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Shand v MBS 2008 Ltd (Christchurch) [2017] NZERA 1129; [2017] NZERA Christchurch 129 (26 July 2017)

Last Updated: 4 August 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 129
5540319

BETWEEN HELOISE SHAND Applicant

A N D MBS 2008 LTD Respondent

Member of Authority: Peter van Keulen

Representatives: Sophie Barclay, Counsel for Applicant

Stephen Shepherd, Representative for Respondent

Investigation Meeting: 22 March 2017 at Nelson

Submissions Received: 28 April 2017 for Applicant

15 May 2017 for Respondent

Date of Determination: 26 July 2017

DETERMINATION OF THE AUTHORITY

A. I decline Heloise Shand's claims for personal grievances:

- i. MBS 2008 Ltd did not constructively dismiss Heloise Shand.**
- ii. MBS 2008 Ltd did not act unjustifiably and cause any disadvantage to Heloise Shand's terms and conditions of employment.**

B. I reserve costs with a timetable set for submissions if required. Employment relationship problem

[1] The applicant, Heloise Shand, resigned from her employment with the respondent, MBS 2008 Ltd (MBS). Ms Shand says MBS intended to make her resign by undertaking a particular course of conduct, she did resign because of MBS's conduct and MBS should compensate her for this, as it was an unjustified dismissal.

Ms Shand also says MBS's actions were unjustified and caused disadvantage to the terms or conditions of her employment and MBS should pay her compensation for this.

[2] MBS denies this; it says it did not act in the manner alleged and there is no case to answer in respect of the claimed unjustified dismissal and the unjustified action causing disadvantage grievances.

[3] Ms Shand worked for MBS as a Beauty Therapist. The course of conduct that

Ms Shand complains of is that MBS:

(a) Required her to undertake massages contrary to an agreement made when she was employed that she would not be required to undertake massages;

(b) Failed to reduce her hours of work below the agreed weekly maximum number of hours, of 30;

(c) Failed to provide time for breaks during her working days;

(d) Breached the duty of good faith when it conducted a disciplinary process with her pertaining to matters that had not previously been raised with her;

(e) Failed to provide a safe work place for her, allowing her to be subjected to bullying and harassment when MBS undertook meetings with her on an aggressive and angry basis, when MBS failed to be receptive to Ms Shand's concerns and when MBS specifically directed her not to use the work computer.

[4] The actions that Ms Shand says were unjustified and caused disadvantage to her terms or conditions of employment were:

(a) MBS failing to pay her on time;

(b) MBS making last minute changes to her roster;

(c) MBS failing to provide her with light duties as agreed;

(d) MBS failing to provide time for breaks during the working day.

Unjustified dismissal

[5] In order to succeed with her claim for unjustified dismissal Ms Shand must first establish that MBS dismissed her.

[6] A resignation can amount to a dismissal in certain circumstances; that is, a constructive dismissal. In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*¹ the Court of Appeal set out three non-exhaustive categories of constructive dismissal:

(a) Where the employee is given a choice of resignation or dismissal;

(b) Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign;

(c) Where a breach of duty by the employer leads an employee to resign.

[7] Ms Shand relies on the second limb in *Woolworths*. So, I must consider:

(a) Whether the actions by MBS amounted to a course of conduct that had a deliberate and dominant purpose of causing Ms Shand to resign; and

(b) If so, did Ms Shand resign in response to this course of conduct?

Unjustified action causing disadvantage

[8] The issues that arise for the personal grievance of unjustified action causing disadvantage include:

(a) Did MBS act in a manner that caused disadvantage to Ms Shand's terms or conditions of employment?

(b) If so, was that action justified, considering the statutory test for justification?

¹ [\[1985\] 2 NZLR 372 \(CA\)](#) at 374-375

[9] In order to assess whether there was a course of conduct with the deliberate and dominant purpose of coercing Ms Shand into resigning, I must establish whether the events complained of actually occurred and then, if they did, whether cumulatively the actions amounted to such a course of conduct.

[10] It is also necessary for me to determine what was agreed regarding Ms Shand's role as some of the complaints relate to matters that MBS says Ms Shand was required to do, for example, massages. This is for the simple point that if MBS was merely requesting or requiring Ms Shand to undertake agreed duties then this cannot constitute a course of conduct contemplated in *Woolworths*.

[11] Ms Shand, Bedelia Shepherd, the manager of the business operated by MBS, and Stephen Shepherd, the sole director and shareholder of MBS gave evidence of the terms and conditions of Ms Shand's employment and the events that occurred during that employment. Ms Shand's evidence conflicts with Ms Shepherd and Mr Shepherd's evidence. I must resolve these conflicts of evidence in order to establish what the parties agreed about Ms Shand's terms and conditions of employment and

what occurred.

[12] In order to resolve the conflicts I have:

- (a) Considered the contemporaneous documents including Ms Shand's diary, a draft employment agreement, time sheets, MBS's record of appointments contained in its POS system and transcripts of relevant meetings;
- (b) Considered the consistency of each witness's own evidence including their written briefs of evidence and answers to questions;
- (c) Looked at any inconsistencies of each witness's evidence with the other two witnesses' evidence and any contemporaneous documents; and
- (d) Looked at the likelihood that a particular witness's evidence is correct based on how well the totality of their evidence hangs together.

[13] I have also considered the demeanour of each witness and the veracity with which they have recalled events including whether each has made appropriate concessions or admissions. However, I am conscious that these may be of limited value because confirmation bias and confabulation may affect a person's memory – witnesses can unintentionally recall events in a way that confirms their beliefs or hypotheses and, as a result often recall these events with strongly held conviction.

Terms and conditions of employment

[14] In a prior role as a Beauty Therapist at another business, Ms Shand suffered a work place injury. As a result of the injury, Ms Shand received treatment and undertook a rehabilitation programme; she was unable to stand for more than two hours at a time and could only complete light duties. Ms Shand then had three months off work as she had treatment for her injury in Christchurch.

[15] Ms Shand returned to Nelson and became aware of that there was part-time work available at MBS. Ms Shand attended an interview with Ms Shepherd on 13

August 2014.

[16] In her brief of evidence Ms Shand says that at the interview she told Ms Shepherd:

- (a) That she had a back injury, was receiving ACC compensation, was being treated by a physiotherapist, was working with an occupational therapist and had a special stool supplied by ACC for use at work.
- (b) That she had to leave her previous employment because it was too physical, particularly given the number of massages she was required to do, the lifting involved in hot stone massages she had to undertake and the requirement to stand for long periods.
- (c) That she could do 15 – 30 hours per week but 30 was the absolute maximum.

[17] Ms Shand also states that there was a discussion about massages and Ms Shepherd told her she would not need to do massages.

[18] At the investigation meeting, in response to questions, Ms Shand stated:

- (a) That she told Ms Shepherd she was on a rehabilitation plan and could only do limited hours, and that she could not do prolonged massages.
- (b) That there was no agreement regarding massages but that she would just undertake the general duties of a Beauty Therapist.
- (c) That it was agreed that she would work set days of Monday, Thursday and Friday plus additional days in the weekend if required, the hours would be varied depending on how busy the salon was and there would therefore be no set roster.

[19] Ms Shand also referred to her diary entry for 13 August 2014 where she had recorded matters she wished to discuss with Ms Shepherd in advance of the interview. These notes include the word "massage" but there is nothing further noted about massages.

[20] There are also three other references in Ms Shand's diary to massages. One entry is simply the word "massages", another is "too many massages" and the third is "4! Massages booked today!!!".

[21] There is no doubt that the issue of Ms Shand undertaking massages was an important one for her and one she raised

with Ms Shepherd. This is clear from Ms Shand's evidence and her diary notes. However, Ms Shand's own evidence is inconclusive on what was agreed about massages. She says there was no agreement about doing massages but she understood that she would not do any massages. And the diary entries are more consistent with an expectation that Ms Shand would do a small number of massages as she complains of "too many" and four massages – these are not complaints of having to do any massages.

[22] Ms Shepherd says that at the interview:

(a) Ms Shand told her that in her previous role she had an issue with doing too many massages because of her back injury. Ms Shepherd reassured her that she would not need to do hot stone massages and the number of massages in any given day would be limited as it was a small part of the services MBS offered.

(b) There was no mention of a rehabilitation plan and Ms Shand did not show her a plan of any kind.

(c) That she could only do a certain amount of work because of ACC, this may have been up to 30 hours but Ms Shepherd could not recall if this amount was specifically mentioned.

(d) That she could not work Tuesdays.

[23] On the question of whether Ms Shand was required to undertake massages, Ms Shepherd says this was her expectation and she did not agree anything contrary to this. Ms Shepherd says that if Ms Shand had been unable to do any massages she would not have hired her.

[24] Ms Shepherd also points to a draft employment agreement for Ms Shand that contains a job description that includes massages. MBS could only produce a draft employment agreement as evidence of what was agreed. Mr Shepherd says Ms Shand would have signed this draft and Ms Shand accepts that she would have signed an employment agreement. Ms Shand is unsure if the signed employment agreement would be the same as the draft; she cannot recall signing it and does not have a copy of the signed agreement.

[25] Based on all of the evidence I read and heard I accept:

(a) That Ms Shand raised the issue that she had with her back injury and the limitations imposed. However, Ms Shand's injury was discussed in the context of general expectations about the role, not specific requirements of hours worked or duties to be undertaken. I do not accept that any rehabilitation plan was raised. I am persuaded by Ms Shepherd's evidence where she said that if she had been aware of a plan she would have taken some advice on what would be required because it may have imposed significant limitations on what Ms Shand could do in her role.

(b) That Ms Shand raised the issue of not working too many hours in any given day or cumulatively in a week; however, I do not find that there was an agreement on the number of hours to be worked on any given day or in any week. This does not reflect the draft employment

agreement, the agreed discussion on hours and how the MBS operated its business including how rosters were done.

(c) That Ms Shand raised concerns about undertaking massages but again this was a more general discussion about not doing too many; a discussion that did not conclude with any specific agreement on the maximum number of massages to be undertaken.

[26] I conclude that Ms Shand's terms of employment included the following:

(a) She would work part time with a minimum of 15 hours per week, working Monday, Thursday and Friday.

(b) She would work varied hours subject to a roster, which in turn was subject to appointments and availability and therefore subject to change. If required Ms Shand would work additional days but not Tuesday as she had another commitment on this day.

(c) Her role was a Beauty Therapist undertaking the general range of duties as outlined in the job description annexed to the draft employment agreement.

(d) Ms Shand was required to do massages as part of her role but this would be a minimal part of her role and would not involve long lifting such as hot stone massages.

Massages

[27] Ms Shand's complaint is that she was required to undertake massages contrary to an agreement made when she was employed that she would not be required to undertake massages.

[28] There is no doubt that Ms Shand was required to do massages and she did do these. However, as I have already determined, Ms Shand was required to do massages as part of her role.

[29] I believe that Ms Shand was concerned about doing too many massages or too many massages in a row.

[30] The evidence shows that Ms Shand did not do any more than three massages in a day and only on two occasions was she required to do two massages in a row.

Hours of work

[31] Ms Shand's complaint is that MBS failed to reduce her hours of work below the agreed weekly maximum number of hours, of 30. However, as I have already determined I am not satisfied there was an agreement that Ms Shand would work a maximum of 30 hours per week.

[32] I do accept that Ms Shand did work in excess of 30 hours in some weeks. I also accept that Ms Shand became concerned about working too many hours and she raised this concern with MBS.

[33] However, I believe that Ms Shand's evidence on the amount of hours she worked was unreliable and influenced by confirmation bias. So, for example, Ms Shand recorded that on her first day of work she worked for 10 hours but her time sheet shows she only worked nine hours. Mr Shepherd points to several other examples where Ms Shand states she worked excessive hours but the contemporaneous documents, such as signed time sheets and the POS system confirm that Ms Shand's account is wrong.

[34] Of the 18 weeks she worked, Ms Shand worked in excess of 30 hours in a week, six times. Ms Shand also worked 10 hours or more in a single day on six occasions.

Breaks

[35] Ms Shand's complaint is that MBS failed to provide time for breaks during her working days.

[36] Ms Shand was entitled to breaks in line with the draft employment agreement and the statutory requirements at the time. That is:

(a) One 10-minute paid break for every period of work between two hours and four hours.

(b) One 10-minute paid break and one unpaid meal break of 30 minutes for every period of work between four hours and six hours.

(c) Two 10-minute paid breaks and one unpaid meal break of 30 minutes for every period of work between six hours and eight hours.

(d) The same breaks again for any period of work in excess of eight hours calculated as if her period of work had started at the end of the eighth hour.

[37] MBS's POS system, which records the appointments allocated to each employee on a daily basis, shows that MBS scheduled appointments to accommodate breaks.

[38] However, Ms Shand says that the scheduled appointments were only part of the job requirements that she had on any given day. She says that once an appointment was finished there would be something else to do such as stocking shelves, cleaning or assisting with other clients. She says every day was full with tasks that Ms Shepherd set so there was no time at all for her to take her breaks. She also says that there was no tearoom and it was not easy to take a break.

[39] Ms Shepherd and Mr Shepherd deny this. They say each therapist's day was structured in a way that allowed for breaks. They accept that appointments generally dictated that structure but they say they would not book too many appointments in so that an employee was working without a break. Breaks were allocated and employees were encouraged to take them. Ms Shepherd said, in particular she would buy food for staff to share and whilst the premises were small there was a kitchen space and room for staff to sit, including in a courtyard.

[40] Again, I find that Ms Shand's recollection of what occurred is unreliable due to confirmation bias. I think that on some occasions Ms Shand may have felt she had too much work to do that she could not take a break but I do not accept the general tenor of her evidence – that there was no time for her to take any breaks.

[41] Ms Shand has two diary entries that record that she did not take any breaks on

6 December 2014 and 20 December 2014. If Ms Shand did not have any time for breaks on a regular basis then I would expect to see more entries in her diary. Two entries only suggests that in fact there were only two days out of 55 days worked in which she may not have had time to take a break.

[42] Also, the POS system shows that for the six hours that Ms Shand worked on 6

December 2014 there were two 30-minute spaces for breaks and at least one 15-minute gap between clients.

Disciplinary process

[43] Ms Shand says MBS breached the duty of good faith when it conducted a disciplinary process with her pertaining to matters that had not previously been raised with her.

[44] This allegation involves an incident that occurred on 12 December 2014. I do not need to set out the detail of the incident, it relates to Ms Shand leaving work early and changing the appointments that had been scheduled without properly consulting with Ms Shepherd or others at the salon.

[45] The concerns that MBS had were set out in a letter dated 15 December 2014 and a meeting was held on 19 December 2014 to discuss these concerns.

[46] I have reviewed the transcript of the meeting held on 19 December 2014 and am satisfied that the allegations were discussed and there was nothing new raised in terms of disciplinary matters.

[47] I am not satisfied that MBS breached the duty of good faith in the disciplinary process. There were no new allegations raised and the matters that were discussed appeared to be considered in detail with appropriate response.

[48] As an example, Ms Shand raised the issue of her view that she was doing too many massages and working too many hours and Ms Shepherd responded by agreeing to reduce the number of massages and ensuring that Ms Shand did not work more than

30 hours per week. At one point to summarise the MBS position Ms Shepherd said

“So what I need to do is be really diligent with my rostering so you don’t go over your

30 hours and if there is lots of massages put them less, put them less for you.”

Bullying and harassment

[49] Ms Shand’s last allegation is that MBS failed to provide a safe work place for her, allowing her to be subjected to bullying and harassment when MBS undertook meetings with her on an aggressive and angry basis, when MBS failed to be receptive to Ms Shand’s concerns and when MBS specifically directed her not to use the work computer.

[50] MBS did not bully and harass Ms Shand:

(a) As I have already indicated I do not consider that the meeting on 19

December 2014 was problematic. There was a further meeting on 20

December 2014 and likewise, I do not find this meeting to be aggressive nor was it carried out in such a way to be bullying or harassing. At worst, the meetings may have been confrontational but that is the nature of a disciplinary matter.

(b) I have already indicated that I find that MBS responded to Ms Shand’s concerns about hours and workload. Similarly, it responded to her concerns about having adequate time to take breaks.

(c) I accept that Ms Shand was directed not to use computer but MBS was prompted to put this in place by its concern that Ms Shand had changed the booking system and until this was resolved this was the best way to manage. This, of its own, cannot amount to bullying or harassment.

Conclusion on course of conduct

[51] So, Ms Shand may have considered the hours she was rostered on were, on occasion, excessive and she may have had to undertake more massages than she would have liked and sometimes she may have not been able to take all of her breaks but I cannot see that MBS deliberately acted this way to cause her to resign:

(a) The hours worked were a product of what was agreed regarding days and hours of work and how the roster was completed. Once she raised a concern about the number of hours MBS agreed to accommodate her desire to work less.

(b) The number of massages Ms Shand was required to undertake was not excessive and in any event in line with her job description and the expectations of her role.

(c) There was sufficient time in every day that Ms Shand worked for her to take breaks. I accept that Ms Shand says that she could not take her

breaks but there is insufficient evidence for me to conclude that this occurred regularly or at all. Nor am I able to conclude that, if this did happen, it was MBS’s fault as the scheduled appointments allowed for breaks.

(d) MBS carried out the disciplinary process in a fair manner. (e) There was no bullying or harassment.

[52] As there was no course of conduct, I do not need to consider whether Ms Shand resigned in response to it.

[53] Ms Shand has not established a grievance for unjustified dismissal.

Unjustified action causing disadvantage

Did the actions complained of occur and if so, did they cause any disadvantage?

[54] Ms Shand complains that she was not paid on time. There was insufficient evidence to show this occurred, so I find there was no action that caused disadvantage.

[55] Ms Shand also complains that there were last minute changes to her roster. The evidence shows that this did happen on occasion but it was limited. However, this did not cause any disadvantage to Ms Shand's terms or conditions because the changes to her roster were part of the terms and conditions she agreed to.

[56] Ms Shand then says MBS failed to give her light duties, but as I have determined, there was no agreement regarding this. So again, I find there is no action by MBS that caused disadvantage.

[57] Ms Shand's last complaint is that MBS failed to provide her with breaks during her working days. I have already discussed this allegation and have determined that MBS structured the working days to ensure its employees could take breaks. There may have been an occasional day that Ms Shand felt she was unable to take her break but I cannot attribute this failure to any actions by MBS. So, again, I do not have an action by MBS that has caused disadvantage to Ms Shand's terms or conditions of employment.

[58] Ms Shand has not satisfied me that MBS carried out any actions that caused disadvantage to the terms or conditions of her employment. I do not need to consider the issue of justification.

[59] Ms Shand has not established a grievance for unjustified action causing disadvantage.

Determination

[60] I decline Heloise Shand's claims for personal grievances:

- (a) MBS 2008 Ltd did not constructively dismiss Heloise Shand.
- (b) MBS 2008 Ltd did not act unjustifiably and cause any disadvantage to

Heloise Shand's terms and conditions of employment.

Costs

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[62] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen

Member of the Employment Relations Authority