

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 186
5456117

BETWEEN CATHERINE STALKER
 Applicant

A N D GRAEME'S SERVICE CENTRE
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: David Beck and Danielle Mills-Godinet, Counsel for
 Applicant
 Robert Thompson, Advocate for Respondent

Investigation Meeting: 23 October 2014 at

Submissions Received: On the day of hearing

Date of Determination: 20 November 2014

DETERMINATION OF THE AUTHORITY

- A. Catherine Stalker was unjustifiably dismissed.**
- B. Contribution is assessed at 15% and the following orders are made
for payment by Graeme's Service Centre Limited:**
- 1) Lost wages in the sum of \$3939.58 gross;**
 - 2) Compensation in the sum of \$5950 without deduction;**
 - 3) Interest is not awarded on the amount of lost wages.**
- C. Costs are reserved and failing agreement a timetable has been set.**

Employment relationship problem

[1] Catherine Stalker commenced employment on 17 January 2013 as a workshop receptionist with Graeme's Service Centre Limited (GSC) which trades as the Challenge Oxford Auto Centre in Oxford, Canterbury.

[2] On 11 February 2014 Ms Stalker requested a meeting with a director of GSC, Graeme Paget, to discuss some concerns she had in the workplace. Ms Stalker said that Mr Paget was not willing to discuss the concerns constructively so she tabled a pre-prepared letter detailing the concerns and advising that she wanted an exit package of 14 weeks' pay. Ms Stalker says that Mr Paget briefly glanced at the letter and then laughed and said he would pay her two weeks and to pack her stuff and go. Ms Stalker says that Mr Paget escorted her off the premises and told her to *get out* when she stopped to talk to another employee.

[3] Ms Stalker says that she was unjustifiably dismissed.

[4] Ms Stalker was sent the following letter by email which although dated 17 February, was not received by her until 25 February 2014:

Dear Catherine,

Thank you for your letter dated 11 February 2014. This letter was handed to me and you have not returned to work since it was provided. We were surprised to receive your letter of 11 February.

We are prepared to undertake an investigation into your allegations. However, we will not be agreeing to an exit package as highlighted in your correspondence. In addition to this, we are also prepared to attend mediation. Please advise if you wish us to make the necessary arrangements. The purpose of mediation will be to discuss your concerns to enable you to return to your place of employment. In addition to the mediation, we will be undertaking a full enquiry into your concerns.

You have indicated in your correspondence that you hold a diary. To assist us in this investigation, it may be necessary for you to provide us with a copy of the relevant pages to assist the company. It is our intention to create a safe and harmonious work environment.

*Accordingly, we will be using the services of IR Thompson Associates Ltd to assist us in our employment investigation. **[The phone number for Robert Thompson was provided in the letter].***

[5] Ms Stalker sent the following email to another director, Robyn Paget on the same day that she received the email:

Hi Robyn,

No never got the letter that you have attached. Have only received the copy of payslip and the copy of the timesheet that was posted on the 21 February. It was pretty clear to me when Graeme told me "that you would pay me two weeks and to pack my things and get out" that I was not to return and also in front of Darron told me to "get out" as he followed me from the workshop. I am not sure how this could be confused with anything else that [sic] being dismissed on the spot.

I have referred the attached letter onto my lawyer and she will be in contact in due course.

[6] Ms Stalker seeks an order for lost wages and interest, together with compensation and costs. Ms Stalker confirmed that she has now been paid her holiday pay.

[7] GSC is a duly incorporated company that has its registered office in Oxford and carries on its business as a workshop, issuing of warrants of fitness, petrol provider and seller of takeaways and convenience food. GSC has two directors, Graeme and Robyn Paget. Mr Paget runs the workshop and Mrs Paget undertakes the administration and some management of staff and operates the petrol station.

[8] Mr Paget accepts that Ms Stalker requested a meeting with him on 11 February 2014. He does not accept that he laughed when he was provided with the letter, but did advise GSC would not meet the terms of what was described as a non-negotiable exit package open for a 24 hour period. Mr Paget does not accept that Ms Stalker was dismissed or that she was escorted off the premises.

[9] It says that when Ms Stalker did not return to work on 12 February 2014 it was unsure of how to proceed and sought advice. The letter Ms Stalker received on 25 February 2014 was then sent but the email address was incorrect which prevented receipt on the date of the letter 17 February 2014. GSC says that it would have been prepared to continue with mediation and investigation into Ms Stalker's concerns but she did not respond constructively.

The issues

[10] The main issue for the Authority to determine is how the relationship ended on 11 February 2014 as follows.

- (a) Was Ms Stalker dismissed at the meeting on 11 February 2014 or did she, as GSC say, leave of her own accord in the nature of a resignation or abandonment of employment?
- (b) If either party misunderstood the other's intention at the meeting on 11 February 2014 were the steps taken after 11 February 2014 by them timely and in accordance with the obligations of good faith?
- (c) If Ms Stalker was dismissed, was the dismissal unjustified?
- (d) If there was an unjustified dismissal then what remedies is Ms Stalker entitled to and are there issues of contribution and mitigation?

What happened on 11 February 2014?

22 October 2013

[11] Before I turn to the events of 11 February 2014 I record that Ms Stalker had some earlier concerns about her employment including her interactions with Mrs Paget. This led to a meeting on 22 October 2013 when Ms Stalker raised these concerns with Mr Paget.

[12] Mr Paget recalled what he described as a *quick discussion* about issues with Ms Stalker on that day. In his written evidence he said that he explained that Mrs Paget had a very direct personality and that due to the work environment she had a tendency to be short and direct. He could not remember in his oral evidence, making a statement that Ms Stalker attributed to him *if she did not like it she could leave*.

[13] Mr Paget spoke to his wife about Ms Stalker's concerns. The degree of specificity seemed to be in dispute but that aside Ms Stalker agreed that there was an improvement in the interactions between her and Mrs Paget after she raised the issues with Mr Paget.

Other incidents and preparation of the letter

[14] There were some incidents after the 22 October 2014 discussion which Ms Stalker found upsetting. Ms Stalker has sought some advice from Community Law. She had been advised to keep a record of matters that concerned her. Her

communication with Community Law followed an incident in which Ms Stalker said that Mr Paget swore at her on 6 November 2013. Mr Paget says that his messages and notes around his desk had been moved to a different location and he needed them because of his memory loss. He said that he was frustrated but does not accept that he swore directly at Ms Stalker. He said that he wished Ms Stalker had talked to him at the time so he could have explained himself. Ms Stalker accepted that she had not raised that issue or others until 11 February 2014.

[15] Ms Stalker said that she moved from simply recording the incidents that she was concerned about to compiling the letter that was handed to Mr Paget on 11 February 2014 over the Christmas period. This followed an incident in which Mr Paget had checked up with a courier about a bottle of wine that Ms Stalker had been given as gift at the workplace. Ms Stalker wrote in the letter that she felt that it demonstrated that Mr Paget did not trust her and insinuated that she was a thief. Mr Paget agreed he had contacted the courier company about the bottle to see if it was a gift for GSC. When it was confirmed that the wine was a gift for Ms Stalker he said he thought nothing more of it. At noon on 11 February 2014 Ms Stalker updated the letter. The letter is five full pages and the sixth page only contains one paragraph. The exit package is attached to the letter.

11 February 2014

[16] Mr Paget suffers from memory loss following an accident in when he suffered serious concussion. That difficulty put him at a considerable disadvantage in remembering and therefore answering questions about what took place on 11 February 2014. There were some discussions at the meeting he could recall. This is a case where what occurred following the meeting of 11 February 2014 also assumes some importance and the material exchanges after the meeting are in writing.

[17] The meeting commenced at about 4pm on 11 February 2014 with Ms Stalker discussing some of her concerns. Mr Paget agreed that there was a discussion about some issues before the letter was given to him and he thought that discussion took about 15 minutes. He could recall some of the concerns being discussed.

[18] Ms Stalker said that Mr Paget's responses to her concerns were not constructive. Ms Stalker said that she raised a concern about a comment from Mrs Paget at a recent meeting that she *get over it*. Ms Stalker said that Mr Paget

responded and said *if she did not like it she could leave*. Mr Paget said could not recall responding in that way but under questioning from Mr Beck accepted that it was a possibility he had.

[19] After concluding that the discussion was not constructive Ms Stalker then produced the envelope with the letter in it. She gave it to Mr Paget and told him that she would finish up for the day. Mr Paget said that he asked Ms Stalker to sit back down which she did. I do not conclude that Mr Paget read much of the letter before turning to the final page of it which had the proposed exit package of 14 weeks.

[20] It is at this point that there is a material dispute as to what was said. Mr Paget said that he advised that the maximum that had to be paid was two weeks and he offered that as an alternative to the 14 weeks. He did not accept that he told Ms Stalker then to *pack her bags and go* but said that as it was getting near Ms Stalker's home time he suggested she may as well go home. He did agree in his oral evidence that he had made reference to Ms Stalker collecting her personal belongings as she had her purse and keys in the office and the meeting was held away from the area where the office was. Mr Paget agreed that Ms Stalker did say that her lawyer would be in touch.

[21] Both Mr Paget and Ms Stalker had to come back into the yard to get to the office. Ms Stalker said that she was escorted out by Mr Paget. Mr Paget does not accept that. He said that as Ms Stalker went to the office she approached another employee and talked to him at which stage Mr Paget asked her to leave the premises, but did not accept that he told her to *get out*. He did accept, under questioning that he may have said to Mrs Paget that it *looked like Catherine was going to leave*. Ms Stalker did not return to work the following day.

[22] I have carefully considered the evidence about the exchange that took place on 11 February 2014 as to whether there was a dismissal, a sending away of Ms Stalker. I have taken into account that Mr Paget was surprised by the letter and described himself in his evidence as quite agitated. The letter contained a large number of concerns and Mr Paget was not expecting it or the proposed exit package. Mr Paget can recall having looked at the letter that he advised Ms Stalker to pick up her personal belongings, meaning her handbag and keys. An employee would normally be expected to take those items home without needing to be told. Mr Paget

did accept a possibility he may have said to Mrs Paget that it looked like Ms Stalker was leaving.

[23] The evidence does not support that Ms Stalker had said anything that would suggest that she immediately wanted to end the relationship so that her absence the following day would not have been surprising. The letter given to Mr Paget referred to a next step being involving the Labour Department, now known as the Ministry of Business, Innovation and Employment (MBIE). Involving MBIE does not mean the end of the employment relationship because mediators employed by MBIE in this area often work with parties in on-going employment relationships. The exit package was on offer for 24 hours and although expressed to be a one-off offer and not open to discussion is not an unequivocal intention on Ms Stalker's part to end her employment as at 11 February 2014.

[24] Mr Paget asked Ms Stalker *to leave* or as Ms Stalker recalled *to get out* because she was talking to another employee. This is an unusual instruction to give to an employee and is reflective I find of Mr Paget's agitated state. I find it more likely that in the heat of the moment before the meeting ended Mr Paget did send Ms Stalker away so as to conclude that she was dismissed. I prefer her evidence that she was told together with the advice that she would be paid two weeks *to pack her stuff and get out*.

[25] I find, in conclusion, that Ms Stalker was sent away in the nature of a dismissal during the conversation on 11 February 2014. Words can be said by employer or employee in the heat of the moment which are not meant or are misunderstood. There are a number of employment cases about such situations. Sometimes they involve an employee in the heat of the moment saying words of resignation as part of an emotional reaction when it was not meant to be taken literally. Chief Judge Goddard in *Boobyer v Good Health Wanganui Limited* WEC 3/94, 24 February 1994 described this as one of those situations where a disputed resignation can arise. It was recognised in *Boobyer* that because of their nature there is importance in resolving these types of cases as soon as possible.

[26] I have found in this case heat of the moment words of dismissal. As with a disputed resignation the situation needed to be resolved as soon as possible to keep the relationship on foot. Ms Stalker said that if she had had a telephone call within a day or so of 11 February 2014 to explain the situation and confirm she had a job

then the relationship could have continued. She said that she had previously been sent a text message from the Paget's and they had her telephone number which had an answering service. Judge Couch in *New Zealand Cards Ltd v. Colin Ramsay* [2012] EmpC 51 stated:

If there was such a situation where the employer understood that an employee considered a dismissal had taken place they would communicate without delay.

[27] At [52] Judge Couch stated:

A fair and reasonable employer in Mr Beresford's position would have communicated directly with Mr Ramsay without delay and, in any case, within a day or so. As I have already found, Mr Beresford could easily have done that. He chose not to and the company must now accept responsibility for the consequences of his inaction.

[28] GSC says that they did communicate with Ms Stalker and met the good faith obligations with their letter dated 17 February 2014 which showed from their perspective that the relationship remained intact.

Communications after 11 February 2014.

[29] There was no communication between the parties from 11 February 2014 until 17 February 2014. There could easily have been a telephone call/text to Ms Stalker to ascertain her intentions as early as after her usual start time on 12 February 2014. Once the parties had cooled off there was a good faith obligation to communicate with Ms Stalker as soon as possible. The statutory good faith obligations require both parties to an employment relationship to be active and constructive in maintaining a productive employment relationship and responsive and communicative.

[30] On 17 February 2014 Ms Stalker asked for her payslip and timesheet. She asked for the information to be available to take to her solicitor on Wednesday and asked for the contact details for GSC's solicitor. Mrs Paget responded on 18 February 2014 and advised that the information had been posted the previous day and if it was not received then to let her know. On 20 February 2014 Ms Stalker advised Mrs Paget that there was no sign of the information and asked for it to be scanned. On 25 February 2014 Ms Stalker confirmed that the payslip and timesheet had arrived and asked for her holiday pay as her lawyer seemed to think it should

have been paid the previous week. Ms Stalker advised she had given her work shirts to another person to return to the shop. Mrs Paget then later that same day by email sent the letter dated 17 February 2014 for the first time.

[31] Had the letter of 17 February 2014 been successfully sent by email that day then there would have been some communication within four working days after 11 February for Ms Stalker to respond to. That may depending on the circumstances and any response have been a reasonable timeframe to restore a relationship. The letter was not received until two weeks after 11 February. Ms Stalker's response of 25 February 2014 within hours after receiving the 17 February 2014 letter assumes importance because she makes it very clear that she considers she was dismissed on 11 February 2014.

[32] I accept Mr Beck's submission that there was no attempt to communicate directly with Ms Stalker about her view that she had been dismissed or deal with that a constructive way so that the employment relationship could be restored in a timely way. Even if there was a belief by GSC that the employment relationship with Ms Stalker remained on foot that belief could not be maintained after 25 February 2014.

[33] The next communication came from Mr Thompson by email dated 3 March 2014. Mr Thompson advised that he had been instructed to act for GSC and has been instructed to undertake an investigation and understands Ms Stalker was seeking legal advice. There is no mention of the 25 February 2014 email from Ms Stalker to Mrs Paget that she had been dismissed.

[34] A letter from Ms Stalker's then solicitor followed on 6 May 2014 raising a personal grievance of unjustified constructive or actual dismissal.

[35] There was a dispute in the evidence about whether the advertisement for a forecourt salesperson on 8 March was for the position of the employee who was undertaking Ms Stalker's role. Having carefully considered the evidence my view is that it was more likely that it was an advertisement for that purpose.

[36] Mr Thompson responded to the 6 March 2014 letter by letter dated 20 March 2014. He advised that his client denied terminating the employment relationship and states that Ms Stalker did not respond or reply to the correspondence until 6 March 2014. It would appear he had not been advised of the email of 25 February 2014 to

Mrs Paget. Mr Thompson then advises that his client was of the understanding that the employment relationship was ongoing. He wanted Ms Stalker's confirmation that she viewed her employment as either continuing or that it had ended at her instruction.

[37] By this stage Ms Stalker had been without employment for over five weeks. She had not in any of the exchanges prior to this letter been reassured that she had not been dismissed and simply been invited back to work. Although meditation was a sensible suggestion there was no invitation for Ms Stalker to return to the workplace before that took place. Without directly dealing with Ms Stalker's belief that she had been dismissed very shortly after receipt of her email on 25 February 2014, I do not find that it was possible to restore the employment relationship. I agree with Mr Beck's submission that failing to deal with the dismissal was not a genuine attempt to resolve matters.

[38] I find that Ms Stalker was unjustifiably dismissed from her employment on 11 February 2014 in the heat of the moment. The relationship could have been restored but attempts to communicate with Ms Stalker were inadequate and not in accordance with the obligations of good faith and what a fair and reasonable employer could have done. The letter of 17 February 2014 did not ask Ms Stalker to return to work and/or ask her to clarify why she was not at work. Even if the letter could be viewed as an adequate first step the failure to communicate promptly with Ms Stalker after her 25 February email in which she made it quite clear she considered she had been dismissed prevented the restoration of the relationship.

Was the dismissal justified?

[39] The Authority assesses justification in accordance with the test of justification in the s.103A of the Employment Relations Act 2000 (the Act). The Authority is required to objectively assess whether GSC's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Ms Stalker was dismissed.

[40] The Authority must consider whether the four procedural fairness tests in s.103A(3) of the Act have been complied with. The Authority may also consider any other factors it considers appropriate and also considers compliance with statutory good faith requirements.

[41] GSC did not attempt to justify the dismissal. The letter being produced with an exit offer was a less than desirable way of dealing with concerns but I find the concerns were genuine for Ms Stalker and needed resolution. I do not find that the presentation of such a letter justifies the dismissal. GSC did not meet any of the procedural fairness factors set out in s.103A(3)(a) to (d) of the Act. The dismissal was both substantively and procedurally unjustified.

[42] I conclude that Ms Stalker has a personal grievance that she was unjustifiably dismissed and is entitled to remedies.

Remedies

Lost Wages

[43] Ms Stalker set out her claim for lost wages for a three month period in the sum of \$4634.80 gross and her loss until she gained fulltime employment on 1 August 2014 as \$8158.90. She supplied information from the Inland Revenue Department showing income received from 1 April 2014.

[44] Mr Thompson submits that there should be no reimbursement of wages as there is an absence of evidence that between 11 February 2014 and 11 May 2014 Ms Stalker attempted to mitigate her loss and find a full time job. Ms Stalker explained that it was difficult to obtain work given her rural location but she did manage to pick up some casual milking jobs and this is supported by the Inland Revenue information.

[45] I am satisfied that Ms Stalker lost remuneration as a result of the personal grievance and that she did make some attempts to mitigate that loss bearing in mind her rural location. I do not intend to exercise my discretion and order payment greater than the remuneration for a three month period. Ms Stalker had indicated that she probably intended to leave her employment and I could not conclude with certainty that the relationship would have continued beyond that time.

[46] I have undertaken my own calculations for the three month period to cross check Ms Stalker's calculation of her loss. I have calculated the actual loss of 13 weeks at \$18 per hour for a 40 hour week as \$9360 gross. That is from 12 February 2014 to 13 May 2014. From that figure I have taken earnings for Four Leaf Clover for April in the sum of \$157 gross. I have taken payments received from S & E

Limited for April and May earnings. Lost wage reimbursement is not for the whole of May so I consider it fair to simply halve the earnings for May. Total relevant earnings from S & E Limited are once this is done \$1832.50 gross. I have taken payments received from Smith & Calderwood Limited for April and May earnings. Again I have halved the May earnings. Total relevant earnings from Smith & Calderwood Limited are \$2602.50 gross.

[47] I have then taken off total earnings in the sum of \$4592 from \$9360 and I arrive at a slightly higher figure than Ms Stalker of \$4768 gross. Ms Stalker would have more accurate information at her disposal as to when her earnings were received so as my own calculations are very similar it is appropriate to simply accept Ms Stalker's claim for three months in the sum of \$4634.80.

[48] Subject to any finding about contribution Graeme's Service Centre Limited is to pay to Catherine Stalker the sum of \$4634.80 gross being reimbursement of lost wages under s.123(1)(b) of the Act.

[49] I am not minded in this case to exercise my discretion and order interest on that sum.

Compensation

[50] Mr Thompson submitted that Ms Stalker provided no evidence or other witnesses to demonstrate that she had suffered any hurt or humiliation. There was I find some evidence of humiliation and injury to feelings. The dismissal occurred in the heat of the moment. Ms Stalker was told to leave or *get out* in front of another employee. I accept that there were serious financial consequences for Mrs Stalker. She got behind with her mortgage and payment of utilities and struggled to buy healthy food. She had difficulty with sleeping and sought medical advice.

[51] She said that she spoke to someone down the road who knew what had occurred at mediation when it took place with GSC and that caused further upset her and that there was gossip and disparaging remarks made about her. Mr and Mrs Paget's said that they knew they were not to say anything about mediation and did not specifically tell anyone what occurred. Mr Paget and Mrs Paget said that they were told Ms Stalker was bad mouthing them.

[52] I am not able to reach any firm conclusion about the cause of the gossip but I accept that the matter did come to the knowledge of people in Oxford though in a way that would be unlikely to occur in a larger centre. I accept that caused Ms Stalker additional distress.

[53] In all the circumstances I am of the view that an appropriate award is the sum of \$7000.

[54] Subject to any finding about contribution the sum of \$7000 without deduction is an appropriate award for compensation for humiliation, loss of dignity and injury to feelings under s 123 (1)(c)(i) of the Act.

Contribution

[55] The Authority is required under s.124 of the Act when it determines that an employee has a personal grievance in deciding both the nature and the extent of remedies to be provided to consider the extent to which the actions of the employee contributed towards the situation that give rise to the personal grievance and, if the actions so requires, reduce the remedies that would otherwise have been awarded.

[56] Ms Stalker was entitled to raise concerns and there is no blameworthy behaviour or culpable action in her doing so. I also do not find any blameworthy conduct on her part after 11 February 2014 because as soon as she received the letter of 17 February 2014 she responded to it.

[57] There are two issues however that I find did contribute in a blameworthy manner to the personal grievance. The first is that Ms Stalker only gave Mr Paget a limited time 15 – 20 minutes before she concluded that his response to her verbal concerns was not constructive. Mr Paget had no understanding at that stage that if his responses were inadequate he was to be presented with an exit package. It was only after Ms Stalker considered his responses were inadequate that he received the concerns in writing with the letter and exit package agreement already signed by Ms Stalker. The exit package was non- negotiable and on offer for 24 hours. Mr Paget said he felt blackmailed and was clearly upset. After that point I have found a heat of the moment dismissal.

[58] Mr Beck submits that Ms Stalker was trying to seek to pragmatically resolve a deteriorating employment relationship. Parties to an employment relationship

though are to deal with each other in good faith. I do not find that the actions of Ms Stalker in presenting the non- negotiable exit package so soon after raising concerns was an action that was constructive in maintaining a productive employment relationship. The actions were blameworthy and contributed to the personal grievance that I have found.

[59] The amount referred to above for lost wages and compensation are to be reduced by 15%.

Orders

[60] I order Graeme's Service Centre Limited is to pay to Catherine Stalker the sum of \$3939.58 gross being reimbursement of lost wages under s.123(1)(b) of the Act.

[61] I order Graeme's Service Centre Limited is to pay to Catherine Stalker the sum of \$5950 without deduction being compensation under s.123(1)(c)(i) of the Act.

Costs

[62] I reserve the issue of costs. Mr Beck and Mr Thompson may reach agreement about this but if they are unable to Mr Beck has until 5 December 2014 to lodge and serve submissions to costs and Mr Thompson has until 19 December 2014 to lodge and serves submissions in reply.

Helen Doyle
Member of the Employment Relations Authority