

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 243
5353775

BETWEEN	KIRSTEN VICTORIA TAYLOR Applicant
A N D	MARIA WIMMERS LIMITED First Respondent
A N D	THE WORKS LIMITED Second Respondent
A N D	MARIA WIMMERS Third Respondent

Member of Authority: Rachel Larmer

Representatives: Jenny Guthrie, Counsel for Applicant
Ronald Wimmers, for Respondents

Investigation meeting: 25 June 2012 at Gisborne
28 June 2012 by telephone conference

Date of Determination: 18 July 2012

DETERMINATION OF THE AUTHORITY

- A. The Authority finds that Ms Kirsten Taylor was:**
- (i) Employed by the first respondent, Maria Wimmers Limited;**
 - (ii) Never employed by the second or third respondents;**
 - (iii) Not dismissed. Her employment ended when she voluntarily resigned.**

Employment relationship problem

[1] Ms Kirsten Taylor worked in the bar and restaurant of *The Works*¹ in a management type role² from 23 December 2010 until 24 January 2011. Prior to 17 December 2010 *The Works* was owned and operated by Taylorworks Limited. Ms Taylor's mother and brother, Tony Taylor, were the directors of Taylorworks.

[2] Taylorworks and Maria Wimmers Limited (MWL) entered into an Agreement for Sale & Purchase for *The Works* under which MWL took on the Taylorworks staff and Tony Taylor was to provide vendor assistance for 30 days from the date of settlement.

[3] Although Ms Taylor was not one of the staff who had originally intended to transfer to MWL she was employed by MWL on 22 December 2010 as a replacement for her brother when he decided he was not available to provide vendor assistance. Mr Taylor suggested that his sister replace him because she was the only person who had full knowledge of the business, so MWL agreed to employ Ms Taylor.

[4] On 10 January 2010 Ms Taylor received a call from a client who had booked a wedding party for 150 people at *The Works* on Saturday 22 January 2011. MWL had no knowledge of this booking which had been made with Taylorworks the previous year because no information about the function had been passed on to it, nor had it been recorded in *The Works* functions book.

[5] Ms Taylor knew the bridal party and she had some involvement with the booking which had been made while she was waitressing for Taylorworks at *The Works*. Ms Taylor therefore decided to personally complete the final arrangements for the wedding function and she took overall responsibility for running the function on 22 January 2011. Her role involved co-ordinating staff and services and liaising with the bridal party to ensure their needs were met.

[6] The function did not go well. It was beset with multiple problems and ended in litigation. Mrs Wimmers attributed these problems to what she described as Ms Taylor's *complete loss of control on the evening*. Mrs Wimmers said that meant staff did not know what they needed to do, or when or where their services were required at any given time.

¹ A well known bar, café, restaurant in Gisborne.

² She believed she was the overall manager but the Wimmers said she was the bar manager only.

[7] Mrs Wimmers said Ms Taylor was clearly not coping and drank 8 cans of red bull during the function. She said that Ms Taylor failed to put processes in place in the bar and restaurant to appropriately manage the volume of people, which resulted in long queues and multiple complaints.

[8] Ms Taylor refutes Mrs Wimmers allegations about her handling of the function. Her view is that staff worked well and that the function went as well as could be expected. Ms Taylor attributes any problems to Mrs Wimmers decision to give an experienced staff member the evening off. Ms Taylor says the function was understaffed which put pressure on service delivery. Ms Taylor believes she organised the available staff appropriately.

[9] On Sunday 23 January 2011 Ms Taylor phoned Mrs Wimmers to set up a debriefing meeting for 8.30am the following day. This was attended by Ms Taylor, Mrs Wimmers, and her husband Roland Wimmers. There is substantial conflict over what was said during this meeting but there is no dispute that as a result of the meeting Ms Taylor's employment ended that day and she was paid one week's pay in lieu of notice.

[10] Ms Taylor claims she was unjustifiably dismissed. She alleges Roland Wimmers told her she *was no longer needed*. Ms Taylor says that amounted to a procedurally and substantively unfair redundancy which breached her contractual entitlement to two weeks' notice of a redundancy dismissal.

[11] Ms Taylor's original Statement of Problem named MWL as the employer respondent. However, on 16 March 2012 she filed an Amended Statement of Problem which named The Works Limited as a second respondent and Maria Wimmers personally as third respondent.

[12] Ms Taylor believes MWL is no longer operating in business and does not have any assets. She asks the Authority to pierce the corporate veil by transferring any liability MWL may have towards her over to the second and/or third respondents on the grounds that they have assets she can pursue if she needs to take action to recover any remedies that may be awarded to her. Ms Taylor relies on the fact that Mrs Wimmers is the sole director and shareholder of MWL and The Works Limited.

[13] Maria Wimmers and The Works Limited both say they should not be respondents in this matter because they never employed Ms Taylor, who they say was

only ever employed by MWL. The Works limited was incorporated many months after Ms Taylor's employment ended.

[14] Mr and Mrs Wimmers say that when Ms Taylor met with them on the morning of Monday 24 January 2011 she was tearful and stated she had made a mess of managing the wedding and that her management role was beyond her. The Wimmers say that because Ms Taylor was obviously distressed they offered to pay her one week's pay in lieu of making her work out her notice and she accepted that offer.

[15] MWL says there was no dismissal because Ms Taylor resigned on her own initiative.

Issues

[16] The following issues require determination by the Authority:

- (a) Which respondent employed Ms Taylor?
- (b) If it was the first respondent, then should any liability it may have towards Ms Taylor be transferred to the second and/or third respondents?
- (c) Was Ms Taylor dismissed?
- (d) If so, was dismissal justified?
- (e) If not, what if any remedies should be awarded?

Which respondent employed Ms Taylor?

[17] Ms Taylor said she believed both MWL and Maria Wimmers employed her. She says Mrs Wimmers offered her the job and was her boss. She also accepted that her employment agreement recorded MWL as the employer, and that MWL paid her wages.

[18] I find Ms Taylor was employed by MWL not Maria Wimmers personally. MWL was named as the employer in Ms Taylor's written individual employment agreement. MWL was the entity which paid Ms Taylor's wages. MWL is recorded by the Inland Revenue Department as Ms Taylor's employer. MWL owned and

operated the Works restaurant. MWL (not Mrs Wimmers) employed all staff who worked at the Works.

[19] Ms Taylor can only pursue a dismissal grievance against MWL. She cannot pursue a dismissal grievance against either the second or third respondents because they never employed her.

Should any liability MWL may have towards Ms Taylor be transferred to the second and/or third respondent?

[20] Ms Taylor is concerned that if she obtains remedies against MWL that entity will not have sufficient assets to enable her to recover any remedies she may be awarded.

[21] Ms Guthrie therefore asks the Authority *to lift the corporate veil* by transferring any liability MWL may have to the second and/or third respondent so Ms Taylor can pursue any remedies she may be awarded against those two respondents instead of being limited to pursuing remedies against MWL.

[22] I do not consider the Authority has jurisdiction to pierce the corporate veil or transfer liability as Ms Guthrie submits it should. Even if it did, this is not a suitable case for doing so. MWL was the sole employer, so any liability for an unjustified dismissal is limited to that entity only.

[23] The Authority cannot make a finding of unjustified dismissal against a person (Mrs Wimmers) or entity (The Works Limited) who is not the employer or former employer of the employee.³ Even if Ms Taylor's dismissal grievance succeeds there is no jurisdiction to attribute any liability for remedies to the second and/or third respondents.

Was Ms Taylor dismissed?

[24] Because dismissal is disputed, Ms Taylor bears the onus of establishing that a dismissal occurred. Although in some circumstances a resignation may amount to a constructive dismissal if the initiative or impetus for ending the employment came from the employer, Ms Taylor claims she was actually (not constructively) dismissed by Mr Wimmers.

³ *New Zealand Harbour Workers' Union v. Auckland Harbour Board* [1991] 2 ERNZ 200; *Square One Service Group Ltd v. Butler* [1994] 1 ERNZ 667.

[25] Ms Taylor said Mr Wimmers said her services were no longer needed. The Wimmers say Ms Taylor told them she did not want to continue working for them and that her role was beyond her. They say because she was distressed they agreed they would pay her in lieu of her having to work out her notice period. They attributed her distress to problems with the wedding function which they believed was the catalyst for her resignation.

[26] The substantial conflict between the accounts Ms Taylor and the Wimmers gave of the Monday meeting must be resolved on the balance of probabilities, which requires me to determine which version is more likely than not to be correct.

[27] I have preferred the Wimmers evidence that Ms Taylor freely and voluntarily resigned for the following reasons:

- (a) Ms Taylor's significant downplaying and inappropriate minimising of the problems which I find occurred during the wedding function undermined her credibility;
- (b) Ms Taylor's actions in asking to return to work for some hours immediately after the meeting so she could train staff and do a proper handover were inconsistent with the alleged distress she says she suffered as a result of the alleged dismissal. I consider such actions are more likely to be consistent with an employee who was relieved to have been let out of her notice period and who was happy to have finished working for MWL;
- (c) Ms Taylor attended The Works for coffee and to chat to other staff as well as to pick up or drop off items after her employment ended. That seemed inconsistent with her alleged distress over the alleged dismissal;
- (d) The Wimmers' evidence of a resignation was supported by information given by two other witnesses that Ms Taylor told them prior to the Monday meeting that she was going to leave;

- (e) I accept without hesitation Ms Jessica Fisher's⁴ evidence that Ms Taylor phoned her early on Monday (before the 8.30am meeting) to tell her to come in to work in her front of house uniform because Ms Taylor intended to resign that morning;
- (f) Ms Fisher was an independent witness, who has not been in contact with either party. Her evidence came to light during a discussion with another witness and it was brought to the Authority's attention in that way. A teleconference investigation meeting was held on 28 June to hear Ms Fisher's evidence which was given under affirmation. Ms Fisher was questioned by the Authority and was also cross examined by Ms Guthrie. She impressed me as a credible and independent witness;
- (g) I also accept Ms Elaine Vandeworm's evidence that during the week before Ms Taylor's employment ended Ms Taylor told her a number of times that she *would be leaving soon*.

[28] I find that Ms Taylor has been unable to discharge the onus of proving that she was dismissed. I consider, on the balance of probabilities, that Ms Taylor freely and voluntarily resigned from her employment with MWL. Accordingly, her personal grievance claim for unjustified dismissal is not upheld.

Costs

[29] WML is not legally represented, so it is not entitled to an award of costs.

Rachel Larmer
Member of the Employment Relations Authority

⁴ A former employee of MWL who worked with Ms Taylor at The Works but who has not had any contact with the Wimmers since her employment ended in March 2011.