

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 383/07
5070115

BETWEEN JENNY O'NEIL
 Applicant

AND SUPER BUTCHER (THAMES)
 LTD
 Respondent

Member of Authority: Vicki Campbell

Representatives: Jenny O'Neil in Person
 No Appearance for Respondent

Investigation Meeting 29 November 2007 at Hamilton

Determination: 4 December 2007

DETERMINATION OF THE AUTHORITY

History

[1] This matter was lodged in the Employment Relations Authority on 16 November 2006. Following mediation in January 2007, it was brought to the attention of the Authority that the respondent had been incorrectly cited as being Mr Warren Valois. An amended statement of problem was filed in the Authority on 30 April 2007 citing the Respondent as Super Butcher (Thames) Ltd.

[2] The respondent has failed to respond to any correspondence forwarded by the Authority to the extent that reference to further mediation was considered unlikely to contribute constructively to a resolution, of the problem.

[3] On 3 August 2007 the Authority received a notification from Mr CA Johnson advising that the respondent was no longer trading. The Companies Register shows that the company continues to be registered and therefore, in order to progress this matter, the Authority set the matter down for an investigation meeting to be held on 29 November 2007 in Hamilton.

[4] On 28 November 2007, in response to an enquiry from the Authority, Mr Johnson advised the Authority that he had received the notice of meeting and a minute from the Authority reminding the Respondent of its entitlements to attend the investigation meeting, together with the consequences of non-attendance. He advised that he would not be attending the investigation meeting and he had doubts as to whether a representative of the company would attend. Mr Johnson further advised that the company was no longer trading and that its one director/shareholder, Mr Andrew Brown, was "laying low".

[5] At the commencement of the investigation meeting there was no appearance from the Respondent. I am satisfied that sufficient endeavours have been made to allow the Respondent to refute the Applicant's claim if it wished to do so.

[6] I proceeded to investigate this matter in the absence of the Respondent pursuant to Clause 12 of Schedule 2 of the Employment Relations Act 2000 which empowers to the Authority to proceed to act fully in a matter if a party fails to attend or be represented without good cause.

Employment Relationship Problem

[7] The applicant, Miss Jenny O'Neil, was employed by Super Butcher (Thames) Limited ("Super Butcher") during school holidays. She was 14 years old and this was her first employment. Miss O'Neil worked five days per week, Monday to Friday inclusive and 8.5 hours per day and was paid a cash rate of \$7.00 per hour. Miss O'Neil says she was "paid under the table" meaning no tax was deducted and/or remitted to IRD as a result of the wages she received. Miss O'Neil served customers and packed meat for display and stocked shelves.

[8] The store manager was Mr Warren Valois and Miss O'Neil reported directly to him on a day to day basis. Having previously worked for Super Butcher during school holiday periods, Miss O'Neil was engaged to work during the 2006 school holiday period between terms 3 and 4. There was confusion about the dates at the investigation meeting. Miss O'Neil recalled it as being during the Christmas/New Year period, however that could not be correct as she had already lodged her grievance at the Authority before the holiday period commenced.

[9] Miss O'Neil told me at the investigation meeting that on or about Wednesday 20 September 2006, during a tea break in the kitchen, another employee, who had travelled to the US, had talked about how much he had

enjoyed the experience. Miss O'Neil suggested that she would like to go to Hollywood. Mr Valois, who was present during this conversation, suggested that she should go with him to the States and enquired as to what her parents would say if she did just leave and go with him. Miss O'Neil says she thought he was joking and just laughed it off and told him that they would not approve of that. (Mrs O'Neil, in her evidence, estimated Mr Valois to be in his 50's).

[10] Later that afternoon, Miss O'Neil says Mr Valois asked her to go into the meat chiller and get some sausages. Miss O'Neil said that Mr Valois followed her into the chiller, turned the light off and asked another butcher to shut the door, which he did. Miss O'Neil said at first she thought it was a joke but as she reached up to unhook the sausages, Mr Valois came up against her and started kissing her on the cheek. She said he then had his tongue out and was rolling it around her face. At that stage she realised that he was not joking. She was shocked and scared. Miss O'Neil said she was so scared she did not know what to do. She wanted to scream but she could not.

[11] Miss O'Neil said that after a short time Mr Valois (who had his arm up which prevented her leaving) stepped aside and let her walk out of the chiller. She said she did not know what to do. She went back to work but could not focus. Her hands were shaking and she was giving customers the wrong change. Miss O'Neil told me that twice she went into the kitchen and called her mother on her cell phone but her mother was milking and did not answer. She said she went back to work because Mr Valois had called her back, then asked her a couple of times if she was alright. Miss O'Neil said she just wanted to leave but her shift had another half hour to go so she thought she had to stay.

[12] Miss O'Neil's sister and friend came into Super Butcher and advised Miss O'Neil they would give her a ride home at 4 o'clock. She said she was so relieved to see them she burst into tears and told Mr Valois that she was leaving with them. She said they then went to a park bench around the corner from Super Butcher and she sat there crying and told them what had happened. She then phoned her mother who came into the township to see her.

[13] Miss O'Neil's undisputed evidence is that the actions by Mr Valois made it impossible for her to return to work and she has never returned.

Constructive dismissal

[14] The nature of Miss O'Neil's complaint, although not set out formally in her statement of problem, is that her leaving Super Butcher ought to be regarded as a constructive dismissal. In deciding whether the circumstances of this case gave rise to a constructive dismissal I am guided by the principles enunciated by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168.

[15] Following the approach of the Court in its recent decision *Gorrie Fuel (SI) Ltd v Gittoes*, unreported, 8 November 2007, Couch J, CC21/07, if I find that this was a constructive dismissal, whether it was justifiable must be determined in accordance with s103A of the Act which 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.

[16] In determining the merits of this application, I have therefore considered the following issues: -

- (a) Was there a breach of duty by the Respondent to Miss O'Neil?
- (b) If so, was that breach sufficiently serious to make it reasonably foreseeable that Miss O'Neil would resign as a result?
- (c) If so, did Ms O'Neil actually resign as a result of that breach?
- (d) If Miss O'Neil was constructively dismissed, were the actions of the Respondent those which a fair and reasonable employer would have taken in the circumstances?

Determination

[17] In a letter dated 13 November 2006, Mr Valois responded to the original statement of problem where he acknowledged his behaviour. I find that the conduct of Mr Valois, as Miss O'Neil's manager and the person in charge of the business was outrageous and constitutes a breach of duty owed to Miss O'Neil. Further, I find Mr Valois egregious conduct was also a breach of the respondents' statutory duty of good faith.

[18] Turning to the second issue, there can be no doubt that the breaches of duty were sufficiently serious to make it reasonably foreseeable that Miss O'Neil might leave her employment as a result.

[19] As to the third issue, of the causal link, I have adopted a similar approach to that of the Court in *Z v A* [1993] 2 ERNZ 469, where the Court adopted a "but for" test which consists of testing Miss O'Neil's claim that she left because of the conduct of Mr Valois and posing the question, would Miss O'Neil have left her job but for being subjected to that conduct?

[20] In this case, Miss O'Neil told me that she loved her job to such an extent that she had discussed with Mr Valois the possibility of participating in the school's "Gateway" program which allows students to gain work experience by working one day each week instead of attending school. The answer therefore is obvious. Had the incident with Mr Valois not occurred, Miss O'Neil would not have left her employment.

[21] On that basis I find that Miss O'Neil was constructively dismissed. Applying section 103A of the Act I have no hesitation in concluding that Miss O'Neil's dismissal was unjustifiable and she is entitled to remedies.

Remedies

[22] Miss O'Neil was visibly upset at the investigation meeting when recalling the incident. The evidence is clear that at the time Miss O'Neil was inconsolable.

[23] At the time of the incident Miss O'Neil was a 14 year old schoolgirl and was in her first employment situation. Her uncontested evidence is that this incident has left her with a very deep sense that she can no longer trust males in the workplace. That is very sad as there are some very good employers in New Zealand where male employees treat their female counterparts with great respect.

[24] Miss O'Neil was working during the school holiday period between the 3 and 4th terms which dates were 17 July 2006 to 22 July 2006. As a result of her leaving her employment before it was due to concluded, Miss O'Neil has lost wages for a period of two days. Miss O'Neil is entitled to be reimbursed for those two days at the rate of \$59.50 nett per day (being 8.5 hours at \$7.00 per hour).

[25] Miss O'Neil also seeks payment of compensation for hurt and humiliation. I have taken all the evidence into account and having regard to the level of awards made in broadly comparable cases, it seems to me that an appropriate award of compensation is \$3,000. I find that Ms O'Neil did not contribute to the situation giving rise to her personal grievance.

Costs

[26] This application required a filing fee of \$70.00. It is appropriate that the respondent reimburse the fee.

Summary of orders

- **Super Butcher (Thames) Ltd is ordered to pay to Miss O'Neill the sum of \$119.00 pursuant to section 123(1)(b) within 14 days of the date of this determination.**
- **Super Butcher (Thames) Ltd is ordered to pay to Miss O'Neill the sum of \$3,000 without deduction pursuant to section 123(1)(b) within 14 days of the date of this determination.**
- **Super Butcher (Thames) Ltd is ordered to pay to Miss O'Neil the sum of \$70.00 within 14 days of the date of this determination.**

Vicki Campbell
Member of Employment Relations Authority