

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Christina Strong (Applicant)
AND Katherine Ritchie (Respondent)
REPRESENTATIVES Christina Strong In person
Sam Guest, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 5 October 2005
DATE OF DETERMINATION 3 November 2005

DETERMINATION OF THE AUTHORITY

Introduction

[1] Christina Strong worked for Otago Taxis Limited for approximately two years until the employment was terminated as a result of events on Wednesday 12 January 2005.

[2] In her Statement of Problem Ms Strong identified her employer as Katherine Ritchie. The Authority sent the Statement of Problem to Mrs Ritchie and she lodged a Statement in Reply saying that she had never employed Ms Strong and that she had no authority and was unable to comment on the Statement of Problem. Mrs Ritchie is the majority shareholder in Otago Taxis Limited and in correspondence describes herself as its Manager. Otago Taxis Limited owns and operates the business in which Ms Strong worked under the direction of Mrs Ritchie. However, there is no written employment agreement to assist with correctly identifying the legal entity that employed Ms Strong. In those circumstances I made a direction to the effect that service of the Statement of Problem on Mrs Ritchie constituted service on her personally and service on Otago Taxis Limited, which could later be substituted as the correct respondent if appropriate. The parties were directed to mediation but the problem remained unresolved. At the investigation meeting, having confirmed from Ms Strong that she was aware of the existence of the company throughout her employment, I made a direction substituting the company for Mrs Ritchie as the correct respondent.

[3] Counsel for the respondent submitted that the proceedings had not been properly served on Otago Taxis Limited and that the matter should return to mediation, the correct identity of the respondent having been established. I disagree. The regulations allow the Authority to direct a particular manner of service which was done here. In substance, Otago Taxis Limited knew of the proceedings once Mrs Ritchie received the statement of problem. It would have been a simple step for her to acknowledge that and focus on the merits of the dispute. In my view, the suggestion of further mediation was simply to delay a determination of the problem. Mrs Ritchie has a fixed view about the merits of the matter and there is no doubt that she would have determined the position of Otago Taxis Limited.

Nature of the Problem

[4] On Wednesday 12 January 2005, Ms Strong rang Mrs Ritchie from work. Mrs Ritchie abruptly terminated the call because of abuse from Ms Strong and did so again when Ms Strong rang back. Soon after, Mrs Ritchie arrived in at work and there was an exchange between the two women. Mrs Ritchie says that Ms Strong resigned during the telephone call and during their exchange at work. Ms Strong on the other hand says that Mrs Ritchie was rude and abusive during the telephone call and then dismissed her during the exchange at work.

[5] The main issue for resolution therefore is whether Ms Strong resigned or whether she was dismissed and that turns on resolving the sharply differing evidence of Ms Strong and Mrs Ritchie. To assist in that task, there is evidence from Mrs Ritchie's daughter who I accept overheard her mother's part in the telephone conversation, two others associated with the company who were present during the exchange at the workplace and some notes made by Mrs Ritchie which she says are a contemporaneous account of relevant events. Having seen and heard the two main protagonists, I will rely more on the evidence of the other three witnesses to parts of the relevant exchanges. There is also evidence from Barry Gow, the respondent's director. He became involved in an effort to resolve the dispute and I found him also to be a credible witness. However, Mr Gow was not present during any of the events of 12 January 2005.

Some Background

[6] Ms Strong was working as a dispatcher on Wednesdays and Thursdays from 6pm to midnight and Friday and Saturday from 6pm until the end of the shift, which could be as late as 4am. On New Year's Eve, when they worked together, Ms Strong told Mrs Ritchie that she wanted to give up the Friday and Saturday night work but would do the following two weekends (up to Saturday 14 January 2005) to give Mrs Ritchie a chance to find a replacement. Ms Strong also said that she would not mind taking on any vacant day shifts. Mrs Ritchie said that she would get back to Ms Strong about this. There was no further communication between them about this until 12 January 2005. Mrs Ritchie gave evidence that there was a lot of rumour around the workplace that Ms Strong would leave if she did not get the shifts that she wanted. That evidence is given to support Mrs Ritchie's contention that Ms Strong resigned during their exchange on 12 January 2005.

[7] On Wednesday 4 January 2005, Ms Strong wrote on her timesheet her start and finish hours for that day and her anticipated start times for the rest of the week, as she commonly did. However, she was sick and absent from work on Thursday 5, Friday 6 and Saturday 7 January 2005. Ms Strong had no sick leave but was owed lieu days for statutory holidays so she arranged with Kayella Burton, a taxi driver, to put in another timesheet with the three absent days marked as days in lieu. Ms Burton did this. However, when she checked her bank account while at work on Wednesday 12 January 2005, Ms Strong discovered that she had not been paid for all the hours claimed in that timesheet. She decided to ring Mrs Ritchie to sort that out. It was important for Ms Strong because she needed the pay in her bank account to cover payments due out of her bank account.

The Telephone Calls

[8] The first call was about 9.45pm. Ms Strong's account is that she started by apologising if she had woken Mrs Ritchie and then said her pay was about \$200.00 short. Mrs Ritchie said that no timesheet had been filled out and Ms Strong explained about the replacement timesheet via Ms Burton. Mrs Ritchie said *are calling me a liar* but Ms Strong said no but the timesheet had been handed in. Mrs Ritchie, in a raised voice said that if there was a problem, it would be sorted out. Ms Strong then asked if a replacement had been found for her weekend shifts. Mrs Ritchie asked in an aggressive tone *what are you talking about*, Ms Strong referred to their conversation on New Year's Eve and said she was finding it too stressful to work on the Friday and Saturday nights. Ms Strong also said that she would do the next two weekends but after that she would only work the

Wednesday and Thursday shifts. Ms Strong also asked about the vacant day shift. Mrs Ritchie responded by yelling down the telephone *if you're not going to do your weekend shift you can forget the bloody lot and just get out*. Mrs Ritchie then slammed down the telephone.

[9] In her evidence, Mrs Ritchie agreed that Ms Strong first raised the short pay and the timesheet then referred to the weekend shifts that she intended to relinquish. Mrs Ritchie says that Ms Strong was loud and aggressive and repeatedly swore at her. Her prepared statement of evidence had Ms Strong reportedly saying *bloody* but her notes record Ms Strong saying *F_ _ _ g* and *F_ _ _* as well. Mrs Ritchie's notes record her asking if Ms Strong was intending to work the coming Friday and Saturday nights. Ms Strong said that she did not intend to work those nights. Mrs Ritchie asked if Ms Strong thought it was short notice and Ms Strong agreed. Mrs Ritchie then said *well if you can't be reliable with your current shifts then you can forget about the day shift. I'll come in now!* Mrs Ritchie then hung up.

[10] Mrs Ritchie told me that she decided to go into work because she understood that Ms Strong would be leaving the workplace immediately. However, the notes do not indicate that Ms Strong said that. Mrs Ritchie also told me that she went into work because she *did not know what it was all about*. I do not accept that Mrs Ritchie thought that Ms Strong would be leaving the workplace immediately or that she did not know what it was all about. I find that Mrs Ritchie went into work because she told Ms Strong that if she was not going to do her weekend shifts she could forget about the lot and just get out.

[11] The evidence of Mrs Ritchie's daughter (Jessica Ritchie) indicates that the discussion was first about the pay with Mrs Ritchie saying several times that if there was a problem, it would be sorted out tomorrow. Mrs Ritchie then said to the caller *do you mean that you are not doing this weekend?* and *don't you think that is short notice?* Mrs Ritchie also told the caller not to speak to her *like that* and *don't shout at me*. Mrs Ritchie then said she was coming in to work and hung up. I accept this evidence from Jessica Ritchie is substantially accurate. The inference that comes with that finding is that Ms Strong rang to query her pay and became argumentative and rude.

[12] After Mrs Ritchie hung up, Ms Strong rang back. Mrs Ritchie's evidence of that call is that Ms Strong told her to make up her pay. That is given to support Mrs Ritchie's contention that Ms Strong resigned. However, I do not accept that Ms Strong resigned during either telephone call or that she asked for her pay to be made up as if she was resigning.

[13] Mrs Ritchie went directly into the office which took perhaps 10 minutes at the most. By that time, Ms Burton had returned to the office and was in the despatch area with Ms Strong. Having seen and heard Ms Burton I accept her evidence and prefer it where there is a conflict with Mrs Ritchie's evidence. Mrs Ritchie's opening words to Ms Strong were *what are you still doing here, I told you to get out!* Her tone was very forceful. It follows that Mrs Ritchie must have said during the telephone call for Ms Strong to leave and that explains why she went directly into work. Jessica Ritchie told me in evidence that she did not recall everything that was said by her mother during the telephone call. Her mother telling Ms Strong to *get out* must be one of the things she is unable to recall.

[14] Again in reliance on Ms Burton's evidence, I find that Ms Strong said that she was not going to leave but that she would now since Mrs Ritchie had arrived. Ms Strong then collected her belongings. As Ms Burton put it, *they continued to speak to one another, not nicely*. Mrs Ritchie told Ms Strong that she was irresponsible and unreliable. Both those criticisms are unfair. It was also during this part of the exchange that Ms Strong asked for her pay to be made up but did so because she had been dismissed.

[15] During this exchange another driver arrived on the scene. Sage Arthur appeared and gave evidence under a summons. I accept her evidence as accurate. She heard Mrs Ritchie telling

Ms Strong that she was unreliable and to get out. Ms Strong asked Sage Arthur to take her home which she did. On the way home Ms Strong was upset. She told Sage Arthur that she had been unfairly dismissed. Sage Arthur confirmed that she heard voices raised on both sides of the exchange.

[16] Barry Gow is the director of and one of several minority shareholders in Otago Taxis Limited. I accept his evidence as accurate. On Thursday 13 January 2005, Mrs Ritchie told Mr Gow that there had been a heated argument. Mrs Ritchie spoke to him again on the Friday and asked him to go and see Ms Strong, which he did at about 11am. Mr Gow asked Ms Strong if she was going to return to work. Ms Strong said she was unsure and that she needed some time to think about it. Mr Gow asked how much time she needed and Ms Strong said she needed at least a week. Mr Gow said that a week would be fine. Mr Gow also said that others were interested in the day shift position so that the best thing that Ms Strong could do would be to put in writing to Mrs Ritchie what shifts she wanted. Mr Gow said that Mrs Ritchie did not like being yelled at and Ms Strong said that she did not like being yelled at either. Neither Mr Gow nor Ms Strong felt it necessary to describe the situation as a dismissal or a resignation. Mr Gow then left. The exchange between Mr Gow and Ms Strong was perfectly civil. Ms Strong's evidence is that Mr Gow also told her that Mrs Ritchie was under pressure and that she might have come herself but did not know how Ms Strong would have received that. In evidence, Mr Gow accepted that he might have said these things to Ms Strong. Accordingly, I accept Ms Strong's evidence on this point. Later on Friday, Mr Gow reported the content of his discussion to Mrs Ritchie. Mrs Ritchie therefore knew that she would hear from Ms Strong in due course.

[17] Despite that, Mrs Ritchie wrote a letter dated 15 January 2005 to Ms Strong. The letter starts by referring to *...our telephone discussion on Wednesday 12 January 2005, at the conclusion of which you tended your resignation*. Ms Strong took exception to the claim that she had resigned and wrote back on 18 January 2005. In that letter, she says *...unless an apology is given either verbally or in a written form, I will have no other alternative than to look at this matter as an unfair dismissal*. That is based on the claim in the letter that *you told me if I didn't do my Friday and Saturday night shifts to forget about the lot...* and *...you then arrived at the taxi depot where you once again rudely told me to 'get out' which was in front of two witnesses. You then also informed me of how unreliable I have been....* Mrs Ritchie responded in turn by letter dated 26 January 2005 containing a fuller version of her own account of the events of 12 January 2005. The evidence of the others confirms that the account of events in Ms Strong's letter is much more accurate than the account in Mrs Ritchie's. However, based on her account, Mrs Ritchie made it clear that there would be no apology and that in the absence of a response as discussed between Mr Gower and Ms Strong, she must conclude that *you have terminated your employment*.

Dismissal or Resignation?

[18] I am satisfied that Mrs Ritchie dismissed Ms Strong on 12 January 2005 by telling her to get out. Something of that sort was said over the telephone by Mrs Ritchie and then Ms Strong was summarily dismissed with those words at the business premises.

[19] The test for justification is now set out in Section 103A of the Employment Relations Act 2000. Justification must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[20] What this employer faced was an employee rudely saying on the telephone that she no longer intended to work her weekend shifts following on from an initial discussion about pay. I accept that Ms Strong used the word *bloody* when speaking on the telephone. However, I do not accept Mrs Ritchie's evidence that other swear words were used.

[21] I do not accept that a fair and reasonable employer would have reacted to the above circumstances over the telephone by telling the employee to forget about the lot and to get out, or something similar. Nor do I accept that a fair and reasonable employer would have immediately gone into work and dismissed the employee by angrily telling her to get out while wrongly criticising her as unreliable. The employer was entitled to take issue with Ms Strong's rude manner and was also entitled to insist that Ms Strong perform the whole of her working hours. However, the situation did not warrant dismissal.

[22] Ms Strong has a personal grievance because she was unjustifiably dismissed.

[23] Despite the dismissal, there remained the possibility that Mrs Ritchie and Ms Strong might resolve their dispute after the involvement of Mr Gow. Ms Strong was left with a week to consider whether she would return to work. The prospects for resolution were derailed by Mrs Ritchie's unnecessary letter of 15 January 2005 which was written by her to advance her untrue claim that there had been a resignation. That caused the dispute to re-escalate so the position taken by Ms Strong is hardly surprising.

Remedies

[24] I will deal first with the issue of contribution. I find that Ms Strong did contribute to the situation in a blameworthy way by her rude manner and swearing over the telephone to Mrs Ritchie. There is no basis for any complaint about Ms Strong's behaviour during the exchange at the office. She naturally became upset, angry and critical of Mrs Ritchie after she was dismissed. Despite Ms Strong's contribution most of the circumstances giving rise to the grievance are attributable to the behaviour of Mrs Ritchie. I assess Ms Strong's contribution as relatively minor and in the order of 10%.

[25] Ms Strong seeks an apology and compensation for lost wages for three months following the dismissal. The remedies available for a proven personal grievance are those set out in Section 123 of the Employment Relations Act 2000. An apology is not one of those remedies. The claim for three months lost wages is modest. I accept that Ms Strong made efforts to find alternative employment but was unsuccessful. I note also that Ms Strong had decided to stop working at the weekends. Her loss attributable to the grievance is therefore the loss from work on the Wednesday and Thursday, 12 hours per week, for 13 weeks. The respondent is to pay her compensation for that loss, less 10% to account for her contribution. Leave is reserved if there is any difficulty with calculating that sum which the respondent is to do without delay.

[26] Ms Strong was not legally represented but would ordinarily be entitled to costs against the respondent of at least \$70 to cover her lodgement fee. However I will reserve costs in case there is any more to it than that.

Summary

[27] Ms Strong has a personal grievance against Otago Taxis Limited. Otago Taxis Limited is to pay Ms Strong compensation for her lost wages in accordance with the forgoing order.

[28] Costs are reserved.