

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 58/07  
5038236

BETWEEN JOCELYN DIANE TURNHAM  
Applicant

AND SPOTLESS SERVICES (NZ)  
LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Janie Kilkelly, Counsel for Applicant  
Richard Harrison, Counsel for Respondent

Investigation Meeting: 30 March 2007 at Dunedin

Submissions received: 27 April 2007 from Applicant  
9 May 2007 from Respondent

Determination: 5 June 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Jocelyn Turnham, was employed by the respondent, Spotless Services (NZ) Limited (“Spotless”) from 9 February to 21 March 2006, to work in two cafés which Spotless operate at Dunedin Airport, Velluto and Espresso Plus.

[2] Ms Turnham says that she was a permanent employee and should not have been employed as a casual employee. She says that she was unjustifiably constructively dismissed from her employment with Spotless as the result of a meeting on 21 March 2006 and/or alternatively, that she was subjected to a series of unjustified actions which caused her to be disadvantaged in her employment.

[3] Spotless says that Ms Turnham was employed as a casual employee and was then offered a permanent position shortly before her final day at Spotless on 21 March 2006.

[4] Spotless does not accept that Ms Turnham was constructively dismissed following a meeting on 21 March 2006 or that there were any unjustified actions that disadvantaged her during her employment.

### **The issues**

[5] The issues for the Authority to determine in this matter are:

- (a) Was Ms Turnham a casual or permanent employee?
- (b) Was Ms Turnham unjustifiably constructively dismissed as a result of the meeting of 21 March 2006?
- (c) Were there unjustified actions of Spotless that disadvantaged Ms Turnham in her employment?

### **Was Ms Turnham a casual or permanent employee?**

[6] Ms Turnham lives close to Dunedin Airport. In February 2006, she went to the airport to make some inquiries about any suitable positions. Ms Turnham was directed to Spotless and as a result of her approach employed by Spotless from 9 February 2006. Ms Turnham was experienced in customer service type positions.

[7] Ms Turnham said that prior to the commencement of her employment, she was not given an opportunity to take the employment agreement away with her before signing it.

[8] The documentation provided to the Authority supports that Ms Turnham signed a payroll advice form on 8 February 2006 which noted her employment as a genuine casual. Ms Turnham signed a signature page of an employment agreement on the day she commenced her employment which also described her employment as genuine casual. One of the special conditions was that she would work on an as and when required roster basis. There were no minimum hours of employment. It does seem more likely, given the fact that the payroll advice was signed on 8 February 2006, that Ms Turnham also had the employment agreement with her before the date she commenced her employment.

[9] When Ms Turnham signed the agreement, she acknowledged that she had been advised of her entitlement to seek independent advice about the agreement, had a reasonable opportunity to do so and had read, understood and accepted the conditions in the handbook.

[10] I do not find the evidence supports that Ms Turnham was pressured into signing her agreement or that she asked for, and was refused, further time before signing it. Ms Turnham did not raise any concerns about her casual status during the period that she was employed, which was just over six weeks.

[11] There is a dispute about what Ms Turnham was told about the nature of her employment.

[12] Tracey Bates is employed by Spotless as the Site Manager at Dunedin Airport and is responsible for management of three different cafés at the airport, including the two cafés where Ms Turnham worked. Ms Bates was the person Ms Turnham spoke to when she initially asked if there were any positions. Ms Turnham was keen to work as many shifts as possible and Ms Bates was able to accommodate her in that. The rosters do support that Ms Turnham was given shifts that, when analysed over the period of her employment, show features of regularity.

[13] I accept Ms Bates' evidence, which was supported by some rosters and requests for leave from other employees, that Ms Turnham was employed, in the main, to cover for employees when they were absent, for whatever reason, rather than to what Spotless classified as a permanent position. Support is found for this in the offering to Ms Turnham of a permanent position in the café known as Espresso Plus about a week or so before Ms Turnham's last day of work on 21 March 2006. I accept that Ms Bates probably indicated that she could give Ms Turnham plenty of shifts. Ms Turnham may well have taken from that that she would be given shifts over five days of the week. I do not find, though, that the evidence supports that Ms Turnham was told she would be employed on other than a casual basis.

[14] In conclusion Ms Turnham was employed on a casual basis and she agreed to be employed on that basis. Annual holiday pay is only able to be paid on a pay as you go basis in terms of s28(1) (a)(ii) of the Holidays Act 2003 when the employee works on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with annual holidays or is employed on a fixed term basis to

work less than 12 months.. Employers do have to monitor the situation where an employee is appointed on a casual basis. This is because employment can become regular in nature and create an expectation of ongoing employment indicating a permanent rather than casual employment status. Ms Turnham was offered a permanent position, five weeks into her casual employment. If that position had been taken up as was anticipated prior to the events of 21 March 2006, that would have resolved any issue about Ms Turnham's employment status.

[15] Ms Turnham was paid holiday pay each week under s.28 of the Holidays Act 2003. Ms Kilkelly has asked that Ms Turnham be paid holiday pay again on her termination under s.25 of the Holidays Act 2003. Ms Turnham's entitlement to annual holidays had not arisen as she had only worked six weeks. The handbook which contained Ms Turnham's employment conditions provided that for a genuine casual employee 6% of gross hourly pay will be paid as holiday pay.

[16] The amount of holiday pay paid to Ms Turnham was an identifiable component of her pay. Ms Turnham was paid holiday pay at 6% on top of her hourly rate of \$10.85. This situation can be distinguished from one where holiday pay is not an identifiable component of pay and there is no evidence of any agreement of holiday being paid in that manner.

[17] Ms Turnham was employed on a genuinely casual basis. A analysis of her actual employment does show features of regularity in shifts worked over the six weeks but Ms Turnham did not become entitled to annual holidays in terms of s.28(4) of the Holidays Act 2003. I make no award for holiday pay in these circumstances under s 25(2) of the Holidays Act 2003 because it has already been paid in accordance with s 28.

[18] For completeness, it is not necessary, given that no entitlement arose for annual holidays in this case, for me to consider the lawfulness of the clause in the Spotless handbook relating to overpayment.

### **21 March 2006**

[19] Ms Turnham met with Ms Bates on 21 March 2006. She did not return to work after that meeting although Ms Turnham did speak with Ms Bates on the telephone. I place some importance on the telephone calls because Ms Turnham said

that after the first of the calls she thought it would be *okay to return* but that after another call she then *gave up because Tracey chopped and changed – attacking/nice*.

[20] During the investigation meeting, I became aware for the first time that Ms Turnham had made notes in her personal diary shortly after the meeting and entries about the telephone calls. The diary entries were made available at the investigation meeting and I have placed weight on these entries. I have also considered the entries in light of the fact that Ms Turnham advised Ms Bates when she left the meeting that she thought she had a personal grievance.

[21] The diary entries and the evidence of Ms Turnham and Ms Bates confirm that the discussion during the meeting of 21 March proceeded as follows.

[22] Ms Bates asked Ms Turnham to go with her to her office. Ms Turnham said that she had not had any difficulty with Ms Bates prior to that meeting but described her that day as tense and solemn whereas normally she was happy.

[23] Ms Bates had received a telephone call from a customer who was concerned about a discussion by two staff members in Velluto. The customer had given a physical description of the staff members. From the description, Ms Bates believed the staff members to be Ms Turnham and the duty manager. Ms Bates checked the roster to confirm that Ms Turnham was working the day in question. Ms Bates also wanted to talk about an incident when Ms Turnham was relieved late from the café. I accept that there was no attempt to raise the matters in any disciplinary manner and Ms Turnham could not recall any part of the discussion on that day in which the word *disciplinary* was used by Ms Bates.

[24] Ms Bates advised Ms Turnham about the customer complaint. It was established that Ms Turnham was on duty that day. Ms Turnham denied the complaint and asked for it to be put in writing. I find it likely that Ms Turnham raised issues with Ms Bates about her concern that the integrity of her customer service was being questioned and that she became very upset by the raising of the complaint. Ms Bates agreed to get the complaint in writing as requested by Ms Turnham and the discussion about that matter then stopped.

[25] Ms Bates then steered the conversation toward a diary entry that Ms Turnham had made on Saturday, 18 March about difficulties getting relief for a toilet break. Ms Bates agreed that Ms Turnham was entitled to be upset about the lack of relief and

advised Ms Turnham that it was all right if she shut the site instead of waiting. Ms Turnham was not happy with that response.

[26] Ms Turnham then raised concerns about lack of product and referred to comments she had made from time to time in the café diary. She also raised concerns about back-up on the weekend. Ms Turnham was not happy with Ms Bates' response to those issues. She recorded in her diary notes that Ms Bates said she did not need product to do her job. Ms Bates said that Ms Turnham criticised other staff. Ms Turnham denied that she was critical of any other staff. Ms Bates said that she attempted to close down the conversation about other staff members.

[27] Having considered the diary entry it is more likely than not that Ms Turnham did make some comment about other staff reading magazines during work time, probably in the context of *time theft* and with respect to back-up on the weekend.

[28] I find that it is likely that Ms Turnham was critical of Ms Bates' management as a result of her responses to Ms Turnham's concerns. Ms Bates made a comment to the effect that Ms Turnham would not be happy with less than a management position and/or found a junior position difficult. Ms Bates said that she made this comment, and I have no reason to doubt her evidence, to acknowledge Ms Turnham's previous experience and the reasons for the frustration that she had about Ms Bates and other staff. In hindsight, it was probably an unwise comment to make, but the same could probably be said about the criticism by Ms Turnham of Ms Bates' management skills.

[29] Ms Turnham's diary reflects that there was further discussion about another staff member complaining that Ms Turnham had sworn at her.

[30] There is agreement that Ms Turnham advised Ms Bates that she could not work for her in the circumstances and she would have to quit. Ms Turnham also told Ms Bates that she thought she had a personal grievance.

[31] There is one important dispute about what occurred during the meeting. Ms Turnham said Ms Bates suggested Ms Turnham fill out a resignation form and went as if to take a form from her desk. Ms Turnham said that she told Ms Bates that she liked her job. Ms Bates denied that she made any mention whatsoever of resignation and denied that Ms Turnham told her she liked her job.

[32] Significantly, Ms Turnham's own diary entry makes no reference to this event although it is quite detailed in other respects about the meeting. I would have expected if Ms Turnham thought she had a personal grievance that there would be mention of the resignation form. I find Ms Turnham's evidence about the resignation form to be unreliable. I prefer the evidence of Ms Bates that there was no discussion about filling in a resignation form or reaching for the same. I also accept Ms Bates' evidence that Ms Turnham did not advise her that she liked her job.

[33] There is no dispute that Ms Turnham was given the card of the Operation Manager, Otago/Southland, Allan Baird, toward the end of the meeting. Ms Turnham then left the office.

[34] Ms Bates believed that Ms Turnham had resigned. She telephoned Mr Baird to advise him of what had happened. Mr Baird told Ms Bates that Ms Turnham's resignation should not be accepted until she had had time to cool off and that there should then be a meeting.

[35] On 22 March 2006, Ms Turnham telephoned Ms Bates. Ms Turnham made a diary entry about this telephone call. I prefer Ms Bates' evidence which is more consistent with Ms Turnham's own diary entry than the evidence Ms Turnham gave at the investigation meeting. I find that Ms Turnham advised Ms Bates that she wanted her job and that she liked the people and staff. Ms Bates responded that Spotless did not want to see good people go and that Ms Turnham could have the rest of the day off.

[36] Later that day, Ms Turnham telephoned back and asked about working shifts from Thursday onwards. Ms Bates advised that a meeting would need to be organised with herself, Ms Turnham and Mr Baird prior to rostering Ms Turnham on. Ms Bates advised Ms Turnham that Mr Baird was on site the following day and she would advise a suitable time for a meeting.

[37] On Thursday Ms Bates telephoned Ms Turnham and suggested a meeting time on Monday. That time was not suitable and Ms Turnham advised that the time did not suit and that she would need to get back to Ms Bates with a time that did suit. Ms Bates advised Ms Turnham to leave a message with Gillian in case she was not available via phone.

[38] Ms Turnham did not call Spotless back. I accept Ms Bates' evidence that she did make some telephone calls to Ms Turnham during the week before sending her a letter on 29 March 2006.

[39] Ms Turnham was not straight forward in her evidence to the Authority about her situation following the meeting on 21 March 2006. Ms Turnham denied that Spotless attempted to contact her at home after Thursday, 23 March 2006. She told the Authority that she was at home all that week apart from a short time on Monday and would know if such a call had been made.

[40] It then became clear that Ms Turnham had attended a job interview on the Monday that she was unavailable to meet with Spotless. Ms Turnham then started a new job, if not on that day, then the following. Ms Turnham did not know whether or not Ms Bates had made any telephone calls because she was working and not at home.

#### **Determination with respect to constructive dismissal**

[41] Ms Turnham said that she resigned as a result of the meeting on 21 March 2006 and subsequent telephone calls. Ms Turnham says that she was coerced to resign and that there were breaches of duty towards her.

[42] I find no evidence that Ms Turnham was coerced to leave. This ground is founded on Ms Bates' going to hand Ms Turnham a resignation form. I have not found, on the balance of probabilities, that this occurred. Spotless considered Ms Turnham to be a very good worker and had offered her a permanent position. Her previous experience was recognised and appreciated.

[43] The meeting of 21 March 2006 and the raising of a customer complaint would no doubt have made Ms Turnham feel unhappy. It was not unreasonable of Ms Bates to raise with Ms Turnham on an informal basis the complaints from a customer. An employer must be able to raise day-to-day issues with staff without fear that every discussion may result in an employment problem being lodged and investigated. Good faith behaviour requires the parties to an employment relationship to be responsive and communicative with each other.

[44] There were issues that needed to be talked through after the meeting. It appeared that Ms Turnham was unhappy with the way the cafés were being managed by Spotless. Ms Turnham felt she could not continue to work and advised Ms Bates

of this. Ms Bates was told by Mr Baird that Ms Turnham's resignation should not be accepted until she had a cooling down period and a meeting. Ms Turnham did seem prepared to return to work the following day.

[45] In this case, the evidence falls short of establishing that there was conduct during the meeting or in subsequent telephone calls that was dismissive or repudiatory so as to give rise to a claim that Ms Turnham was unjustifiably constructively dismissed. Ms Turnham does not have a personal grievance that she was unjustifiably constructively dismissed.

### **Unjustified actions causing disadvantage**

[46] There were a number of actions/inactions of Spotless which Ms Turnham say disadvantaged her in her employment.

[47] These are that Ms Turnham was asked to spy on colleagues, was inadequately trained, was not provided with cover to take breaks and was not provided with sufficient product for the café.

[48] I do not find the evidence to support that Ms Turnham was asked to spy on her colleagues as alleged. Ms Turnham would note some issues and operational concerns in the diary kept in the café. Ms Bates valued both her opinion on these matters and Ms Turnham's previous experience. Ms Bates' responses during the meeting on 21 March 2006 do not support that she wanted Ms Turnham to spy on other employees. In fact she did not want to hear that kind of feedback from Ms Turnham.

[49] Ms Turnham said her training was inadequate. She did have some training with respect to making coffee but had not been properly inducted. Whilst that would have been desirable, there was no evidence of disadvantage as a result.

[50] The cover for toilet or other breaks was discussed during the meeting on 21 March 2006. Ms Turnham was told she could close the café if relief was not available. While she was not happy with that, it was a practical solution to the problem that she had raised.

[51] The short supply of product on occasion was an operational matter and not an unjustified action.

[52] Employment relationships have their ups and downs. There will be frustrations from time to time and operational issues can cause conflict. The entries that Ms Turnham made in the café diary for the six weeks of her employment are not all negative. They show, in the main, that Ms Turnham was cheerful, capable and had a good work ethic. I accept Mr Harrison's submission that Ms Turnham focused on some issues in her relationship and elevated them to the level of the personal grievance claim.

[53] I do not find that Ms Turnham has a personal grievance that there were unjustified actions that caused her disadvantage during her employment.

[54] Ms Turnham's claims are dismissed in their entirety.

### **Costs**

[55] I reserve the issue of costs.

[56] Ms Turnham is legally aided. The parties should be able to reach agreement about the contribution that Ms Turnham made toward her legal aid.

H Doyle

Member of the Employment Relations Authority