mrs Newman's immediate response was to deny that there were any such problems on the Friday. Ms Dekker responded that she could not accept Mrs Newman's denial given the complaint that she had received. Ms Dekker informed Mrs Newman that she would have to get the complaint in writing and then get a formal response from Mrs Newman. Mrs Newman repeated that there was nothing to investigate.

[8] Ms Dekker then questioned whether Mrs Newman really wanted to work there, because she obviously did not like serving people, and suggested retirement. She then said that she needed to know Mrs Newman's intentions about retirement because she had said she would be retiring when she had bought a new car and yet she already had bought one.

[9] Mrs Newman said that she had not even thought about retiring. Ms Dekker said she wanted her to think about it and that she could either let her know now, or on the 29th (which was when Mr Dekker was returning to the hotel). Ms Dekker did not, however, tell Mrs Newman the context within which she retained the retirement issue, namely to help her ascertain whether a disciplinary investigation was necessary.

[10] Mrs Newman's response was immediate. Swearing, she said that she would go now and that she was going to run down the business for the way she had been treated.

[11] When Mrs Newman made her way to her car Ms Dekker followed her, telling her she did not have to try and ruin the business. Ms Dekker also said that she didn't have to be so mean, and that Hard Left had been loyal to Mrs Newman, to which she responded that she had been loyal too.

[12] On her way out Mrs Newman spoke to the assistant manager and told him that she had been fired. I accept that that was what Mrs Newman thought at the time. Ms Dekker was immediately informed of that view by the assistant manager. However, Ms Dekker believed that Mrs Newman had simply walked out at the beginning of her shift and had made it clear that she was leaving for good. She therefore discounted the assistant manager's comments.

[13] Ms Dekker determined to do what she thought would help protect the business, and thus immediately wrote an email, which she sent to the local community group. That email was as a result circulated widely amongst the communities in Arthurs Pass, such as Otira where Mrs Newman lived. That document stated amongst other things that there was to be a smear campaign due to start against Ms Dekker and the Bealey Hotel and that Mrs Newman had vowed to ruin their business and reputation. The email also stated:

*This has come about due to my suggestion that she retire after continued complaints of her poor customer service and frustrating inability to follow directions.*

*As many of you will know, I conduct myself with kindness, care and thought for others.*

*Despite also doing this with the ex staff member (who just walked out this morning after my suggestion) I was stunned to hear the venomous and nasty threats she has made ...*

[14] Mrs Newman was informed of the email that afternoon, and was shocked at its tone and content.

[15] Ms Dekker then had to work the rest of the day and evening, doing her job and Mrs Newman's. That evening she decided that she had perhaps been too dismissive in her morning email and wanted to deal with Mrs Newman on a more conciliatory basis. She therefore emailed Mrs Newman stating:

*I was very shocked and saddened by the turn of events at this morning's meeting to discuss the serious complaint made against you of poor customer service as a result of an encounter with customers at lunch time on Friday 15<sup>th</sup> June.*

*As your employer, I do have the right and responsibility to raise issues like this when they occur.*

*We both know this is not an isolated incident but I will obtain a statement from the complainants and make it available to you so we can get to the bottom of this in the fairest way possible. As you have been intending to retire for quite some time now, I feel it is also important for our future planning, to have some idea of when that may be.*

*Also given your demeanour with customers at times, I wondered if you would rather not have to deal with them and this is why I asked of your intentions.*

*Now that you have hopefully had time to calm down and more accurately review what was said this morning, I would like clarification of your intentions.*

*As you stated this morning as you left the premises at the beginning of your shift, that you were finishing your employment immediately, I respectfully ask, is this still your intention?*

*If you choose to reconsider, I am open to a calm and professional discussion with a view to resolving these issues and moving forward.*

*If however, you are resolute in your decision voiced this morning, then please advise of your resignation in writing.*

*I do hope your threats to spread vicious rumours about us in an attempt to further damage our business are untrue and that you will not be choosing this course of action.*

*If you do go down that road, please know that other than already advising several people this morning of your threats, I choose to not dignify anything you say in this regard, with a response.*

*I will let our actions and integrity speak for us and I will have nothing to hide.*

*I need to know of your intentions in regard to employment and if I do not hear from you within 24 hours I can only assume that you have given notice and no longer wish to be employed here.*

*I will reiterate again though that I am open to resolving this issue and moving forward with a professional relationship and resolution of problems raised this morning.*

*I look forward to hearing from you and knowing your decision.*

[16] Ms Dekker did not receive a response that evening, so re-sent the email the next morning, with a note stating:

*I am having a very lovely day. I hope you are also. Just resending last night's message in case you have overlooked it.*

*We would appreciate your decision (either way) in writing. If we do not hear from you by 9.30pm this evening, we will take that to mean that your decision made yesterday is final and your resignation effective immediately at the time you left the premises.*

[17] Mrs Newman determined not to respond to those emails, given that she believed that the Dekkers no longer wanted her working there, especially given the tone of the email to the local community on the morning of 18 June. After waiting for a response for several days, Ms Dekker considered that Mrs Newman's employment had indeed terminated on 18 June and that there was no chance of resurrecting it.

[18] Mrs Newman was discouraged from looking for employment thereafter because she did not believe that there was a lot of work around and that she would not be successful, because of the content of Ms Dekker's email to the local community.

### **The law**

[19] A constructive dismissal occurs when the initiative for an employee leaving can be said to have come from the employer. In this regard, as was stated in *Wallace & Cooper Ltd v Irvine* [2013] NZEmpC 86 at Para. 47:

*The law related to constructive dismissal is settled and may be briefly summarised in the form of three questions.*

- (a) *Was there a breach by the employer of a duty owed by the employer to the employee?*
- (b) *If so, was the nature of that breach and the circumstances in which it occurred such that it was reasonably foreseeable that the employee might resign as a result?*
- (c) *Did the employee actually resign because of that breach of duty?*

### **Determination**

[20] There was no breach of duty by the Bealey Hotel in Ms Dekker raising the issue of the complaint with Mrs Newman. An employer is quite entitled to raise such issues in a preliminary way, in order to determine whether a disciplinary process is required, without going through the disciplinary process procedures itself provided for in the employment agreement. However, I accept that Ms Dekker's suggestion that Mrs Newman retire was a breach of duty towards her by Hard Left. Mrs Newman is protected from discrimination on the grounds of age and it is not appropriate for employers to suggest that an employee who is on National Superannuation should retire, particularly when linked with complaints of a performance nature. On the other hand, I do not accept that this was a *retire now or in two weeks' time* situation, as misconstrued by Mrs Newman.

[21] Ms Dekker's email to the local community group members would clearly have constituted a serious breach of the employment agreement if at that point Mrs Newman was still an employee. It was true that, although by a misinterpretation of events, Mrs Newman had made it clear that she was leaving immediately and for good. However, the Bealey Hotel was under an obligation, in a heat of the moment

resignation such as this, to ensure that any apparent resignation was in fact a genuine and considered one, after a reasonable cooling off period had elapsed - see for example *Boobyer v. Good Health Wanganui Ltd* (unreported, WEC394, Goddard CJ). The duty of good faith owed by both parties to each other necessitates such an approach in these sorts of circumstances. This is because Mrs Newman only left because Ms Dekker suggested that she retire. Ms Dekker's reaction was to issue the intemperate email to the whole local community, despite knowing that Mrs Newman believed she had been sacked. Ms Dekker simply accepted from the words used by Mrs Newman that she was resigning on the spot, but that was something that a fair and reasonable employer could not do, given the contemporaneous reports of Mrs Newman stating that she had been sacked, the fact that Ms Dekker had put forward the idea of Mrs Newman leaving her employment and as Mrs Newman had never behaved in that way before.

[22] Instead of allowing for a cooling off period, Ms Dekker issued the intemperate email, which stated amongst other things that Mrs Newman was an ex-member of staff, that there were continual complaints of her poor customer service, and that she was unable to follow directions. She also stated that she had acted in a venomous and nasty way. It was therefore not at all surprising that Mrs Newman decided that enough was enough and she did not respond to Ms Dekker's later more conciliatory emails. I accept that, unfortunately, the damage had already been done and could not be undone.

[23] Mrs Newman had no immediate intention to retire. She walked out of her shift because Ms Dekker suggested she retire. She believed that she had been sacked even though Ms Dekker did not go that far. Mrs Newman had misheard the two dates for her to advise of when she intended to retire as being two dates when she had to retire. However Ms Dekker knew that Mrs Newman thought she had been sacked and instead of clearing that up as the two emails that she sent to Mrs Newman would have properly done, she sent the fatal email to the local community harshly criticising Mrs Newman at a personal and professional level. No employer can be surprised when an employee considers it is unreasonable to expect them to return to work after that sort of public attack.

[24] I therefore conclude that despite not intending to dismiss Mrs Newman, the effect of Ms Dekker's interactions with her on 18 June were such the initiative for

Mrs Newman leaving her employment came from the Bealey Hotel, her employer. She was therefore constructively dismissed, and like most constructive dismissals it cannot be justified, because Mrs Newman did not have a proper opportunity to respond to the concerns of Hard Left.

[25] Mrs Newman claims compensation for the way she was treated. I accept that she is entitled to be compensated for that, based on her evidence of being run down in the community and losing a job she had done for over 20 years. However this evidence was not corroborated by any other evidence, and in all the circumstances I consider the sum of \$4,000 is appropriate.

[26] Mrs Newman also claims for lost remuneration. However she has failed completely to mitigate her loss, as is required (see for example *Nimon & Sons v Buckley* unreported, Couch J, WC26/07). There was work that she could have considered in the local area, in motels and the like, as she accepted. However she declined to even look for work as she was required to do if she wished to seek lost remuneration, most likely because she was intending to resign soon anyway. In those circumstances there can be no award for lost remuneration.

[27] I must also assess whether Mrs Newman contributed to the situation that gave rise to her grievance. For there to be any such contribution her behaviour must be blameworthy. There is nothing blameworthy in misinterpreting Mrs Dekker's suggestion that she retire and that she inform the Bealey Hotel when she intended to retire on one of two forthcoming dates. That was a mistake, but not a blameworthy one. It was understandable.

[28] On the other hand, Mrs Newman's behaviour on the Friday beforehand was quite unacceptable and she accepted that in evidence. Perhaps because the Bealey's owners were to be away that day she had simply not prepared in time for lunch, which led directly to the complaint. However the complaint – substantiated as it would have been – was never sufficient to lead to Mrs Newman's dismissal, because Ms Dekker had only ever sought to give her a warning over it. Mrs Newman's behaviour however was a dereliction of duty and was blameworthy behaviour. Her response to the suggestion of retirement was also ill-advised and rude, even if she had been dismissed, which she had not. Without that blameworthy behaviour there would not have been the ill-fated email from Mrs Dekker to the local community. Therefore there was sufficient proximity to the later constructive dismissal for it to be

considered, but only at the level of 25%, because Mrs Newman would not have been dismissed for that error anyway.

[29] I therefore order the respondent, Hard Left Limited, to pay to the applicant, Mrs Frances Newman, the sum of \$3,000 in compensation.

**Costs**

[30] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**