

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 85/09
5133642

BETWEEN JUDY STEWART
Applicant

AND INDUSTRIAL SERVICES
NELSON LTD
Respondent

Member of Authority: Paul Montgomery
Representatives: Stephen Thomas, Counsel for Applicant
Mark Ryan, Counsel for Respondent
Investigation Meeting: 26 February 2009 at Nelson &
26 March 2009 at Nelson
Submissions received: 15 May and 10 June 2009 for Applicant
5 June 2009 for Respondent
Determination: 19 June 2009

DETERMINATION OF THE AUTHORITY

[1] Mrs Stewart claims she has been unjustifiably, constructively dismissed from her employment as an office administrator with the respondent. The applicant has 23 years experience in office administration and accounts management in her employment history and says she has never had a performance or disciplinary issue raised with her during the 25 years of her working life.

[2] Mrs Stewart says she was misled by the respondent's General Manager, Mr Anil Singh, as to the respondent's financial security and further, the respondent failed to provide her with the essential tools to perform her assigned tasks. The applicant's health was affected and she tendered her final resignation on 17 June 2008. Persuaded to retract her initial resignations by local management who gave her assurances of significant positive changes, Mrs Stewart says such changes never

occurred and she came under what she says were *abusive* and *insulting* attacks from Mr Singh.

[3] Following her final resignation Mrs Stewart found other employment beginning work with her new employer on 28 July 2008.

[4] The applicant seeks lost remuneration, plus a petrol allowance of \$48 per week; \$15,000 for hurt and humiliation under s.123(1)(c)(i) of the Act; a penalty of \$1,000 for the respondent failing to pay the applicant when due in early weeks of her employment; a penalty of \$5,000 for breach of implied terms of the employment agreement; a penalty of \$4,000 for the respondent's failure to comply with s.4 of the Act when negotiating a variation to the employment agreement; interest on outstanding monies and costs.

[5] The respondent denies breaching s.12 of the Fair Trading Act 1986 and also contends the resignation tendered to it by the applicant was a genuine resignation. It denies the remedies Mrs Stewart requires and is adamant she does not have a personal grievance.

[6] Owing to a range of difficulties including the unavailability of Mr Singh and of Mr Ryan, and the concern that the respondent's business was in poor health, the Authority set the matter down for investigation with urgency after the agreement of Mr Ryan to having the Authority accept Mr Singh's written evidence and conduct questioning of that witness by teleconference. Counsel for Mrs Stewart concurred with this view.

What caused the problem?

[7] Mrs Stewart heard of the vacancy through Mr Andrew Smith and told him she would be interested in exploring the position further. Mrs Stewart attended an interview with Mr Singh, Mr Giddens the South Island Manager and Mr Borlase, the Nelson Manager.

[8] The applicant says the interview lasted approximately one and a half hours.

[9] In summary Mrs Stewart says that *in time, the position would have had two employees reporting to it, that the company cash flow would be controlled within the South Island and the role would require monthly travel to Christchurch.*

[10] Mrs Stewart said she inquired about the availability of working capital in the company at this interview. She says Mr Singh assured her working capital was available. Reassured she would not have to repeat experiences with previous employers of *placating unpaid creditors* Mrs Stewart expressed interest in the role. She was asked to provide a Curriculum Vitae to Mr Singh which she did. She was told the respondent would contact her in the following week.

[11] The applicant says she was attracted to the role as it offered wider responsibilities than her then current position, including a South Island aspect as well as human resource and health and safety elements.

[12] On 28 January 2008 the applicant was contacted by Mr Borlase who offered her the role and advised her that documentation would be sent promptly. It duly arrived and Mrs Stewart was satisfied with the proposed agreement and the position description but unhappy at the \$42,000 salary offered. She advised Mr Borlase who said he would speak to his supervisors and several days later he contacted Mrs Stewart and offered \$50,000. As a result of this adjustment Mrs Stewart accepted the position and handed in her notice to her then employer. She began with the respondent on 3 March 2008.

[13] Mrs Stewart says she arrived to find she had bare essentials only but no computer, filing system nor stationery. Eventually, after some discussions, Mr Borlase told the applicant to arrange these items. Further, Mrs Stewart says that she was under paid in the first few weeks of her employment and that the position did not *come close* to the position described to her, and over time it became clear the company *did not have working capital*.

[14] A visit by Mr Hill, the CEO, in mid March 2008 brought the news that he was not prepared to pay Mrs Stewart \$50,000 a year. On 27 March 2008 Mr Singh, Mr Borlase and Mrs Stewart were in a meeting when the salary issue was raised. Mr Singh said he could not pay her \$50,000, but said he could pay her \$45,000 through the payroll system and provide \$2,500 a year in petrol through Mr Borlase's company fuel card.

[15] The variation was agreed and signed by Mr Singh and Mrs Stewart.

[16] On or about 1 April 2008, the applicant received a new employment agreement which was for the role of *Accounts Administrator* and reporting to Mr

Singh in Auckland. After studying the agreement the applicant advised Mr Singh should would not be signing the document. On 7 April 2008 Mrs Stewart tendered her resignation confirming her last day of work would be 11 April.

[17] However, Mrs Stewart did not activate her resignation and continued to work for the respondent. On 21 May 2008 Mrs Stewart went to her doctor who diagnosed her with acute stress. He put her on sick leave for seven days. The following day the applicant tendered her resignation.

[18] Following the week of sick leave, Mrs Stewart met with Mr Hill and Mr Maddix the new Branch Manager who convinced her to withdraw her resignation and to give the job *one last try*. Regrettably, Mrs Stewart found the promises of *significant change were empty*, and she continued to receive insulting emails and telephone calls from Mr Singh.

[19] After returning to work after a bout of the flu on 17 June Mrs Stewart received a telephone call from Mr Singh who *actually yelled down the phone at me making accusations that I was not invoicing correctly*. The applicant was particularly offended as for some seven and a half years she had been invoicing clients and customers of former employers using the Nimbus computer system without any difficulty or complaint.

[20] Following the call Mrs Stewart emailed Mr Singh resigning her position *effective immediately*. She advised Mr Maddix who told her to go home for the day and to meet him the following day. She did so and in spite of Mr Maddix requesting her to withdraw her resignation Mrs Stewart declined. Mr Maddix asked Mrs Stewart to work out her notice. She declined.

Issues

[21] To resolve this employment relationship problem the Authority needs to make findings on the following issues:

- Was the applicant deliberately misled as to the terms and conditions of the employment offered; and
- Which employment agreement forms the basis of the relationship between the parties; and

- Was the respondent in breach of its obligations under the employment agreement; and
- Was the applicant justified in repudiating the agreement in circumstances amounting to a constructive dismissal; and
- If so, to what remedies is she entitled; and
- Did the applicant contribute to the circumstances which gave rise to the alleged grievance.

The investigation meeting

[22] After the respondent frustrating the Authority's efforts to refer this case to mediation, I instructed the support officer to arrange a date for an investigation meeting, I set the matter down for investigation. Counsel for the respondent was advised that in the event that Mr Singh and other respondent witnesses wished to be heard they could appear at the investigation meeting. Mr Ryan advised Mr Singh would be overseas on the date of the fixture but would provide a statement of evidence for the Authority's consideration. I advised Mr Ryan that Mr Singh and any other witnesses statements would be received and considered and further that, in the case of Mr Singh, I would conduct a teleconference with Mr Ryan and Mr Thomas participating to question Mr Singh on his evidence. This teleconference took place on 28 April 2009 following Mr Singh's return.

[23] It needs to be made plain, Mr Ryan was invited to attend the investigation meeting in Nelson. He declined this invitation.

[24] At the investigation meeting the Authority heard from Mrs Stewart and considered affidavits from Mr Borlase, Mr Giddens and Mr Stewart, husband of the applicant.

Analysis and discussion

[25] In this matter it is appropriate to break the issues up and consider them each in turn.

1. *Misleading conduct by the respondent*

[26] Mrs Stewart told the Authority she was assured the respondent had adequate working capital. Mr Singh denies the issue was discussed at the initial interview.

[27] Mr Borlase is quite clear in his affidavit. He says at para.9(b):

Judy Stewart asked the question about whether the branch had a working capital cash flow system set up The General Manager, Anil Singh, assured her that this was not a problem I was surprised Anil answered the way he had as I knew at the time that he was aware our company did owe creditors money and there was no capital cash flow system set up.

[28] Mr Giddens was also present at the applicant's interview and in his affidavit he states:

During the interview Judy Stewart enquired whether the branch would have working capital. Judy was reassured by Anil Singh that the branch would have working capital.

[29] The Authority accepts Mr Thomas's submission in respect of s.43(2)(d) of the Fair Trading Act 1986 and supporting case law that general damages for distress and inconvenience are recoverable under that section of the Act. However, Mrs Stewart suffered no financial loss as a result of Mr Singh's behaviour and that will be addressed in a compensation setting.

2. *The employment agreement*

[30] The applicant signed only one employment agreement with the respondent. She says she signed a variation solely related to her remuneration, namely, a reduction from \$50,000 per year to \$45,000 per year plus \$2,500 for petrol through the use of the company fuel card supplied to Mr Borlase.

[31] The Authority accepts that another employment agreement was offered on or about 1 April 2008 but that proposed agreement transferred Mrs Stewart's employment to the respondent's parent company Industrial Services Limited and a reduction in her salary by \$5,000. Mrs Stewart says she never signed this agreement.

[32] I am satisfied that the initial agreement signed by Mrs Stewart, modified by the variation signed by Mr Singh on or about 27 March 2008 is the document governing the relationship.

3. *Did the respondent breach this agreement?*

[33] At the heart of this specific issue is the respondent's attempt to radically modify the extant agreement and variation. I say radically because the later proposed agreement sought to transfer Mrs Stewart's employer to the respondent's parent company. The applicant declined this proposed transfer. It is the applicant's position that this proposed transfer constituted a breach. I think it is fairer to say Mrs Stewart exercised her rights in repudiating the proffered change. She was entitled to do so.

[34] That however, is not the end of the matter. Mrs Stewart maintains that the respondent failed to meet its obligation to her under the initial agreement and the variation to that agreement signed by her and Mr Singh. She said the petrol arrangement failed to deliver simply because she could not always access Mr Borlase's fuel card and that the card was vehicle specific. That is, fuel purchased on his fuel card could be purchased only for his company vehicle and no other. Essentially, she says, the variation involving the fuel card was a sham.

[35] On the evidence before the Authority it is more probable than not that Mr Singh was attempting to mollify the reduction in Mrs Stewart's salary by providing her with company supplied fuel to mask her total remuneration package.

[36] While I accept Mr Singh was attempting a compromise in respect to the applicant's salary in the face of Mr Hill's refusal to pay her \$50,000 as agreed by Mr Borlase, in reality the fuel deal was never likely to succeed given the restriction on that fuel card's use.

4. *Repudiation of agreement*

[37] This case is peculiar in that the applicant resigned three times. On the two first occasions she tendered her resignation she resiled and continued to work for the respondent. Mrs Stewart says that on each of those occasions, under assurances given to her, she believed the respondent's behaviour would change *significantly*.

[38] The Authority accepts Mrs Stewart resigned from her previous employment based on the representations of the respondent at the initial interview, and that her expectations were not met. Based on the evidence before it, the Authority is of the view that Mrs Stewart was genuine in her search for information as to the respondent's financial stability in regards to working capital and made it plain that she had no interest in a role which required her to fend off creditors whose accounts were overdue.

[39] I am satisfied Mr Singh gave an undertaking that the respondent had sufficient operating capital apart from debtors, to meet its commitments to the creditors.

[40] Again, from the evidence, I am satisfied that in spite of this assurance, Mrs Stewart was faced with dealing with suppliers to the company who had placed it on *stop credit*, and when she addressed this with Mr Singh was blamed for the situation.

[41] Further, I am satisfied that the stress imposed on Mrs Stewart was weighty, leading to her doctor placing her on sick leave. There is no denial that the basis for the sick leave related to stress occasioned by the behaviour of the respondent.

5. *Constructive dismissal*

[42] The key questions to be asked are these:

- (a) Was the applicant entitled, on the basis of the respondent's treatment of her, to walk away; and
- (b) Was the *walking away* reasonably foreseeable to the respondent.

[43] Again, on the basis of the evidence before it, the Authority is of the view that Mr Singh's behaviour in respect of the applicant was initially deceptive and latterly bordered on the abusive.

[44] I am satisfied Mr Singh misled Mrs Stewart as to the financial position of the company although I need to concede his concept of working capital to that of the applicant may have been different. Nonetheless, I am satisfied he gave an assurance on behalf of and as the representative of the respondent.

[45] I do not accept Mr Singh's denial of being abusive to Mrs Stewart.

[46] In respect of Mrs Stewart's final resignation, I consider that having *resigned* twice before the final resignation, the respondent had been put on clear notice of the problems in the relationship. It had given undertakings of *significant* improvements none of which materialised.

[47] On the other hand I need to consider the applicant's retraction of her two earlier resignations. I have considered her evidence closely and am of the view that she was unwise, given her initial experience with the respondent, to have remained in its employment at the time she tendered her second resignation. To remain on the basis of yet further assurances from Mr Hill and the new branch manager was, in the Authority's view, supremely hopeful.

[48] That said, I am of the view that the outcome was very foreseeable to the respondent given its previous undertakings and its failure to deliver on them.

The determination

[49] Returning to the issues set out above in this determination I find that:

- The respondent through Mr Singh misled the applicant. It remains unproven whether the two parties had the same understanding as to what constitutes *working capital*. However, it is clear from the evidence, the other two present were surprised at the assurances given to the applicant given their knowledge of the financial status of the company at the time.
- The employment agreement signed by the parties at the outset of Mrs Stewart's employment and the signed variation are the documents which govern the relationship between the parties.
- The respondent through the behaviour of Mr Singh, and to a lesser extent Mr Hill, breached its obligations to the applicant. Specifically, Mr Hill refused to honour the remuneration offered and accepted by Mrs Stewart, and Mr Singh attempted to mask the remuneration package from his employer by agreeing to the petrol component, which arrangement failed due to Mr Borlase's fuel card being vehicle specific.

It also failed to deliver on the expectations set before Mrs Stewart at the initial interview and when faced with her departure on two occasions failed to make good on its undertakings to her.

- The applicant was justified in repudiating the agreement. That is so all the more because Mrs Stewart relied on undertakings given to her at the time of her first and second tendering of resignation. Those undertakings to her were never fulfilled.
- Mrs Stewart did not contribute to the circumstances giving rise to her dismissal, other than her holdout hope that the undertakings given to her would be honoured. They were not. She declined to withdraw her final resignation and declined to work out her notice.
- Mrs Stewart was constructively dismissed and I now turn to the remedies due to her.

Remedies

Lost remuneration

[50] The applicant mitigated her loss commencing new employment on 28 July 2008, six weeks after her resignation. The loss was \$5,190.00 gross in wages and the loss of the benefit of \$48.00 per week petrol allowance. That loss was \$288.00. The respondent is to pay the applicant the sum of \$5,190.00 gross in lost wages and the sum of \$288.00 without deduction in respect of the fuel allowance.

Compensation

[51] While the applicant's employment with the respondent lasted only three and a half months the stress, hurt and humiliation suffered were heightened by the respondent's behaviour towards Mrs Stewart. In particular, Mr Singh's misleading statements caused her significant distress.

[52] I order the respondent to pay the applicant the sum of \$8,000 under s.123(1)(c) of the Act.

Penalties

[53] The applicant has sought penalties for the respondent's failure to pay salary correctly in the first weeks of her employment, for breaching the implied terms of fair dealing and not providing a safe workplace and for failure to comply with its good faith obligations under s.4A when negotiating the variation to the employment agreement. A total of \$10,000 in penalties is sought.

[54] The behaviour of the respondent on the above issues falls well short of the fair and reasonable standard demanded under the Act. It warrants a penalty but in more moderate proportions.

[55] The respondent is to pay a penalty of \$2,000 in respect of the above breaches which I have found have been made out. That sum is to be paid to the Crown within 14 days of the date of issue of this determination.

Interest

[56] Interest was sought and I order the respondent to pay interest on the sum of \$5,478.00 being lost remuneration and petrol allowance. The rate is 4.5% per annum for the period from 18 June 2008 until the date on which the above sums are paid to the applicant.

Costs

[57] In this case the behaviour of the respondent has very significantly increased the work needing to be undertaken by counsel for the applicant. Counsel seeks full client costs and full disbursements.

[58] Weighing the matter I am of the view that a tariff approach is not appropriate in this case because the two and a half hours deployed in the investigation meeting, at which neither the respondent nor its counsel appeared, pales against the time necessarily deployed by Mr Thomas to bring the matter before the Authority. That said, it is not a case where full client costs are appropriate.

[59] Mr Ryan submitted that costs should be dealt with on the basis of memoranda submitted to the Authority. In the normal course of events I would have no hesitation in agreeing to this proposal. However, given the risk to the applicant in the event the

company's business was to fail, I think it just to deal with the matter of costs at this time.

[60] I award the applicant the sum of \$ 3,443.25 being 60% of her reasonably incurred costs of \$5738.75 and full disbursements in the sum of \$120.00 inclusive of the filing fee.

Paul Montgomery
Member of the Employment Relations Authority