

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 177  
5300325

BETWEEN            KATRINA MARIE SAVAGE  
                                 Applicant  
  
AND                    TUI CAMPERS LIMITED  
                                 Respondent

Member of Authority:    M B Loftus  
  
Representatives:        Glenys Steele, Counsel for the Applicant  
                                 Peter Macdonald, Advocate for the Respondent  
  
Investigation Meeting:    9 December 2010 and 9 February 2011 at Christchurch  
  
Submissions Received:    25 March and 19 April 2011 from the Applicant  
                                 12 April 2011 from the Respondent  
  
Determination:            21 August 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Ms Katrina Savage, claims she *was unjustifiably disadvantaged by the process employed by the respondent in terms of her complaint about her treatment by fellow workers and this led to constructive dismissal.*

[2]     While the respondent, Tui Campers Limited (Tui), accepts the event that precipitated the resignation occurred, it denies Ms Savage was constructively dismissed. Tui contends that having received her complaint, it commenced an investigation but Ms Savage resigned before Tui had a reasonable chance to address and resolve the issues. In essence Tui contends Ms Savage abandoned her employment.

## **Acknowledgement**

[3] Unfortunately a considerable period of time has passed since the investigation meeting. The situation arose for a variety of reasons including the file becoming inaccessible for a considerable period due to Christchurch's earthquakes. I appreciate the parties patience and regret any inconvenience.

## **Background**

[4] Tui is in the business of hiring mobile camping vans. It is largely owned by Mr Stephen and Mrs Susan Turner (referred to herein as Mr and Mrs Turner).

[5] Ms Savage worked for Tui for approximately two and half years. She was engaged as a detailer and primarily tasked with preparing the vehicles for lease.

[6] Ms Savage states the first year of employment went reasonably well though she did have concerns about perceived health and safety deficiencies. From her perspective the situation started to change around September 2007. There then commenced a series of incidents which would see her take stress leave in October 2009.

[7] September 2007 saw the first of four interactions between herself and two of the owners children, Mr Aaron and Ms Casey Turner (Aaron and Casey). They occurred over a four month period and initially involve Aaron allegedly removing a newspaper and, shortly thereafter, a magazine from Ms Savage's bag in the tearoom. That was followed by Casey refusing to *help me sort out who had stolen my books from the staffroom* and another incident in which Aaron is said to have interrupted a discussion between Ms Savage and another employee.

[8] Ms Savage states that towards the end of May 2008 Ms Williams, the Operations Manager, asked that she reduce her hours as a result of reduced workloads occasioned by the winter season. Ms Savage agreed on the proviso she return to full time work on 1 September. She complains she was the only person who did so and attributes her acquiescence to a view her job was on the line should she not.

[9] Ms Savage also complains about a warning she received in July 2008. An article had been placed on the staff notice board about the *downfall in tourist ventures* and she and Mr Turner discussed it. She says they discussed the fact some companies

had cancelled staff Christmas parties as a result and laughed about that. She subsequently wrote *what! does this mean no Xmas do for us ha ha?* on the article. She claims that resulted in a warning and an instruction from Mr Turner to tell other staff her actions had led to the cancellation of their Christmas meal that year. Tui denies the existence of a warning but accepts there was no plan for a Christmas function due to the fact that there was no appropriate date upon which all staff would be available. As events transpired some staff, along with those of another neighbouring company, arranged a Christmas meal. They invited Ms Williams but not members of the Turner family. Ms Savage says that led to an even poorer work environment.

[10] There is an allegation Ms Savage was sexually harassed by a colleague (W) towards the end of August 2008. Her concerns were raised with Ms Williams but Ms Savage expresses dissatisfaction about the way the matter was addressed. That said, she concedes the outcome was one to which she agreed, albeit reluctantly.

[11] There was a second incident involving W in February 2009. That saw W's dismissal but Ms Savage complains it was done in a way that masked the reason (redundancy) which would make it easier for him to get another job and perhaps transgress elsewhere. Ms Savage also claims Aaron made a derogatory comment about the issue that same day.

[12] In May 2009 another staff member resigned. Ms Savage contends she was entitled to replace him and accrue the benefit of a small wage rise but complains this was not to be as Ms Williams hired her son, Adam. Ms Savage expresses disappointment at this outcome and says she decided to simply perform the tasks required of her and no longer make an additional effort.

[13] She also comments about there only being two detailers when there had been four when she commenced. She takes issue with the extra work this generated and states that stressed her.

[14] She goes on to say:

*By this time relationships between myself and the family on staff were deteriorating. Jodene (another daughter of Sue and Steve Turner's) had come to work in the office, so now we had 3 family members in the office, plus Trudy, a long term friend and Adam, who is Trudy's son ... I still was asking for extra help in the bay as I knew that things were going to get very busy after the winter period, and I was still getting the answer that we would not be getting any extra detailers. By now*

*Aaron had made a few smart comments about how I should harden up and handle the job or quit.*

[15] Ms Savage talks of another couple of incidents in June and July 2009. Ms Savage takes issue with Casey turning down the heating in the tearoom despite the fact she (Ms Savage) was wet and cold in June. In July there was another incident involving Casey in the tearoom and a further one over stereo heads being removed from the vehicles. Ms Savage states these *wee* incidents were starting to get to her and though only minor she concluded Casey had a personal issue with her. That was upsetting her.

[16] In August 2009 Ms Savage took a week's leave during which she says she considered resigning. She chose not to.

[17] Ms Savage complains of another event in September 2009 when Casey allegedly spoke to her in a nasty tone over the fuelling of a vehicle. She says she raised this with Ms Williams but received what was by then the standard response of *I will have a word with Casey, but there isn't much I can do about it.* Both Casey and Ms Williams deny the claim.

[18] Ms Savage also raises what she contents is an inconsistency in that the Turners were allowed to peruse non-work websites on the firms computer while other staff were precluded from doing so. She says she raised this double standard with Ms Williams but was told there was nothing that could be done about it. Tui denies this claim and says staff are allowed to use its computers for private purposes during breaks.

[19] Ms Savage says that upon leaving work on 13 October Ms Williams advised she was required to attend a disciplinary meeting. She says the meeting was over break times and a complaint Casey had made about Ms Savage surfing the internet during work time. She says she saw Casey's complaint as evidencing a vendetta. Ms Savage subsequently sought an adjournment which was granted. The meeting was rescheduled for the morning of the 29<sup>th</sup>.

[20] Tui disagree. The letter summoning Ms Savage to the meeting is dated 21 October. The issues of concern were about timekeeping and smoking during work time. Tui contends its concerns warranted pursuit and notes Ms Savage was not the only one they spoke to about these concerns at that time. The other employee

concerned gave evidence, accepted she got a warning and essentially said its was warranted and fair.

[21] Ms Savage talked of a series of minor events on the 27<sup>th</sup> before going on to say that having come to work on the 29<sup>th</sup> she was never asked to attend the rescheduled meeting. At 11.45am she went to her GP about the stress she was feeling.

[22] She goes on to say:

*As I was driving to the doctors that day I thought to myself I just need a break and then I will go back to work and it will be okay. A couple of days rest will probably do me good. After seeing the doctor he put me on leave until the 2<sup>nd</sup> of November. He did say that I did not look that well, and that if I found it hard to go to work on the 2<sup>nd</sup> to contact him and he would review it then.*

[23] Ms Savage returned to work on the 2<sup>nd</sup> and, at least initially, all was well. She says that changed when Aaron arrived at lunchtime. Ms Savage claims he made a comment about taking leave but she ignored it and continued to detail the vehicle she was working on. She says she then noticed some damage on the vehicle and approached Aaron about it as he had been the staff member who had handled the return of that vehicle. A disagreement ensued with Ms Savage claiming the damage was new and Aaron claiming it was dated. Ms Savage says she took the matter up with the fleet manager, Mr John Daniel, who agreed the damage was new and pointed out that Aaron had used the vehicle during the weekend. Ms Savage says she returned to the bay, told Aaron the damage was new and he responded angrily calling her *stupid*. She goes on to say *at this point I lost my cool. I had had enough of being contradicted in my job and I had got really annoyed over the 'stupid' comment.*

[24] Ms Savage says she then yelled at Aaron and he responded in an aggressive manner so she walked away from the situation as Aaron continued to yell abuse at her. Ms Savage claims Casey then joined the dispute and Aaron abused both of them.

[25] Ms Savage says she and Casey then discussed the event and that conversation deteriorated in tone before Casey brought it to an end by walking away.

[26] A written statement Mr Daniel prepared on 4 November (see 29 below) suggests the damage was old. His evidence to the Authority ignores the issue but he

does question why Ms Savage chose to become so embroiled in a matter which was beyond her area of responsibility and nothing to do with her.

[27] Ms Savage completed the days work but, as events transpired, was never to return. The following day, 3 November, she returned to her GP who, she claims, again advised she was unfit for work. She claims she went home, concluded her situation was untenable and she was incapable of ever returning.

[28] On 6 November Ms Savage met with Mrs Turner, returned her uniform and advised she was not intending to return. She states Mrs Turner gave no indication the matter would be dealt with in a constructive way and she felt her complaint had fallen on deaf ears.

[29] Tui denies this to be the case. Ms Williams' notes suggests fairly detailed discussion and advice that Ms Savage take time to consider her future. There was also the fact Tui was concerned about the incident and already investigating and here reference needs to be made to the fact they had started gathering written statements on 4 November and Ms Savage was told of this.

[30] On 17 November the advocate Ms Savage had by then instructed telephoned Ms Williams and initiated an attempt to negotiate a exit strategy. He made it very clear Ms Savage would not be returning and he was making this approach as an alternative to the personal grievance that would inevitably follow should it be rejected. Notwithstanding a follow-up phone call on 25 November, a response was not forthcoming and that led to the initiation of a grievance.

[31] That was followed by a letter dated 2 December in which the grievance's existence was confirmed. That was followed by an e-mail from Tui on 4 December saying *we have had no communication from Katrina as to her continuation of employment with Tui Campers or extension of sick leave* and ends with advice that should they not hear from her by 8 December they will consider her to have abandoned her employment.

### **Determination**

[32] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal 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.
- c. A breach of duty by the employer causes an employee to resign.

[33] The claim, as filed, states Ms Savage *was unjustifiably disadvantaged by the process employed by the respondent in terms of her complaint about her treatment by fellow workers and this led to constructive dismissal.*

[34] The word complaint is in the singular and notwithstanding the litany of complaints outlined above, the outline of facts said to have given rise to the grievance would indicate that was deliberate. The statement is relatively brief and commences with the alleged altercation between Ms Savage and Aaron on 2 November. The letter of 2 December which gave notice of the grievance does likewise.

[35] Ms Savage only raised one complaint concerning the behaviour of her colleagues thereafter. That occurred on 6 November. It was as she was handing in her uniform and related to the incident of 2 November.

[36] In other words the claim, as explained in the statement of problem is there was a breach of duty on Tui's part that warranted a resignation as a response. The breach was its failure to investigate Ms Savage's complaint about Aaron's actions on 2 November.

[37] I conclude that claim is unsustainable. The complaint was laid on 6 November yet it is Ms Savage's evidence she had already decided to resign by that time and that was confirmed by the return of her uniform. The breach to which she now attributes her resignation simply could not have occurred when she says she made her decision. In any event, the evidence is that notwithstanding Ms Savage's claim to the contrary, Tui had already embarked upon an investigation and that was confirmed by the gathering of witness statements on 4 November.

[38] Here quick comment need be made about the e-mail of 4 December as it may suggest a resignation had not been tendered. That however is countered to some extent by Ms Savage's submissions and the statement the e-mail was disingenuous as Tui knew she had resigned. I accept Tui knew Ms Savage has resigned. She told

them she was not returning on 6 November and Ms Williams accepts that. Confirmation then came from the advocate on 17 November. I do not, however accept the e-mail disingenuous. It was an attempt to bring closure in the face of the advocate's approaches from someone unversed in the niceties of employment related jargon.

[39] Notwithstanding that conclusion, I note s.122 of the Act permits a conclusion the facts support a grievance other than that claimed. Here there are two possibilities. The first is that the employer engaged in an ongoing course of conduct designed to procure Ms Savage's resignation and the second is an invalid process was used in respect to some of the warnings Ms Savage claims to have received thus constituting an unjustified action.

[40] Ms Savage talks of a number of events which when considered in totality might be viewed as illustrating a course of conduct designed to procure Ms Savage's resignation. That said, I conclude that not to be the case. I do so for the following reason.

[41] Ms Savage is under a duty to establish the fact of dismissal, or in this instance, that Tui's conduct amounted to dismissive or repudiatory behaviour (refer *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965. There the Court stated that for a dismissal to be constructive:

*It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.*

[42] Here I note the evidence of Ms Montgomery, a fellow detailer. She comments on Ms Savage's frequent use of foul language before saying *If things didn't go her way she would become fiery and confrontational whereas the easiest solution would be to walk away, calm down and tackle the problem more constructively.* Ms Montgomery then observes the incidents she saw were trivial. In other words Ms Savage was a difficult employee who overreacted and that is the consistent evidence of all Tui's witnesses.

[43] I conclude there were a series of niggles in a robust environment. Ms Savage's conduct contributed to the robust nature of that environment and the evidence leads me to conclude she often gave as good as she got. The events also

took place over a considerable period of time and most are, as Ms Savage admits, minor.

[44] Such interaction may be inconsiderate and cause offence but it is not dismissive or repudiatory, especially as there is evidence that when she raised a serious concern such as that about the actions of W, Tui acted. There is also the evidence that even when faced with Ms Savage's decision to leave, Ms Williams approached the discussion in a caring way and suggested reconsideration. These are not the acts of an employer striving to ensure an employees removal.

[45] There is then the question of warnings. The evidence in this respect is somewhat confused. There is considerable evidence of verbal cautions and other discussions but this is to be expected given the outline above. There is, however, evidence of only one formal verbal warning and that was given in December 2008. I take this no further and do so for the following reasons. The issue was unrelated to that which Ms Savage claims gave rise to her resignation and there is no evidence that the warning affected or was otherwise linked to those later events. Similarly Ms Savage has given no evidence of resulting harm so it is difficult to ascertain that there has been a disadvantage in respect to this warning even if the process was inappropriate.

### **Conclusion**

[46] Ms Savage claims she has been constructively dismissed. The onus falls upon her to establish the fact of dismissal before Tui may be called upon to justify it.

[47] Whilst a very simple summary of considerably more detailed law, constructive dismissal occurs in circumstances where the applicant is forced/coerced to resign by the actions of his or her employer. For the reasons discussed above, I conclude Ms Savage has failed to convince me was in such a situation and her claim therefore fails.

[48] Costs are reserved.