

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 127/09  
5114664**

BETWEEN      ELISE SANDRA SCHOONEBEEK  
Applicant  
  
AND             ALBANY INSURANCE SERVICES  
LIMITED  
Respondent

Member of Authority:    Leon Robinson  
  
Representatives:        Mark Nutsford for Applicant  
                                 Clive Bennet for Respondent  
  
Investigation Meeting:    6 November 2008  
  
Further Information:      14 November 2008  
  
Submissions Received:    20 November 2008  
                                 27 November 2008  
                                 4 December 2008  
  
Determination:            21 April 2009

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1] The applicant Ms Elise (Lee) Sandra Schoonebeek (“Ms Schoonebeek”) says she was forced to resign from her employment with Albany Insurance Services Limited ("Albany Insurance") and was thereby constructively dismissed.

[2] The parties were unable to resolve the problem between them by the use of mediation.

**The facts**

[3] Ms Schoonebeek commenced employment with Albany Insurance Services Limited ("Albany Insurance") in November 2005 as a data processor. She was

initially paid a salary of \$42,000.00 but this was increased in March 2007 to \$44,000.00. The terms of the employment were recorded in a written individual employment agreement.

[4] Ms Schoonebeek's mother Ms Myburgh lives with Ms Schoonebeek. On 2 July 2007 Ms Myburgh fell and broke her ankle. Following an operation her ankle was put in a cast which was advised by medical professionals to be removed on 5 September 2007. Ms Schoonebeek was her mother's sole caregiver during the period of Ms Myburgh's incapacity.

[5] Ms Schoonebeek's manager and Albany Insurance director Ms Debbie Hutton ("Ms Hutton") was sympathetic to Ms Schoonebeek's situation and about 9 July 2007 Ms Hutton agreed to allow Ms Schoonebeek to start work later each day on the basis that she make the time up. Ms Hutton and Ms Schoonebeek had become friends over the time they had worked together. Ms Hutton was kind and supportive towards her friend and employee Ms Schoonebeek. I find that Ms Hutton was explicitly aware that Ms Myburgh was to have her cast removed on 5 September 2007. Ms Hutton had also formed a friendship with Ms Myburgh.

[6] I find that Ms Schoonebeek on occasion would arrive for work between 9.30am and 11.00am. Ms Hutton and her fellow director Mr Jeremy Bleakley ("Mr Bleakley") were unhappy with the frequency of Ms Schoonebeek's delayed commencement times. The directors considered Ms Schoonebeek was not maintaining her duties satisfactorily and that her work was causing disruption in the workplace.

[7] On the evening of 28 August 2007, Mr Bleakley asked Ms Schoonebeek how her mother was doing. Ms Schoonebeek replied that her mother was having her cast removed the following week. Mr Bleakley then said to Ms Schoonebeek "don't you think your mother is taking advantage?" Ms Schoonebeek was deeply offended by that comment. She became upset and shocked. She told him "not at all".

[8] I prefer Ms Schoonebeek's evidence of the ensuing exchange to Mr Bleakley's economical account. Mr Bleakley said he was not prepared to tolerate her coming in late any longer and that he did not have to put up with this. Ms Schoonebeek said neither did she. Mr Bleakley said it was unfair to the other three employees that Ms Schoonebeek was arriving late to work each morning. Ms Schoonebeek told Mr Bleakley it was not important what time she started work each day as she had no customer contact. She said she was making up the time as had been agreed. Ms Hutton interrupted and said that Ms Schoonebeek was not present when she was needed.

[9] Mr Bleakley then insisted that Ms Schoonebeek commit to a regular commencement time each day. Ms Schoonebeek did not appreciate Mr Bleakley's enquiries of her. She said if she was being asked for an exact start time and date she would have to resign. She said "if I have to choose between my family and my job, I would choose my family and resign" She also said "If that's what you want I'll resign in the morning." Ms Schoonebeek then left upset.

[10] Mr Bleakley says he discussed the matter with another director and they resolved to accept Ms Schoonebeek's verbal resignation if she offered it again the next day. Mr Bleakley prepared a resignation letter for Ms Schoonebeek to sign as follows:-

*29 August 2007*

*Albany Insurance Services Ltd  
PO Box 205  
Albany Village*

*Dear Jeremy*

*With effect from today I wish to tender my resignation and hereby give fourteen days notice.*

*Yours sincerely  
Elise Schoonebeek*

[11] The following day Ms Schoonebeek arrived for work. Mr Bleakley escorted her to adjacent offices. He told her to wait in the tearoom. Mr Bleakley then returned

with Ms Hutton. Mr Bleakley said "last night you verbally tendered your letter of resignation". Ms Schoonebeek nodded. Mr Bleakley then said "we accept sign here" and placed the resignation letter he had prepared the previous evening in front of her. Ms Schoonebeek queried the contractual notice period. The letter was amended by hand. Ms Schoonebeek then signed the letter.

[12] Ms Hutton said she was too afraid to ask Ms Schoonebeek anything and said that "nobody wants to work like that". Ms Schoonebeek then asked when her last working day would be. Mr Bleakley told Ms Schoonebeek she did not have to serve her notice and that she would be paid out any notice and leave owing. He said she would leave now. Ms Schoonebeek was crying and shaking uncontrollably. She asked Mr Bleakley why he was treating her so badly. He answered that she had raised her voice to him. Mr Bleakley then told Ms Schoonebeek to leave. He held the door open for her to leave. Ms Schoonebeek left the premises in a seriously distressed condition.

### The merits

[13] Was Ms Schoonebeek's unjustifiably constructively dismissed? The settled tests for constructive dismissal are:-

- (i) did the employee resign?
- (ii) was the resignation caused by a breach of duty on the part of the employer?
- (iii) if it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[14] Ms Schoonebeek did sign a resignation letter that had been prepared for her. That establishes there was a resignation.

[15] The real issue is whether Albany Insurance breached a duty owed to Ms Schoonebeek. I find it was insensitive and offensive for Mr Bleakley to suggest to Ms Schoonebeek that her mother was taking advantage of her. It ought to have come as no surprise to Mr Bleakley that Ms Schoonebeek would not react well to such a

suggestion. Thereafter the discussion further deteriorated and culminated in quite an unpleasant way.

[16] I find that Albany Insurance was initially quite supportive towards Ms Schoonebeek. However, I also find that that support dissolved and transformed into resentment and hostility towards Ms Schoonebeek.

[17] I find that Ms Hutton and more likely than not Mr Bleakley through her, were aware that Ms Myburgh's cast was to be removed on 5 September 2007 and that that event would have altered Ms Schoonebeek's situation so that she would then be in a position to return to her normal commencement time. That situation was known by all, I find, to eventuate only a few days after 28 August 2007.

[18] I further find that Ms Schoonebeek expressly reminded Mr Bleakley and Ms Hutton that her mother's cast was to be removed on 5 September 2007.

[19] I rather consider that Albany Insurance, being fully aware of Ms Schoonebeek's circumstances and in particular the change in them scheduled for 5 September 2007, behaved in an insensitive and unfair way when Mr Bleakley and Ms Hutton confronted Ms Schoonebeek with criticism on the evening of 28 August 2007. It was unfair to compel Ms Schoonebeek to commit to a regular start time when Albany Insurance was fully aware the situation was due to change when Ms Myburgh's cast was removed.

[20] Knowing that Ms Schoonebeek's situation would likely change in a matter of days, Mr Bleakley initiated a very uncomfortable, distressing and emotionally charged exchange which Ms Hutton also participated in. I find that there were genuine concerns about Ms Schoonebeek's performance but I further find these concerns were not put to her in a sensitive or appropriate way. Ms Schoonebeek was entitled to have any concerns about her work put to her fairly and reasonably. The circumstances in which they were, were unfair and not in good faith. It ought to have been obvious to Albany Insurance that Ms Schoonebeek's particular circumstances were a cause of great stress and pressure for her and a degree of compassion, tact and

sensitively was therefore required.

[21] Ms Schoonebeek became distressed and upset as a result of Albany Insurances' insensitivity and in the heat of the moment she tendered her resignation which I am satisfied would not otherwise have been forthcoming.

[22] I do not accept that Ms Schoonebeek was invited to go home and think about things. A cooling off recess was required for the parties to reconsider the respective positions. Unfortunately that did not occur. Far from having the good judgement and wisdom to recognise that cooler heads ought to have prevailed and that Ms Schoonebeek's resignation was given in the heat of the moment, Mr Bleakley and his fellow director resolved that they would insist on her resigning the following day. Ms Schoonebeek was not invited to retract the resignation she had given verbally previously because it might have been ill-considered and hasty. I mean by that, that Mr Bleakley had no genuine intention of permitting Ms Schoonebeek to withdraw her verbal resignation should she have so desired. Mr Bleakley never once considered such an invitation. Instead, he remained committed to seeing that Ms Schoonebeek's verbal resignation was confirmed in writing. His resolve to have her sign the written resignation the next day and for Ms Schoonebeek's immediate departure suggests Albany Insurance always had a very clear outcome in mind.

[23] Because of the views I have expressed above and the conclusions I have reached about its conduct, I find that Albany Insurance behaved in an insensitive and unfair way towards Ms Schoonebeek. I find Albany Insurance forced her resignation by the way in which it procured that resignation but also because it failed to permit her any real opportunity to resile from it should she have so wished. I find Albany Insurance breached its duty to treat Ms Schoonebeek fairly and reasonably and in good faith. For these reasons, I find Ms Schoonebeek's resignation was caused by a breach of duty by her employer.

[24] I further find that the breach of duty by Albany Insurance as I have found it, was sufficiently serious that a substantial risk of resignation was reasonably foreseeable.

## The determination

[25] I accept Ms Schoonebeek's evidence of the hostility and unpleasantness she was confronted with on the morning of 29 August 2007. I accept that she was in tears and clung to Ms Hutton for support. I accept that she was upset, distressed and inconsolable. In such circumstances, I do not accept Ms Schoonebeek's resignation was voluntarily given or that her departure was amicable.

[26] The breach of duty inherent in the way that Albany Insurance acted was not the actions of a fair and reasonable employer. **I find that Ms Schoonebeek was unjustifiably constructively dismissed. She has a personal grievance accordingly and she is entitled to remedies in settlement of that personal grievance.**

## The resolution

[27] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the *Employment Relations Act 2000* to consider the extent to which Ms Schoonebeek's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I find that Ms Schoonebeek did not contribute to the situation that led to her personal grievance because I find there was no blameworthy conduct on her part. While it might be said Ms Schoonebeek's frequent late starts could be blameworthy conduct, I consider it cannot be so regarded for that situation was consented to by the employer and was not therefore blameworthy. I say too, Mr Bleakley's over familiar suggestion to Mrs Schoonebeek that her mother was "taking advantage" was always unwise.

## *Reimbursement*

[28] Ms Schoonebeek by her statement of problem claimed reimbursement in the total sum of \$6,768.00. At the investigation meeting Mr Nutsford sought to amend that claim to one year's lost wages in the total gross sum of \$35,821.00. I permitted that amendment on the basis that the respondent could address the amendment with further evidence subsequent to the investigation meeting. The matter has been addressed by submissions.

[29] Ms Schoonebeek says that she had no income after her termination. She made application for income support from Work and Income New Zealand. She says she received \$18,617.00 total income support.

[30] From January 2008 Ms Schoonebeek provides copies of applications she made for employment extending to September 2008. She says she is unable to provide similar evidence in respect of the period after her termination until January 2008 because she says she changed internet provider and her email account for that period is therefore no longer available. She has advised of particular applications and contact with recruitment agencies during this period.

[31] I accept Ms Schoonebeek's evidence that she tried hard to find alternative employment since she was dismissed. She was unfortunately not successful with the many applications for employment I am satisfied she made. She also says that she has struggled with the interview process because when she is asked about the termination of her employment with Albany Insurance she becomes tearful and is unable to explain herself. She accepts that situation does not help but she has little control over her reaction.

[32] Because of the absence of corroborative evidence of efforts to find alternative employment in respect of the period following dismissal until January 2008, I am not persuaded that I should exercise my discretion to award a sum greater than three months remuneration. Accordingly, pursuant to sub-section 128(2) of the *Employment Relations Act 2000*, I award Ms Schoonebeek three months ordinary time remuneration. **I order Albany Insurance Services Limited to pay to Elise Sandra Schoonebeek the gross sum of \$11,000.00 as reimbursement.**

### ***Compensation***

[33] I accept Ms Schoonebeek's description of the unpleasant and hostile way she was dealt with on the morning of 29 August 2007. I accept she lost her composure and was distressed, upset, and inconsolable. I find that she reached out for physical support from Ms Hutton, her manager and friend.

[34] Ms Schoonebeek says she felt humiliated, degraded and stripped to the core. She says her self-esteem has lowered and her self-confidence shattered. She says she had nightmares and suffers from insomnia. She says she also suffers with depression. Finally she says she remains extremely tearful when she recounts the ordeal of her termination and says the events have had life changing effects on her. I accept Ms Schoonebeek's evidence.

[35] I find that Ms Schoonebeek has suffered hurt and humiliation, loss of dignity and injury to her feelings. Having regard to her evidence, her length of service, and the nature of the personal grievance, I award her compensation in the amount of \$6,000.00. **I order Albany Insurance Services Limited to pay to Elise Sandra Schoonebeek the sum of \$6,000.00 as compensation.**

### Costs

[36] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Nutsford is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Bennett is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson  
**Member of Employment Relations Authority**