

The Investigation

[3] Ms Pryce's statement of problem was first filed on 9 July 2009; her amended statement was received on 23 November. An email dated 4 February 2010 provided "*the applicant's response to the amended statement in reply*" and advice that the parties agreed to a determination was sought on the papers. As set out in my record of the same date, the parties reiterated their position during a telephone conference on 24 February, when timelines for filing submissions were also agreed.

[4] Because the parties agreed to an investigation on the papers, this determination was provided to them in draft form for further comment and also in an (unsuccessful) attempt to facilitate a resolution on their own terms.

Background

[5] In the papers provided the Authority the Company's current sole director, Ms Karen Spooner, is more frequently referred to as Karen Luff and that is the name that I will use.

[6] Ms Pryce was employed by the Company in October 1997 as a full-time property manager.

[7] The applicant and four witnesses (3 co-workers and one customer) say that, on 27 July 2007, one of the Company's previous directors, Mr Ron Clark said to Ms Pryce, "*God, you're fucking unreasonable*". Mr Clark was described as standing very close to Ms Pryce and pointing a finger in her face; one witness thought he was going to hit her. Ms Luff separated them. Mr Clark was heard to direct other obscene language at the applicant.

[8] By letter or memo dated 11 October Ms Pryce said she was "*mortified*" at the way she was treated by Mr Clark on 27 July, that she "*did not deserve to be spoken to in (that) manner ... in front of my colleagues and a client*" and sought a response "*to this complaint in writing within 7 days ...*" (attachment A to statement of problem).

[9] By letter or memo dated 19 October Ms Luff confirmed her verbal advice that her then co-director would not be apologising to Ms Pryor.

[10] The parties' evidence confirms another incident on 26 October 2007 when – Ms Luff says – Ms Pryce, amongst other things, invited from her, a departure figure: when given a figure Ms Pryce said the Company would be hearing from her representative.

[11] A letter dated 12 November 2007 was forwarded to the Company by the applicant's representative. Its purpose was "*to address the terms and conditions of Ms Pryce's (proposed) new employment agreement*" with the Company (attachment C to statement of problem). It raised various issues including a pay increase, bonus payment and other matters about the proposed employment agreement; no mention was made, however, of the incidents occurring on 27 July and 26 October, and no grievances in respect of those incidents were expressly or impliedly raised.

[12] Because there was no response to the 12 November letter a follow up advice was forwarded dated 10 December; again, no grievances were raised expressly or implied in respect of the 27 July and 26 October incidents.

[13] Despite the advice that formal steps would be taken in the absence of a prompt response to the 12 November and 10 December letters, no such steps were initiated.

[14] The Company's representative replied to the 12 November and 10 December 2007 correspondence by letter dated 13 February 2008: he said his client would like to advance matters and suggested a meeting to that end. He advised the matters raised in the 12 November letter could be discussed at the meeting; his clients otherwise did not intend to respond in writing. Ms Pryce's representative was invited to contact him to discuss the respondent's proposal.

[15] Before a meeting could be arranged, and on 12 March 2008, Ms Luff met with Ms Pryce: the former says the purpose of the meeting was to explain to the applicant of her intention to sell her share of the business to Mr Clark. Ms Luff says Ms Pryce responded by saying Mr Clark would never be able to run the business on his own. Ms Luff says she also advised Ms Pryce Mr Clark did not wish to continue to work

with the applicant. That advice was repeated in the presence of a witness. Efforts by the director, she says, to add comment were blocked by Ms Pryce; Ms Luff says the applicant also responded with, 'That's ok, I'll go now'. Ms Pryce disputes that claim.

[16] Ms Luff says that, despite her comment, Ms Pryce continued to work that day, for some hours, in particular deleting items from the computer system and shredding paperwork: she says the Company is still unaware of what was deleted and lost. Ms Pryce denies the allegation.

[17] For various reasons, Ms Pryce never returned to work following the 12 March meeting. She provided two medical certificates, the first dated 12 March. It declared her fit to resume work on 20 March; the second said the applicant was fit to resume work on 29 March. By letter dated 20 March, Ms Pryce's representative advised the respondent that his client was pursuing claims of unjustified disadvantage and unjustified dismissal.

[18] Ms Pryce's final pay was paid to her in April 2008.

[19] Ms Pryce says that, because of her age and current health, and despite undertaking up-skilling courses and many job applications, she has been unable to find fresh employment.

[20] She seeks 20 months lost remuneration (the period of her unemployment, up to the amended statement of problem received on 23 November 2009), i.e. \$65,000, plus interest.

[21] Other remedies sought by Ms Pryce are: compensation for humiliation, etc of \$50,000, a penalty for breaches of her employment agreement and the duty of good faith, a certificate of service and costs.

[22] The current Companies Office records confirm that the respondent remains in existence with Ms Luff (i.e. Karen Spooner) its sole director and principal shareholder.

Parties' Positions

[23] Because of the extent to which the parties differ over the events (some of which are now nearly three years old) and – as a result of undertaking an investigation on the papers – my inability to clarify matters by direct questioning and to test credibility, I see no value in attempting to summarise the parties' positions. Instead, and as best as I understand them from the papers, and in particular relying on key matters that are largely agreed or accepted, I will address and determine Ms Pryce's major employment problem allegations, set out the Company's response and make my findings.

Discussion

[24] In determining this matter I apply the observation of the full Employment Court, set out at para [37] in *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, namely that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[25] The documentary evidence before the Authority discloses no grievance being expressly raised on Ms Pryce's behalf in respect of her alleged concerns until her letter of 20 March 2008 (attachment G to the original statement of problem), i.e. after the termination of her employment.

[26] The earlier letters on behalf of Ms Pryce, of 12 November and 10 December 2007 (attachments C & D), do not amount to communications of a personal grievance; indeed the former is clearly intended to advance negotiations in respect of an individual employment agreement; whereas the latter talks of beginning "*a more formal process with the Department of Labour*" if a reply is not received within 7 days (which it was not, but no "*formal process*" was initiated). What the formal process would be in respect of, by implication, appears to relate to the negotiation process sought by the applicant. The letters are not expressly stated as grievance notifications, nor by implication could they fairly, reasonably and objectively be read as such.

[27] However, 90-day protests have not been raised by the respondent in respect of any of the matters set out in the first, unambiguous advice of a grievance (the letter of 20 March), nor in respect of the alleged causes of action as developed in the subsequent statements of problem. Instead, in response, the Company has elected to attempt to justify its actions.

Findings

The applicant's terms and conditions of employment

[28] What is clear from the evidence is that Ms Pryce was in the initial stage of attempting to reach agreement with her employer as to changed terms and conditions.

[29] There is, however, no evidence of unfair and/or unreasonable and/or discriminatory conduct or delay that might amount to unjustifiable disadvantage. That the Company did not agree to Ms Pryce's proposed terms is not evidence of any unjustified disadvantage.

[30] Ms Pryce may have been disadvantaged by the Company's treatment of her concerns about her terms and conditions of employment, and not being paid in line with other employees, but I am satisfied the respondent's actions did not amount to unjustifiable disadvantage.

[31] I find support for this conclusion after having regard to the only reference in any correspondence on behalf of the applicant in respect of this matter, being that set out in the 12 November letter of her behalf. It refers (seemingly erroneously) to the employer's obligations under s. 65 of the Employment Relations Act 2000, **Terms and conditions of employment where no collective agreement applies** (the Act).

[32] What is not made clear in the 12 November letter is s. 65 (2) (b), which provides of course that the individual employment agreement "*may contain such terms and conditions as the employee and employer think fit*" (emphasis added), i.e. the contents of the agreement are dependent on the parties' mutual consent.

[33] While a copy of an individual employment agreement is attached as 4.2 to the statement of problem, it is signed off only by the respondent, on 27 August 2007. I conclude from this evidence that agreement was not reached by the parties in writing as to what Ms Pryce's written (versus her actual) terms and conditions of employment should be.

[34] For completeness sake and because of my comment about error above, I note here that – having been employed in 1997 – Ms Pryce was covered by the Transitional Provisions set out at s. 242 of the Act: ss. (2) provides that part 6 of the Act does not apply in relation to any individual employment contract already in force, i.e. it was not a breach of the Act that Ms Pryce did not have a written employment agreement.

KiwiSaver

[35] Ms Pryce applied for KiwiSaver on 14 September 2007, but deductions did not commence until 2 November: no adequate explanation has been provided by the Company for its failure to act on Ms Pryce's application. Because of her statutory entitlement to this item, it was not a matter for negotiation in the context of a possible new employment agreement. The employer's failure to act clearly frustrated Ms Pryce's legitimate expectation, and possibly financially disadvantaged her. It also distressed the applicant. Accordingly I am satisfied she was unjustifiably disadvantaged but will address her claim for compensation for humiliation, globally, below.

Delays

[36] In the absence of clear advice of the applicant's grievances before 20 March 2008, the Company cannot be said to have unfairly and unreasonably delayed setting up meetings to discuss and resolve ongoing issues.

[37] This conclusion is reinforced by the evidence of Ms Pryce willingly entering into ongoing discussions in the workplace with her employer up to that date, notwithstanding her appointment of an advocate (although the timing of the latter is not clear), and the fact of the respondent's offer to meet communicated by letter dated

13 February 2008 (which appears not to have been uplifted by Ms Pryce and her advocate prior to the termination of the applicant's employment).

Abusive and Obscene Language

[38] The allegation that Ms Pryce was sworn at by Mr Clark in front of other employees and customers on 27 July 2007 is not denied by the respondent. That appalling behaviour was compounded by the director's subsequent refusal to apologise for his conduct (attachment B to original statement of problem). However, it is difficult to accept the conduct was as obnoxious as Ms Pryce claims because, notwithstanding being represented at or around that time by an experienced employment law practitioner, the matter was not formally raised as a grievance until more than eight months later, following the 20 March 2008 advice (which any way does not particularise this matter).

[39] Indeed the allegation and evidence of Ms Pryce's concerns (other than her memo or letter of 11 October 2007) is not particularised until her first statement of problem was filed on 9 July 2009, i.e. nearly two-years after the precipitating event.

[40] However, as the statutory time barriers are not pleaded by the Company and it does not deny the allegation, I am satisfied that, per s. 103A of the Act, Mr Clark's actions were not those of a fair and reasonable employer, objectively measured, and were not what a fair and reasonable employer would have done in all the circumstances at the time the action occurred.

[41] I am satisfied that fair and reasonable employers, objectively measured, present their concerns other than by the use of obscene language and physical intimidation, particularly in front of co-workers and a client.

[42] Because of the threat to the safety of her work environment and her public humiliation, I am satisfied Ms Pryce was unjustifiably disadvantaged as a result of the then director's conduct and has made out her claim for compensation which I quantify below.

Unjustifiably dismissed on 12 March 2008

[43] As is made clear by the attachment to the respondent's amended statement in reply received on 14 January 2010, a condition of Mr Clark purchasing Ms Luff's share of the business was the cessation of Ms Pryce's employment prior to 31 March 2008.

[44] It is clear from the parties' evidence that Ms Pryce's account of what happened on 12 March 2008 is fundamentally correct: she was told that the business was being sold and the purchaser wanted the applicant 'out of here' by the end of that month.

[45] As it happened, on 20 March a change of ownership was announced but, by then, it was Ms Luff who had become the sole owner of the respondent. There is no evidence of Ms Luff then attempting Ms Pryce's return to the workplace.

[46] Applying the same test set out above, I am satisfied that – per s. 103A of the Act – Ms Luff's actions, objectively measured, were not those of what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. This was not the sale of a business but a sale of shares in the business and therefore Ms Pryce's employer was never going to change. Those actions plainly amount to an unjustified dismissal of Ms Pryce.

[47] That is because a fair and reasonable employer, objectively measured, would have raised any performance concerns it had and worked through those matters fairly and reasonably with the applicant, and, in particular – with the sale now having reversed, and there no longer being any condition of purchase requiring the cessation of Ms Pryce's employment (which any way would also have resulted in an unjustified dismissal), and having no fair and reasonable reason not to – would have communicated this new, significant development to the applicant and invited her return to the workplace.

[48] The documentary evidence before the Authority discloses no formal, or even informal, steps being taken by the Company in respect of its claimed concerns about Ms Pryce's performance prior to the termination of her employment.

Penalty

[49] A penalty is claimed in respect of “*breaches of the individual employment agreement and breach of duty of good faith*” (par 3.2 statement of problem). To that end, reliance is placed on “*the applicant’s individual employment agreement (as signed by the respondent on 27/08/2007)*” (par 2.22 a), above). As is made clear above, that employment agreement was proposed by the Company and never accepted by Ms Pryor, and therefore cannot be relied on as setting out her terms and conditions of employment. The breaches are otherwise not particularised.

[50] As is also made clear above, there cannot be a penalty for not providing Ms Pryor with a written employment agreement (originally threatened in her advocate’s letter of 12 November 2007) as the Act’s transitional provisions, at ss. 242 (2) makes clear Part 6 of the Act does not apply to individual employment agreements entered into under the Employment Contracts Act 1991.

[51] In *Xu v McIntosh* [2004] 2 ERNZ 448, 451 the Employment Court found that:

In determining the quantum of penalties to be imposed for the breaches of the ERA ... the first question to ask was, how much harm had the breach occasioned? Further, how important was it to bring home to the party in default that such behaviour was unacceptable, or to deter others from it? The next question ... was: was the breach technical or inadvertent, or was it flagrant and deliberate?

[52] In the absence of clearly particularised claims, I am satisfied that the thrust of Ms Pryor’s concerns are set out by her various grievances: having found in her favour in two significant areas, I am satisfied those concerns are properly awarded for by application of appropriate compensation.

Remedies

Lost Remuneration

[53] Ms Pryce seeks 20 months lost remuneration, i.e. the period of her unemployment from the termination of her job to the filing of the amended statement of problem on 23 November 2009. The reasons given for the applicant’s inability to

find work, notwithstanding her applications and retraining, are that of her age and current health situation. No details or evidence are provided in support of these claims. Ms Pryce accepts her current health situation does not derive entirely from the (unjustified) termination of her employment (see par [78 of her final submissions, dated 23 April 2010). However she does say that, “*Due to the continuing stress my health deteriorated to the point where I required stronger blood pressure medication ...*” (attachment 22.23 to the amended statement of problem). Ms Pryce also indicates that she is undertaking other, significant medical treatment.

[54] While no evidence is provided to this end, I do accept that the current economic recession and public knowledge of the termination of her employment would have significantly impacted Ms Pryce’s ability to find similar employment in the small, intimate Whanganui real estate industry.

[55] In light of the undisputed evidence of jobs pursued by Ms Pryce and the impact her health issues have had on her ability to undertake work, but reflecting the evident problems arising out of her unjustified dismissal, I am satisfied that an award beyond the 3-months provided for in the Act (ss. 128 (2)) is appropriate and, by way of exercising my discretion, consider that in all the circumstances an award of 6-months lost remuneration is appropriate.

[56] This award takes account of the applicant’s claim for interest on lost wages.

Compensation for Hurt and Humiliation

[57] Ms Pryce seeks \$50,000 compensation for humiliation. I understand this claim to be in respect of the obscene language incident on 27 July 2007, the KiwiSaver delay and her unjustified dismissal on 12 March 2008.

[58] No basis is provided in the applicant’s evidence or submissions for such an uncommonly high award.

[59] Ms Pryce pursued the 27 July incident only in the context of her significantly later claim of unjustified dismissal.

[60] Her evidence as to the impact of the former, while powerful, needs to be put into context: by her own account her relationship with Mr Clark was seriously strained (*"It was apparent (he) had no time for the Applicant"* – par 2.9 b) of the original statement of problem) and had been for some time. Ms Pryce nonetheless took no action in respect of that behaviour until after her dismissal: that she elected to tolerate that behaviour must reflect any award for humiliation and hurt.

[61] I have no reason to doubt views expressed via the statements provided the Authority (albeit unsworn) that Ms Pryce could be difficult to work with. However, that view in turn needs to be balanced by the absence of any performance or disciplinary issues initiated by the respondent in respect of her conduct.

[62] Some recognition is also required of Ms Luff's acknowledgement that her Company could have handled matters better.

[63] Because of the surprise announcement of the termination of her employment, and Ms Luff's failure to invite Ms Pryce back into the workforce when the sale circumstances in fact reversed, a significant award is called for but nothing like the unrealistic sum originally claimed by Ms Pryce.

[64] In all the circumstances I am satisfied an award of \$13,000 is appropriate.

Certificate of Service

[65] The Authority has no statutory power to direct the provision of a certificate of service.

[66] However, in light of the acknowledgements expressed in particular by Ms Luff in the amended statement of reply, it is realistic to expect that – as a good employer, and if it has not already done so, or if it has and it has failed to get to Ms Pryce – the Company will willingly provide a record of when Ms Pryce commenced employment, when it concluded, and a list of the duties she undertook during that period.

Contributory Fault

[67] In the absence of any disciplinary or performance issues being raised by the Company, and notwithstanding the trenchant criticism relied on by it by way of statements from co-workers and the evidence of Ms Luff, I am satisfied that the actions of the employee did not contribute towards the situation that gave rise to the personal grievance.

Determination

[68] Ms Pryce succeeds with claims of unjustified disadvantage and unjustified dismissal and I direct the Company to pay to her six months lost remuneration and \$13,000 (thirteen thousand dollars) compensation for humiliation, etc. Leave is reserved for the parties to return the calculation of the lost remuneration to the Authority if agreement cannot be reached on this figure.

[69] Costs are reserved. Subject to any Calderbank proposals and the parties' submissions, I can indicate that costs in favour of Ms Pryce's success of the order of \$2,000 can be anticipated in light of the fact that this was an investigation done on the papers.

Denis Asher

Member of the Employment Relations Authority