

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 89/09
5122560

BETWEEN

JENNY OWLES
Applicant

AND

THE TRAVEL PRACTICE
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: David Beck, Counsel for Applicant
No appearance for Respondent

Investigation Meeting: 14 May 2009

Determination: 26 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jenny Owles says that she was unjustifiably constructively dismissed from her employment with The Travel Practice Limited (The Travel Practice) and/or was the subject of a series of unjustified actions that caused her disadvantage in her employment.

[2] The statement of problem lodged by Ms Owles was served on The Travel Practice but no statement in reply was received within the required timeframe.

[3] A telephone conference was then arranged for 9 February 2009 with the Authority, Mr Beck on behalf of Ms Owles and a director of The Travel Practice, Mr Price to discuss the failure to provide a statement in reply, mediation and an investigation meeting date.

[4] It was agreed during the telephone conference that there would be no benefit in a further attempt at mediation. This was because arrangements had been made for mediation on three previous occasions at the time of the telephone conference but

mediation had not actually occurred. I do not consider I need to go into the reasons why Mr Beck and Mr Price said mediation did not take place.

[5] Mr Price agreed that a statement in reply would be provided on behalf of The Travel Practice by 16 February 2009 and that the original employment agreement between Ms Owles and The Travel Practice would be provided to Mr Beck and the Authority. Mr Beck and Mr Price agreed to 14 May 2009 for an investigation meeting and timetabling directions were given for the lodging and serving of statements of evidence. The notice of direction prepared after the telephone conference and forwarded to the representatives contained a telephone number at which the support officer could be contacted together with an email address.

[6] The notice of direction and notice of investigation meeting were faxed to Mr Price at The Travel Practice on 9 February 2009 at 11.27am. I am satisfied from a perusal of the file that the notice of investigation meeting and notice of direction was delivered to The Travel Practice at its Post Office box at 8am on 10 February 2009.

[7] The Travel Practice took no steps in respect of the directions that Mr Price had agreed to and which were recorded in the notice of direction. There was no statement in reply lodged, the original employment agreement was not provided and there were no briefs of evidence received. The Authority file records that a staff member of The Travel Practice telephoned the support officer at the Authority on 5 March 2009 advising that he did not know what the statement of reply was or what he was replying to. The staff member provided an email address. Later on 5 March 2009 the support officer duly attached to an email to the staff member all the documents already sent to The Travel Practice, including a draft statement in reply.

[8] There was no further communication between The Travel Practice and the Authority in terms of this matter. On the morning of the investigation meeting, the meeting start time was delayed for 15 minutes but there was still no appearance on behalf of The Travel Practice nor any good reason advanced as to why there was no appearance. I am satisfied that The Travel Practice knew of the date of the investigation meeting and had been served with the notice of investigation meeting. In the absence of a good reason for the non-appearance, I commenced my investigation and heard evidence from Ms Owles.

The issues

[9] Mr Beck clarified that the claim for unjustified constructive dismissal was based on the third situation listed by the Court of Appeal in *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 that a breach of duty by the employer had led Ms Owles to resign. The Authority needs to determine the following issues:

- Was Ms Owles' resignation caused by a breach of duty on the part of The Travel Practice;
- Was it a breach of duty of sufficient seriousness to make it reasonably foreseeable that Ms Owles would not be prepared to work under the conditions as they were at the time of the resignation;
- Alternatively, was there a series of actions that caused Ms Owles disadvantage in her employment?

Was Ms Owles' resignation caused by a breach of duty on the part of The Travel Practice?

[10] Ms Owles is Chilean and has lived in New Zealand for 30 years. She has worked in various jobs in New Zealand including 11 years at Air New Zealand undertaking a variety of duties including customer services, reservations and air points.

[11] Ms Owles's husband worked in premises next to The Travel Practice and he arranged for Ms Owles to have an interview with Mr Price for a travel consultant's position at The Travel Practice which specialises in corporate and leisure travel. Ms Owles was interviewed on 5 March 2008 by Mr Price. Ms Owles said in her evidence that she made Mr Price aware that she had never worked as a travel consultant. During the interview, Ms Owles said that Mr Price told her she would receive training on the reservation and booking system. Ms Owles was offered a position as a travel consultant by Mr Price and she said she was very excited by the role as he described it. Mr Price advised Ms Owles that she would be taking tours around South America and Spain.

[12] Ms Owles commenced work at The Travel Practice two days later on Friday 7 March 2008. She said that she signed an employment agreement on the following Tuesday but it was taken away and she was not provided with a copy.

[13] On her first day of employment, Ms Owles was introduced to another employee who was due to leave The Travel Practice. Mr Price advised Ms Owles that she was to observe the employee and learn what to do. Ms Owles asked on a few occasions during her first week of employment if there was a date for training about the booking and reservation system. She recalls Mr Price advising that he would look into it but he did not get back to her to confirm the date or when she would actually undertake the training. Ms Owles said that she estimated that she would need at least six weeks' intensive training based on her Air New Zealand experience because, as she described it, it was like learning a new language. For the first week of her employment, Ms Owles observed that Mr Price was demanding and aggressive with the employee who was leaving.

[14] The employee from whom Ms Owles had been learning the role left her position on Friday, 14 March 2008 and Ms Owles was then on her own from Monday, 17 March 2008.

17 March 2008

[15] On 17 March 2008, Mr Price asked Ms Owles to book an itinerary and flights. Ms Owles said that she indicated that she was unfamiliar with the system and was then told *Jenny get your butt into my office*. She said that Mr Price asked her what her problem was and she raised the issue about training again and Mr Price responded with words along the lines *it is not rocket science*. Ms Owles felt Mr Price was not taking her requirement for training seriously and she was then told to get back to her desk. She said that Mr Price continued to yell out at her as to whether or not she had finished the work he had requested and describes feeling under very unpleasant pressure.

[16] Ms Owles could not find her glasses that morning and it made it somewhat difficult for her when reading or using the computer. Although she was able to complete the itinerary requested and email it through to Mr Price she developed a nauseating headache.

[17] Ms Owles said that Mr Price then walked past her in a manner that she felt was designed to provoke her and have fun at her expense. Ms Owles noticed that Mr Price had two pairs of spectacles hanging around his neck and that one of the pairs was hers. Ms Owles was infuriated by this and followed Mr Price into the staff room asking him whether they were her glasses hanging around his neck. Ms Owles said that Mr Price responded *oh yes I just wanted to see how long it would take you silly little Chilean to find them*. Ms Owles said that she felt degraded by his comments which were disrespectful of her ethnicity. She said that she felt belittled. Ms Owles said that on driving home after work that day, she stopped and cried and that when she arrived home she stayed in her car still crying.

[18] Ms Owles decided to apply on line for other positions because of the events of the day. She also decided, after discussing the matter with her husband, to go into The Travel Practice half an hour earlier the next day to talk to Mr Price about his behaviour and how she found it intolerable.

18 March 2008

[19] Ms Owles went in to talk to Mr Price early and told him that she found it unacceptable that he spoke to her in the way that he did and that he got a laugh in upsetting her in front of her work colleagues. Ms Owles also raised that she was concerned about the use of the *f...* word. She took the opportunity to raise again the issue of training and asked when she could expect some assistance. Ms Owles said that Mr Price laughed during the conversation and she got the clear impression that he was not taking it seriously. She said that whilst he indicated training would come, he would not give her a date and she was left with the impression that training had not previously been arranged and she was not certain that it would be in the future.

[20] Mr Price made some further comments about the work not being rocket science and there was reference to Ms Owles being a big girl and that she could handle it. There was a suggestion that she was a slow learner. Mr Price then told Ms Owles at the end of the discussion to *get her arse back to her desk*. Ms Owles said that she left the office more dejected than before she went into it.

[21] Later that day Mr Price said to Ms Owles *get your minge into my office* and he proceeded to chastise her about spelling mistakes and told her that she was taking too long on work he had requested.

[22] Ms Owles said she felt worse on the Tuesday than she had on the Monday when she went home.

19 March 2008

[23] Ms Owles remained in her office until midday on Wednesday 19 March 2008. She said that Mr Price started again staring at her from his office and that she found it intimidating. She left the office, advising the accounts manager that she could not take it any more. Ms Owles said goodbye to others in the office but could not bring herself to go and see Mr Price again. Ms Owles said that she went home and cried for three hours. She was able to find work within the following 10 days.

[24] The only response that Mr Price made to the employment relationship problem was shortly after the personal grievance was raised. He sent an email sent to Mr Beck's legal practice dated 4 April 2008. Mr Price denied using the words alleged by Ms Owles and he denied the glasses incident. He made several comments about Ms Owles' performance.

[25] I put the contents of the email to Ms Owles and I heard her evidence about these matters. If Mr Price had performance issues with Ms Owles, he should have gone through a proper fair process in raising those with her. He would have had to take into account Ms Owles' inexperience in travel consultancy and that she had been told that she would receive training on the system.

[26] In terms of the denial that he spoke to Ms Owles as alleged Mr Price had an opportunity to give evidence to the Authority. He did not do so. I found Ms Owles to be a straightforward and very credible witness. I accept her evidence as to what occurred during the brief time of her employment without reservation.

[27] In conclusion, I find that Ms Owles resigned directly because of the way she was spoken to and treated by Mr Price. I find that Mr Price's conduct towards Ms Owles went beyond simply inconsiderate or poor taste. Ms Owles was very offended by the conduct and decided quite properly to talk to Mr Price about her concerns about the way he spoke to her and the sort of language that he used. That in my view took some courage on her part. Having raised her concerns, Mr Price then asked Ms Owles to leave his office using similar language to that which Ms Owles had made clear was unacceptable to her. Later that day he asked her to return to his office using even more unacceptable language. Ms Owles was also not provided with

training or a date when training was to take place in circumstances where she had an expectation from Mr Price's discussions with her at the interview that she would be trained. Ms Owles' concern about training was not taken seriously when she raised it.

[28] An employer has a duty not to conduct themselves in way that is likely to destroy the relationship of trust and confidence between the employer and employee. I find that Mr Price speaking to Ms Owles in the way that he did, particularly after she had made it clear to Mr Price that she found it offensive and unacceptable, was a breach of the implied term to maintain trust and confidence in the employment relationship. I also find that it was a breach of that implied term and the statutory obligation, in terms of good faith for parties to be active and constructive in establishing and maintaining a productive employment relationship, for Mr Price to continue to be critical and undermining in terms of Ms Owles' performance without providing a clear date for training to take place as promised.

Was it a breach of duty of sufficient seriousness to make it reasonably foreseeable that Ms Owles would not be prepared to work under the conditions as they were at that time?

[29] I find the breaches were of sufficient seriousness to make it reasonably foreseeable to Mr Price that Ms Owles would not be prepared to work under the conditions as they were on 19 March 2008. She had raised her concerns with Mr Price but his conduct following the raising of those concerns was such that she could have no confidence he would not continue to treat her in the unacceptable manner that he had been treating her up to that point in time. Ms Owles should not have been expected to put up with being treated in that way.

Determination

[30] Ms Owles has a personal grievance that she was unjustifiably constructively dismissed from her employment on 19 March 2008 and she is entitled to remedies.

Remedies

[31] I do not find that Ms Owles contributed to her personal grievance.

Lost wages

[32] Ms Owles seeks lost wages for 7½ days based on an agreed annual salary of \$36,000 which is a weekly payment of \$692.31. For the relevant period I calculate there is a loss of the gross sum of \$1038.46.

[33] I order The Travel Practice Limited to pay to Jenny Owles the sum of \$1038.46 gross being 7½ days' lost wages under s.123(1)(b) of the Employment Relations Act 2000.

Compensation

[34] Ms Owles said that the way she was treated affected her self esteem which in turn impacted on her relationship with her children and husband. She said that during the time leading up to her resignation she cried a lot and that even when she tried to rationalise the behaviour on the basis that Mr Price was simply a bully, it still took her a long time to get over the way she had been treated. It was apparent to me when Ms Owles gave evidence as to what had occurred during her employment that it was still very difficult and distressing for her to talk about it. Ms Owles said that she thought the job at The Travel Practice would be one she would thoroughly enjoy but instead she said the time spent there was amongst the worst time of her life.

[35] I find that Ms Owles was significantly affected by her dismissal although the employment was only for a short time and she was able to secure another position quickly after her dismissal.

[36] Ms Owles' claim was for \$12,000 compensation but in all the circumstances I am of the view that a suitable award, taking all matters into account, would be the sum of \$7,000.

[37] I order The Travel Practice Limited to pay to Jenny Owles the sum of \$7,000 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[38] Mr Beck asked that the issue of costs be reserved and submissions as to costs can be lodged and served by the applicant by 9 July 2009.