

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Dana Parker (Applicant)
AND Postie Plus Group Limited (Respondent)
REPRESENTATIVES Keri Kereru, Counsel for Applicant
Ralph Webster, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 20 October 2004
DATE OF DETERMINATION 20 January 2005

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicant, Dana Parker, says that she was unjustifiably constructively dismissed from her employment with the respondent on 13 May 2003.

[2] The respondent, The Postie Plus Group Limited ("Postie Plus"), say that Ms Parker was not constructively dismissed but was made redundant from her previous position and would have been due to finish on 16 May 2003.

The background

[3] Ms Parker was employed by Postie Plus in October 2002. Her position was Branch Manager in the Invercargill Postie Plus store. Specific terms and conditions of employment were set out in a letter of offer dated 1 October 2002 which Ms Parker signed on 5 October 2002. The letter of offer provided that Ms Parker's terms and conditions of employment were also those in the general terms of employment for branch managers dated July 2002.

[4] Ms Parker reported to Ron Boskell, the National Manager of Postie Plus, who was based in Christchurch and Michael Ingham, the Regional Manager of Postie Plus, who was based in Mosgiel.

[5] On 13 May 2003 Ms Parker resigned from her position. She wrote a letter to Mr Boskell in which she gave two main reasons for her resignation.

[6] The first was the failure of management to address issues following a letter of complaint signed by five employees of the Invercargill Postie Plus in early April 2003 about Ms Parker.

OF THE EMPLOYER

[7] The second was the offer to Ms Parker of a salesperson role for 22 hours per week following her application for management positions and a salesperson position in a new store in Invercargill that incorporated both Postie Plus and "Baby City". Ms Parker had in her position as Branch Manager worked approximately 40 – 42 hours per week.

[8] In April 2003 Mr Boskell received a letter of complaint from five of the six staff at the Invercargill store about Ms Parker which set out some concerns and indicated that staff had lost confidence in Ms Parker. Mr Boskell and Mr Ingham met with the staff on 7 April to discuss the letter.

[9] On Tuesday 8 April 2003 when Ms Parker arrived at work she was met by Mr Ingham and asked to accompany him to an Invercargill Motel where Mr Boskell was staying. The three met in the open living room area and discussed the contents of the letter from the staff. Ms Parker was upset about the letter. She initially wanted to attend at the store and confront the staff but Mr Boskell and Mr Ingham thought that unwise because Ms Parker was upset. Ms Parker waited outside the store whilst Mr Ingham retrieved her bag. It was suggested that Ms Parker take paid leave until the matters raised with staff could be investigated.

[10] Ms Parker was telephoned at home later that same day by Mr Ingham to arrange a further meeting. She advised Mr Ingham that she intended to seek legal advice and met the following day with her lawyer Ms Kereru.

[11] On Friday 11 April Mr Boskell telephoned Ms Parker and it was agreed that there would be a meeting involving Ms Kereru to try to resolve matters. In the meantime Ms Parker remained off work on paid leave.

[12] Ms Parker felt that the issues were mainly instigated by one employee. I shall call that employee "J". Ms Parker said that she had had previous difficulty with J in getting her to follow instructions.

[13] A meeting took place on 15 April 2003. Ms Kereru attended with Ms Parker. Mr Ingham attended from Postie Plus. There was a discussion about issues with J. Ms Parker accepted that she could have been stronger with J. I accept that Ms Parker wanted to return to work but not until the issues were resolved. Ms Kereru wrote to Mr Boskell following the meeting. The letter was incorrectly dated 25 March 2003. The letter provided amongst other matters:

Our client finds it appalling that your employee J has initiated a signed petition in this manner. There was no justification for such a petition. To leave this matter as it is, makes it impossible for our client to return to work and to be able to work in this environment without any trust loyalty or support.

Until this matter is resolved we felt it appropriate that;

- (a) Our client remains on paid leave.*
- (b) J be given a warning for misconduct.*
- (c) J to be removed from second in charge to sales person.*
- (d) Our clients legal fees to be paid by Postie Plus (at this stage approx \$400.00)*

[14] On 16 April Ms Parker received a notice from Postie Plus at her home address. The notice was addressed to all staff. Ms Parker had been aware since in or about March 2003 that there was to be an amalgamation of Postie Plus and Baby City in Invercargill. She was also aware at that stage that there was a requirement for staff to apply for jobs in the new store. The notice informed

staff that the Postie and Baby City Stores would be closing down on Friday 16 May 2003. There was an outline in the notice to staff of the structure and operation of the new store. The notice provided that all staff were required to reapply for a position and that the company had commissioned an independent recruitment consultant, Ralph Webster, to assist with appointment. Staff were advised that they were required, if interested, to submit their applications by Friday 2 May 2003. Attached to the notice was a description of the positions available at the new store.

[15] Ms Parker said that she decided at that point that she needed to return to work. She spoke with Mr Boskell by telephone and told him that she wanted to return to work. Mr Boskell advised that the union had become involved and he would be talking to the union and J. There were two further telephone conversations between Ms Parker and Mr Boskell. I find that during one of these conversations Mr Boskell said words to the effect that the union had instructed the staff at Postie Plus not to talk or listen to her. He may have in this context used the word *blacklist*. I do not believe Mr Boskell said this to upset or alarm Ms Parker but he was of the view that she should know the nature of the comments made by the union organiser representing the staff at Postie Plus. I also find that Mr Boskell suggested to Ms Parker that she return to work. Ms Parker clearly wanted to return to her position but was not satisfied that her workplace would be safe and secure to return to. This is consistent with both the letter Ms Parker wrote to Mr Boskell on 20 April 2003 and her lawyer's letter of 24 April 2003.

[16] Mr Boskell and Mr Ingham attempted to investigate the issues by talking to the staff and the union throughout April. I accept that it was not easy to understand the nature of the issues in the store.

[17] On 29 April Mr Boskell telephoned Ms Parker. He wanted to arrange a date for her to return to work. I also find that he alluded during the telephone call to the contents of a letter he was intending to forward to staff and to Ms Kereru. I accept that Mr Boskell believed that Ms Parker had conceded that she had on occasion made some errors of judgment in her dealings with staff. I do not find that he discussed in any particular detail the parts of the letter that directly referred to Ms Parker. Either during that conversation or subsequently, Ms Parker agreed to return to the store on 2 December 2004. The letter dated 29 April was sent to all staff and copied to the organiser at the National Distribution Union, Mr Ingham and Ms Kereru.

[18] The letter referred to the main issues to be discussed with Ms Parker. It stated that Ms Parker had shown an error of judgment on a number of occasions but that none of the errors were intended to create the situation currently in the branch. It also noted that management would meet again with Ms Parker and discuss methods for her to be more effective as a Manager. It confirmed that none of the issues raised warranted disciplinary action but that there was concern at the level of conflict within the branch. The letter concluded by asking all parties to put aside their differences and a warning that anyone who walked off the job, worked to rule or ignored Ms Parker's instructions may be subject to disciplinary action.

[19] Ms Parker felt that Mr Boskell and Mr Ingham were very polite throughout what was clearly a difficult period but said that they had never sat down with her and really discussed the issues in the store. Further Ms Parker did not accept that she had made judgment errors whilst a manager.

[20] Mr Boskell wrote to Ms Parker on 30 April 2003 confirming that she would be returning to the store on Friday 2 May. The letter stated that the issues raised in the letter such as unprofessional conduct as a Manager and inability to handle stress would require further discussion with Ms Parker on her return. There was also advice in the letter that Ms Parker was to immediately inform Mr Ingham or Mr Boskell if staff did not follow her reasonable requests. Mr Boskell said that Postie Plus was not prepared to pay Ms Parker's legal fees that she had incurred with respect to the matter.

[21] Ms Parker replied to Mr Boskell by letter dated 1 May. In that letter she said that:

In reference to yourself & Michael discussing with me my unprofessional conduct & stress there will be no need as I have withdrawn my application as Store Manager/Dept Head for a role as Senior Sales, so I can go & do my job sell, & go home without any problems.

Ms Parker also acknowledged that management had supported her financially but not in any other way. Ms Parker said in her letter that she was *very bitter*.

[22] On Friday 2 May Ms Parker returned to work at the Postie Plus store. Mr Ingham met her at the rear of the building as previously arranged and they entered the store. Ms Parker commenced performing a task. Mr Ingham encouraged the staff to greet Ms Parker and say "good morning" as they entered the store. J refused to do so. Mr Ingham spoke very firmly to J. Ms Parker went upstairs and telephoned Ms Kereru to update her about the situation. Ms Parker then made the decision to leave the store. Mr Ingham confirmed with Ms Parker that he would spend the day in the store to support her. Ms Parker felt that it was clear the problem was still not resolved and she remained off work on paid leave until her resignation. Later in the day on 2 May Ms Parker met with Mr Ingham at Baby City to hand over her keys with the clear intention of not returning to the store. Mr Ingham encouraged Ms Parker to keep her options open when applying for positions in the new store and wished her well. Ms Parker said that the conversation with Mr Ingham was the first indication that the company had trust in her. Ms Parker then contacted the Personnel Manager at Postie Plus and advised that she was also applying for the positions in the new store of Branch Manager and Departmental Manager.

[23] Ms Parker had an interview in Invercargill with Mr Webster on 7 May 2003 for a position in the new store. There is significant dispute between Mr Webster and Ms Parker about what occurred during the interview process. Mr Webster said that he was aware that there had been some problems in the past in the store but did not ask about them and was not overly concerned about them. Ms Parker described the interview as an interrogation about problems she was having with Postie Plus and said that Mr Webster instigated the discussion on problems at the store and asked Ms Parker why she would want to go back to the *Lions Den* and *that one of them would have to go*. Mr Webster rejected this as simply untrue and said that when he asked Ms Parker about why she had changed her mind about the positions she was applying for she then went into a long winded explanation about problems with other staff in the store. I accept that Ms Parker was distressed at the end of the interview. There was clearly some discussion about previous issues in the store and that discussion did upset Ms Parker. There is a risk in drawing conclusions from isolated statements made during an interview that lasted at least 40 minutes without considering them in context. I was unable to obtain such context as following the investigation meeting Mr Webster confirmed that all interview sheets, including Ms Parker's, had been destroyed.

[24] Importantly though I am not satisfied that Mr Boswell and Mr Ingham tried to influence Mr Webster about Ms Parker. I have reached that conclusion on the basis of the evidence of Mr Boswell, which I accept, that he encouraged Ms Parker to apply for a management position and did not attempt to influence Mr Webster in terms of the interview process. I have also taken into account Ms Parker's evidence that as a result of a discussion with Mr Ingham on 2 May she felt that the company did have trust in her and asked on that basis that she be considered for two managerial positions as well as the salesperson position. That would appear inconsistent with an active attempt by Postie Plus to exclude Ms Parker from such a position in the new store and a conclusion that either Mr Boswell or Mr Ingham lacked trust in her managerial ability.

[25] Mr Webster recommended Ms Parker for a part-time permanent position in senior sales but considered external candidates were more suitable for the management positions. Mr Boskell offered Ms Parker the position of senior sales for 22 hours per week by telephone. Mr Boskell said that all staff in positions other than management were offered reduced hours initially but that the hours increased shortly after the store opened and that most staff are now working on full time hours. Ms Parker said that she then resigned from her position as branch manager knowing that some staff were refusing to work with her and that 22 hours was not enough to live on setting out the detail in the letter of 13 May 2003. Ms Parker said that she felt immense stress and humiliation as a result of those matters. Ms Parker was successful in obtaining alternative employment a month after her resignation.

Analysis and conclusions

[26] I turn firstly to the matters for consideration in a case such as this where Ms Parker claims that she was constructively dismissed.

[27] Cooke P in the Court of Appeal judgment in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW* [1994] 1 ERNZ 168 at p 172 said:

In a case such as this the first relevant question was whether the resignation was caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation had to be examined, not merely the communication by the employee of the termination. If that question of causation was answered in the affirmative, the next question was whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[28] Ms Parker says that she was constructively dismissed because Postie Plus did not conduct a fair investigation in that it failed to address her concerns and criticised her in its letter dated 29 April 2003 to the staff and the union. Ms Parker also claims that after being encouraged to re-apply for managerial positions in the new store she was offered a position significantly reduced in hours and responsibility.

[29] Ms Kereru confirmed that this was not a case about the genuineness of the redundancies that took place at the Postie Plus and Baby City stores in Invercargill when both stores were amalgamated. Ms Parker said to me when giving her evidence that the timing of the restructuring was an unfortunate coincidence.

[30] I find that the main reason Ms Parker resigned on 13 May 2003 was because she had been offered a position in the new store with reduced hours. I reached that conclusion taking into account the timing of the resignation and Ms Parker's evidence that she was unsure what she would have done if a position with more hours had been offered to her. I do accept that the staff issues in the store caused Ms Parker considerable distress and concern. On 2 May 2003 though after discussions with Mr Ingham Ms Parker was satisfied that the company still had confidence in her as a manager and did not resign from Postie Plus at that point even though she made it clear that she could not return to the store and was handing in her keys.

[31] In considering whether there was a breach of duty in terms of the offer of a position with reduced hours to Ms Parker I have had regard to the circumstances at that time which were known to Postie Plus. I do accept that resolving the staff issues was not an easy situation for Mr Boswell and Mr Ingham to deal with and I have no reason to doubt Mr Boswell's evidence that he tried to be

fair to everyone involved in the matter. The situation was one however where Ms Parker had not been at the store for some weeks because of the staff issues raised. These were raised at the same time that staff were expected to apply for jobs in the new store. Ms Parker felt undermined by the letter of 29 April that was sent to staff and the union and contained some criticism of her. She also believed that the issues at the store had not been discussed with her in any detail or resolved. Although Ms Parker was, I find, determined to make a successful return to the store on 2 May 2003 she left the store on that day because she felt that staff, at least J, would not communicate with her and that made her situation impossible. I do accept that Mr Ingham did everything he could to assist the return by Ms Parker to the store on 2 May. Postie Plus was aware of how Ms Parker felt because she communicated throughout this time in writing to Mr Boswell. They knew that she felt bitter about the situation. There was no significant contact between Mr Boswell and Ms Parker from 2 May until Mr Boswell telephoned Ms Parker with the offer of a position on 12 May 2003.

[32] There were obligations on Postie Plus to act fairly and reasonably toward Ms Parker particularly in light of the circumstances as set out above. Ms Parker was in a senior position with the company.

[33] There is no challenge to the genuineness of the redundancy in this case although there is acceptance by Postie Plus that one of the managerial positions which Ms Parker applied for in the new store was very similar to her previous position.

[34] I find that it was inadequate and unfair for Mr Boswell, without further consultation as to other options including a redundancy payment, to simply convey by telephone the offer of a position in the new store with significantly reduced hours. Further consultation would have provided an opportunity to discuss other options and given Ms Parker an opportunity to raise her concerns about a link between the offer and the staff issues, discuss any concerns that she had about the interview process and clarify which staff would be working in the new store. I accept Ms Parker's evidence that Mr Boswell did not advise the hours in the offered position may increase as indeed they subsequently did. If there had been some proper discussion then Mr Boswell would have been able to talk to Ms Parker about the likelihood of that occurring. It is hardly surprising in the circumstances that Ms Parker did not turn her mind to the question of a redundancy payment after the offer was made and before resigning or that she concluded there was a link between the offer and the staff issues.

[35] I find that Postie Plus breached its duty to treat Ms Parker in a fair and reasonable manner in terms of her redundancy by simply offering her a position which was different to the one she was already performing with significantly reduced hours without further consultation or discussion about her options. I find that this breach was sufficiently serious to make it reasonably foreseeable to Postie Plus that Ms Parker would resign in the particular circumstances of this case.

[36] I find that Ms Parker was unjustifiably constructively dismissed from her employment with Postie Plus on 13 May 2003. She has a personal grievance and is entitled to remedies. I do not find this is a situation where Ms Parker contributed to her grievance.

Remedies

Recovery of lost wages

[37] Ms Parker seeks compensation for loss of wages in the sum of \$2,857.25 gross from 13 May 2004 to 16 June 2004. As a result of the grievance Ms Parker lost part of her redundancy entitlement which is provided in clause 16 of the general terms and conditions for branch managers. Notice was provided. Ms Parker's employment would have ended on 16 May 2003.

Clause 16 provides:

The employee's redundancy entitlement consists of:

- *Four weeks notice.*
- *Four weeks for the first year of service or part thereof, then two weeks for each completed year of service up to a maximum of twelve weeks.*

These calculations are based on the average weekly earnings in the previous twelve-month period, ending on the date of termination.

There is no right to redundancy compensation where the Company sells, transfers, or leases the business, and where the person acquiring the business offers the employee employment in the same capacity, or in a capacity that the employee is willing to accept, on similar terms and conditions of employment, and agrees to treat the employee's service as continuous.

Ms Parker is entitled in accordance with the second bullet point in clause 16 to four weeks payment based on her average weekly earnings for the period of her employment which ended on 13 May 2003 and I do so order. In the event that there is any difficulty in calculating the payment that should be made I reserve leave for either party to come back to the Authority. I do not make any other order in terms of lost wages.

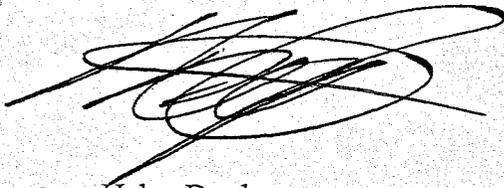
Compensation

[38] Ms Parker was humiliated by the letter of complaint from the staff. That was a matter over which Postie Plus had no control although they had obligations from the time they received the letter of complaint to deal with the matter fairly and reasonable. I have concluded that the way Postie Plus attempted to deal with the staff issues was not the main reason Ms Parker resigned from her employment. Compensation therefore has to be directed to the lack of further consultation following the offer of the part-time salesperson position in the new store. I accept that Ms Parker was very distressed to be made such an offer. I am of the view that in all the circumstances an appropriate award of compensation would be \$2,500.00. I have taken account of the fact that Ms Parker was able to reasonably quickly find new employment which utilised her skills.

[39] I order Postie Plus Group Limited to pay to Dana Parker the sum of \$2,500.00 without deduction being payment of compensation under section 123(c) (i) of the Employment Relations Act 2000.

Costs

[40] I reserve the issue of costs. I would encourage the parties to attempt to reach agreement on this matter in the first instance. If agreement cannot be reached and the applicant wishes to file memorandum with respect to costs then such memorandum is to be filed and served within 14 days from the date of this determination and the respondent is to have a further 14 days to reply to any such memorandum.



Helen Doyle
Member of Employment Relations Authority

