

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Joy Mary Officer (Applicant)  
**AND** Mainland Products Limited (Respondent)  
**REPRESENTATIVES** Craig Smith, Counsel for Applicant  
Garry Pollak, Counsel for Respondent  
**MEMBER OF AUTHORITY** Paul Montgomery  
**INVESTIGATION MEETING** 4 November 2004  
**DATE OF DETERMINATION** 3 June 2005

DETERMINATION OF THE AUTHORITY

***The Employment Relationship Problem***

[1] The applicant claims to have been constructively dismissed from her position as Territory Sales Manager (TSM) on 23 September 2003, after being given the option to resign or be dismissed. Ms Officer seeks reinstatement to her position, loss of remuneration, compensation for stress, humiliation and upset in the sum of \$25,000.00, compensation for the loss of the benefit of the private use of a motor vehicle in the sum of \$10,000.00, incentive bonus that was due to her for the sale cycle period ended 26 September 2003 and costs in connection with her application to the Authority.

[2] The respondent says the applicant was actually *dismissed but was asked that if she wished to resign she could* (statement in reply).

[3] It says the dismissal was justified procedurally and substantively and declines to offer the remedies sought.

***What caused the problem?***

[4] The applicant, prior to her taking up her role as a TSM had been employed by the respondent as a key account representative in both the meat and dairy divisions of the company since March 2001. The territory the applicant managed consisted of 19 supermarkets in Southland, Central and South Otago. Ms Officer had 18 staff reporting to her. These people were sales representatives, sales representative/merchandisers and merchandisers.

[5] Soon after the applicant's appointment to the TSM role, Ms Officer was asked to compile a call cycle (run list) for her visits to major customers in her territory. This she emailed to her manager Mr Kevin Smith on 26 June 2003. This email was in response to Mr Smith's email of the same date. The applicant says that this call cycle *outlined where I proposed to be each week*. The

document is headed "PROPOSED RUN LIST FOR JOY OFFICER".

[6] In the course of a visit to Winton New World Supermarket with Mr Peter Simpson, The National Field Sales Manager, Mr Smith spoke with Ms Gwenda Malloy, the Store Manager, who also managed the Delicatessen and Bakery sections of the store. Ms Malloy complained she was not seeing the applicant frequently enough and asked them to help improve the situation. Mrs Malloy said she thought she had seen Ms Officer two or three times since the applicant had taken on the TSM role.

[7] This appears to have been in late February 2003, as Mr Smith says:

*In the week commencing 3<sup>rd</sup> March, I contacted Joy Officer about the Winton store and Joy told me that Gwenda was not correct, it was much more frequent than that but she had difficulty in actually meeting with Gwenda as she was often away or unavailable... I very clearly told her that she needed to call on Winton New World at least fortnightly... Joy understood and agreed that she would do this.*

[8] Mr Smith says he did not receive the applicant's run list until 30 June 2003 but spoke to her again about making the fortnightly call to Winton. He goes on to say:

*On 3<sup>rd</sup> June in the morning I received a call from Gwenda stating that she no longer wanted Joy Officer in her store and when I asked her some more details about this she told me amongst other things, that she had only seen Joy twice in the whole year...*

Mr Smith then says:

*On the 5<sup>th</sup> September I phoned Joy and passed on the comments from Gwenda and we agreed that we would talk about it on the 8<sup>th</sup> September when I was visiting Invercargill. I had also contacted Winton to arrange an appointment with Gwenda but found that she was on leave for that week.*

[9] On Tuesday 2 September 2003 the applicant called at Winton New World and was met by Gwenda who told Ms Officer that she did not want her back in her store. Ms Officer says that Ms Malloy believed (mistakenly I feel) that she was trying to headhunt Ms Malloy's staff for Mainland. Having known and dealt with Ms Malloy without difficulty for over ten years, the applicant was taken aback. She was further taken aback when she became aware that Mr Smith had known of Ms Malloy's stipulation for several months but had not advised her in any time in the intervening period.

[10] In the morning of 13 September 2003 Mr Smith sent a couriered letter and an email to the applicant "inviting her to a disciplinary meeting on the 17<sup>th</sup> September." The brief letter reads:

*Dear Joy,  
You are requested to attend a formal meeting under Mainland Products Ltd, disciplinary procedures at 11.00am on Wednesday 17 September in Invercargill at the Milk Plant Office, 111 Nith street.*

*The purpose of this meeting is to investigate complaints that you have not been calling the agreed number of times to Winton New World.*

*You are invited to be accompanied at this meeting by any person of your choice.*

*You should be aware that of the serious nature of this meeting [sic] and that it could result in a*

*charge of serious misconduct.*

*Yours faithfully*

*Kevin Smith  
Regional Sales Manager*

[11] The meeting was actually held at 1pm. It was attended by Mr Simpson, Mr Smith, the applicant and Mr Ian Fox, the applicant's partner. In his evidence Mr Smith describes Mr Fox as her *representative person*.

[12] Mr Smith put the allegation to the applicant going through a chronology of events making it clear that he was concerned about the frequency of calls to New World Winton and that the low call rate was *not in accordance with our understanding in the agreements that we had concluded earlier in the year*.

[13] Ms Officer gave her responses on three grounds. That she was unable to maintain the run list because she was frequently engaged in other important aspects of her role in the territory. Ms Officer pointed out that soon after her appointment to the TSM role she was promised time management training by the company which was not provided. Finally, she pointed out that New World Winton, through Ms Malloy, had asked her to call only once a month.

[14] Following the meeting the respondent undertook some further inquiries. Significantly, they were stores from which no complaints had been received namely, Wanaka New World and Wakatipu New World. Both appeared to have advised that they had seen the applicant less frequently than the respondent expected given the run list. These inquiries were done by telephone. Te Anau Supervalu was also contacted and the manager said he had not seen the applicant for several months.

[15] A further meeting was arranged and took place on 26 September 2003. Those attending were the same as at the earlier meeting. Mr Fox requested that the meeting be recorded and this was agreed. The transcript was provided to the Authority and the tape was played at the investigation meeting.

[16] Ms Officer complains that the letter of 23 September 2003 did not outline the findings Mr Smith and Mr Simpson had made following the earlier meeting and had it done so, would have been able to prepare fully and rebut the information gained in the investigation in respect to calls she actually made. Essentially, the applicant is pointing to the new information being put to her without a reasonable opportunity to prepare an accurate response.

[17] The applicant disputed the accuracy of the report for Wakatipu, but accepted the information from Wanaka and Te Anau was accurate.

[18] The transcript of the meeting does not indicate where adjournments were taken but Mr Smith's evidence is helpful in that regard. He says

...

*The meeting was adjourned for 10 minutes and Peter and I wanted to have a discussion about her explanation...*

...

*Our meeting resumed after a break of about 10 to 15 minutes. I made the statement that, on a without prejudice basis, Joy could resign if she wanted to and I ventured the opinion that this would have less effect on further employment opportunities for Joy, particularly given that she lived in Invercargill. I offered four weeks wages in lieu of notice and then we had another brief adjournment. At the recommencement of our meeting Joy said that she would like “legal counsel”. I made the point that we wanted to conclude this matter as quickly as possible to reduce the stress for her and I pointed out that the written invitation to this meeting had made it very clear that “the purpose of this meeting was to discuss the outcome and result of the disciplinary investigation”... However, Joy and her representative wanted legal advice and we adjourned again to consider the options and on resuming again both Peter and I suggested to Joy and Ian a further two hours adjournment. I would have to say at that point that both Peter and I were quite surprised, because we had assumed that Ian was her legal representative and I for one assumed he was a solicitor.*

*However, we agreed to meet at 12.00pm and we all met at approximately 12.00pm. Joy offered to resign. I should point out that if she had not resigned it would have been our decision to dismiss her but we were trying to make it easier for her future employment prospects and that is why both of us clearly said at the outset that her resignation was on a without prejudice basis...*

*At 1.00pm, at the prearranged staff meeting, or shortly thereafter on that day, we informed her staff that she had resigned her employment and there was no further detail of the reasons why or anything like that.*

### ***The Issues***

[19] The issues the Authority needs to address in this particular matter are:

- Was the call cycle/run list “proposed” or was it “agreed”; and
- Was the call cycle rigid or flexible in its application; and
- Was the intervention of Mr Smith timely once he became aware of the complaint from Winton New World; and
- What was the issue with the applicant initially; and
- Was the respondent’s process fair and in accordance with the company procedures; and
- Was the applicant actually or constructively dismissed; and
- What, if any, remedies are justified and how, if at all, should the delay in lodging the grievance affect the remedies.

### ***The Investigation Meeting***

[20] At the investigation meeting I heard evidence from the applicant, her partner Mr Fox and for the company both Mr Simpson and Mr Smith gave evidence. A signed statement from Ms Malloy was also provided in support of the respondent. I thank all for their assistance and particularly Mr Smith for his availability despite a very tight schedule. The Authority also received a short statement of evidence from Mr Brian Dobson supported by a positive reference from Mr Tony Watts. As the evidence did not bear on the key issues, it was not necessary to call Mr Dobson.

[21] The significant points to emerge from the questions at the investigation meeting were in Mr Smith's evidence: That Mr Simpson did not believe the applicant's performance was relevant, that he did not recall considering other options and that the applicant did not say she could not do the call cycle nor did she say she did not have to do the call cycle. The central issues regarding Mr Smith's evidence were that the call cycle was adjustable but not frequently, that the issue regarding Winton New World was that of insufficient calls, that non adherence to the cycle was a performance issue, that *it was not the frequency of calls but the fact that they were still not being done six months later*, and that the applicant had had no previous warnings prior to this matter arising between the parties.

### ***Discussion and analysis***

#### Was the call cycle proposed or was it agreed?

[22] As indicated above the call cycle forwarded to Mr Smith by the applicant is headed up "PROPOSED RUN LIST JOY OFFICER". Clearly this indicates that in the mind of the applicant, she was putting forward a proposed cycle on which she would operate. It is equally clear that Mr Smith took this document to be definitive and in that sense accepted it and therefore agreed to it. It also appears that at no time did Mr Smith confirm with the applicant that this was the cycle and strict adherence to it was a matter of crucial importance from the company's perspective.

#### Was the call cycle rigid or flexible?

[23] The evidence the Authority heard was clearly that the company viewed the cycle as adjustable but not on a regular basis. The applicant's view was that given the range of duties and the number of staff she had to supervise in the field, the need to vary the call cycle on the basis of other exigencies within the business meant departing from the cycle more frequently than the company was either aware or comfortable with. There was no suggestion that Ms Officer was not engaged in company business on the occasions on which she was prevented from adhering tightly to the call cycle.

#### Was the intervention of Mr Smith timely?

[24] On his own evidence Mr Smith says he was told by Ms Malloy that she did not want the applicant back in her supermarket on 3 June 2003.

[25] It took him a little over three months to advise his subordinate of her exclusion, inquire as to the circumstances and get a response from the applicant. This inertia gave rise to Ms Officer being told to her face that she was unwelcome in Winton New World. That delay strongly indicates that, to him, Ms Officer's exclusion was of no significant consequence to him as her manager, and implicitly to Mainland.

[26] The advice from Ms Malloy should have sent warning bells off in the mind of an experienced regional sales manager and prompted him to action. Had he followed up Ms Malloy's call promptly, I think it very likely the situation as it developed would not have occurred.

#### What was the issue with the applicant initially?

[27] Having finally decided to action concerns which emanated from Winton New World, Mr Smith in his letter and email of 13 September 2003 indicated that the investigation *could lead to allegations of serious misconduct*.

[28] The invitation to the first meeting to discuss the allegations stated that Ms Officer was *invited to be accompanied at this meeting by any person of your choice*. Clearly at that point the company, through Mr Smith, were focused on investigating the matter in the context of serious misconduct. In that setting it is remarkable that Mr Smith did not follow the disciplinary process as set out at 4(e) of the company's disciplinary manual which states *advise that representation may be appropriate*. It is clear from the evidence of both Mr Smith and Mr Simpson that both executives *assumed* Ian Fox was legally qualified. In their evidence they sought to place their assumption at his feet by saying that he did not introduce himself. The fact is they did not suggest legal representation, assumed it was present in the person of Mr Fox and only belatedly recognised their error. That was after they had decided to dismiss Ms Officer.

[29] Section 4E in the company's manual is headed *The Disciplinary Process* it states:

...

*Having identified that a problem exists, the Manager needs to identify how an issue needs to be resolved. In each instance, the Manager must make a decision as to whether or not the response required is:*

- a) Counselling;*
- b) Warning procedures; or*
- c) Termination.*

*In most instances, except in cases of serious misconduct, steps a) to c) should be followed in sequence.*

[30] The copy of the power point presentation, [exhibit M(1)] at page 1 states:

*Introduction*

- *Problems at work can be separated into two categories:*
  - *unsatisfactory performance - being poor quality, quantity, timeliness or cost effectiveness of an employee's work*
  - *unacceptable behaviour - being a breach of MPL's/Fonterra's code of conduct*

*The remedies for dealing with the two can be different - you need to be able to identify the most appropriate remedy*

The document then goes on to address matters such as redirection and retraining; informal reprimand; corrective coaching; reorganisation; formal disciplinary action, the latter including *...if allegation is substantiated, options (depending on the seriousness of the matter) are:*

- *a first written warning*
- *a second written warning*
- *a final written warning*
- *dismissal*

[31] In the context of the respondent's evidence that it did not recall considering alternatives to dismissal, the fairness of the investigation and the procedural steps is open to serious question. This is heightened when one considers the transcript of the final meeting in which Mr Simpson, when asked by Mr Fox to take into account the applicant's sales performance, simply stated *it is irrelevant*.

[32] Two other matters arise in the context of the procedures followed by the respondent. In his brief of evidence at paragraph 16 (c) Mr Simpson says *paragraph 14 of her [the applicant's] brief is a completely new matter as far as I am aware*. He makes the same allegation in respect of paragraph 15 of the applicant's statement of evidence. Those two matters covered in the respective paragraphs, relate to the applicant's claim that it would have been impossible for her to keep strictly to the call cycle because there were a number of occasions when she was required for other tasks such as covering staff on sick leave, her taking annual leave and occasions when she was recruiting staff and dealing with other staff related matters, including company seminars. The second matter relates to the applicant's claim that neither her original job description nor the Territory Sales Manager's job description referred to a call or run list, or requires that this be strictly adhered to.

[33] The fourth paragraph of the transcript of 26 September 2003 meeting clearly establishes that at the previous meeting the applicant had raised the issue of her inability to comply and in fact Mr Smith in his evidence, which is confirmed by this same transcript, enquired as to the applicant's availability to meet her call cycle when attending to other matters or covering for staff absences. On the second point I simply observe that a reading of the job description and the employment agreement confirms that no mention is made of the call cycle and its inviolability.

[34] Given that the notice of the meeting and the investigation placed these processes in a context of serious misconduct, the question which raises itself is, why, in line with the Individual Employment Agreement the respondent had with the applicant, did it not suspend as it is entitled to for a period to enable a full investigation to be undertaken. Section 13.3 reads:

*Where the company has reason to believe the Employee has been guilty of serious misconduct, the Company may suspend the Employee with pay for a period not exceeding two weeks to permit a full investigation of the matter to be completed. The employee shall be afforded an opportunity to offer his or her explanation and shall have the right to be represented at any meeting.*

[35] From the evidence I heard, it is apparent that in undertaking inquiries, the company's executives did not undertake a full investigation but rather targeted a number of stores, contacted them in large part by telephone and then relied on those reports in dismissing the applicant. A full investigation would have required more extensive contact than this.

[36] The stark reality of the dismissal however, is set in the words of the transcript.

[37] Immediately following the first adjournment Mr Smith says:

*Okay Joy, obviously the hearing has reached the serious stage and our state of the issue of trust is very important. Um, our line tier seems to manage regions. This includes core cycles and we need to be able to trust. We rely on our... Um, so now without prejudice we are offering you the opportunity to allow you to resign with four weeks paid notice in advance as this would have a lesser effect on your future employment options, rather than termination of your employment, and that is why we asked that question.*

[38] The Court of Appeal in *Auckland etc. Shop Employees etc. IUOW v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) held that constructive dismissal includes, but is not limited to, cases where:

- a) An employer gives an employee a choice between resigning or being dismissed;
- b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and or

- c) A breach of duty by the employer causes an employee to resign.”

More recently in the *Weir v Fuji Xerox New Zealand Limited IERNZ* [1998] 140 Colgan J found for the applicant who had been given the option of resigning or being demoted. Clearly this case goes beyond that in that the option offered to Ms Officer was to resign or undergo dismissal.

[39] It is clear that this last meeting on 26 September 2003 was conducted by the respondent’s executives with undue haste. The evidence from the latter part of the transcript makes it very clear. Mr Fox says, *Well I can’t make any decision without a legal opinion.* Mr Simpson replies, *Well, you can seek legal advice after you have finished here all you like, but we are going to resolve this as far as we are concerned, right now. And if you want to seek legal advice then that is it is up to you.*

### ***The Determination***

[40] Coming to this determination I have been assisted considerably by both the questions posed by counsel at the investigation meeting and by their submissions following that meeting. I wish to record the Authority’s appreciation of their efforts.

[41] I find the applicant Joy Officer was unjustifiably constructively dismissed from her employment by the respondent at the meeting on 27 September 2003.

[42] To address the issues in turn, I find that the call cycle/ run list was perceived by each party in a different light however, the onus was on the employer if it was to demand near rigid adherence to that cycle to formally advise as part of the Individual Employment Agreement that this was a contracted term of the employment. I find it did not do so in this case. I find that the call cycle was somewhat flexible but again, the employee was never informed as to how that flexibility was to be applied.

[43] I find the intervention by Mr Smith to have been unduly delayed. As I observed earlier in this determination, had he moved promptly after the advice on 3 June 2003, this matter, in all likelihood would never have arisen.

[44] I find that the initial issue the respondent had with the applicant was in the investigation of possible serious misconduct. I find that in fact the issue was a performance related issue capable of being resolved without resort to the drastic measures applied. On the evidence of its own documentation the respondent failed to follow the correct course of action in addressing a performance related issue. To me it is indicative of unclear analysis followed by confused thinking on the part of the two executives. I find that the process of investigation was not full and therefore could not be fair.

[45] I do not accept that a fair and reasonable employer could have dismissed the applicant on an issue of performance without invoking the procedures set out in the company’s disciplinary manual. The respondent’s elevation of the alleged breach to one of trust and confidence which goes to the heart of the employment relationship was, in the circumstances, unjustified.

[46] Having found for the applicant I need to address the remedies appropriate to the circumstances of the case.

### ***Remedies***

[47] Before deciding what remedies are just and equitable I have carefully considered Mr Pollak’s submissions regarding reinstatement and the other claims made by the applicant.

[48] A fundamental plank in the respondent's submissions is the delay in lodging her application with the Authority. It is evident from Mr Pollak's letters to Mr Smith that, following mediation, the respondent sought a prompt resolution to Ms Officer's grievance. He received no response to his letters and the respondent proceeded to appoint a replacement in the TSR role.

[49] I accept that the applicant's solicitor notified the respondent that his client was seeking reinstatement although I find it somewhat inexplicable that no reply was sent to Mr Pollak outlining the applicant's position at that time.

[50] Section 125 of the Employment Relations Act 2000 reads as follows:

**125 Reinstatement to be primary remedy**

(1) *This section applies where –*

- (a) *the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123a); and*
- (b) *it is determined that the employee did have a personal grievance.*

(2) *If this section applies the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement as described in section 123(a).*

In considering the applicant's claim for reinstatement I have had particular reference to *Ashton v Shoreline Hotels* [1994] 1 ERNZ 241, and to *Clarke v Norska Skod Tasman Ltd* [2003] 2 ERNZ 213.

[51] I find that the intention of the applicant was to proceed promptly but she was prevented by her straightened financial circumstances following the dismissal and her low mood associated with the termination of her employment.

[52] I direct that the applicant be reinstated to her previous position or one no less advantageous to her.

[53] I accept the applicant has suffered hurt and humiliation as a result of her unjustified dismissal and some compensation is due to her. However, I need to consider the level of compensation in the light of my direction that she be reinstated.

[54] I also accept that the applicant lost remuneration as a result of her dismissal and in the circumstances believe it is just to award her the sum of \$20,000.00 gross salary as made out in her claim. Further, I accept that Ms Officer lost the benefit of the use of a company vehicle. In this regard the applicant has claimed \$10,000.00 but has provided the Authority with no basis for the level of that claim.

[55] Having considered the matter with some care I direct the company to pay the applicant the sum of \$10,000.00 compensation for hurt and humiliation and the loss of the vehicle.

[56] Regarding the bonus payable to the applicant for the sales period ended 28 November 2003, I direct that the respondent pay to the applicant on a *pro rata* basis, what is due to her. Should either party need to seek further clarification on this final order, leave is reserved to approach the Authority on that matter.

*Costs*

[57] Costs are reserved on the basis that the parties will attempt to resolve costs between themselves before making an application to the Authority.

Paul Montgomery  
Member of Employment Relations Authority