

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 117
5307312

BETWEEN

CAROL WALDMAN
Applicant

AND

FARMLANDS TRADING
SOCIETY LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Vicki Eades for the Applicant
Daniel Erickson for the Respondent

Investigation Meeting: 31 May and 1 June 2011 at Whanganui

Submissions Received: By 4 July 2011

Determination: 8 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Waldman claims that her employment as the Whanganui business manager of the Farmlands Trading Society Limited (Farmlands) ended after her being unjustifiably disadvantaged through bullying, and subsequently constructively dismissed. Her claim for constructive dismissal is based on both her employer following a course of conduct with the deliberate and dominant purpose of coercing her to resign and breaches of duty by Farmlands of sufficient seriousness that meant it was reasonably foreseeable that she would resign.

[2] Farmlands denies all of Ms Waldman's claims.

Factual discussion

[3] As the name implies, Farmlands supplies farming products to farmers such as seeds, fencing equipment, drenches and the like. Ms Waldman commenced her employment with Farmlands in 1998 and between then and now has worked in various capacities in several of its retail outlets. From 2004 Ms Waldman was in charge of the Whanganui branch of Farmlands as its business manager.

[4] There appeared to be no problems whatsoever with Ms Waldman's performance or other interactions within Farmlands until after the appointment of a new regional manager in mid-2008. She perceived the manager to be quite sharp and arrogant, and uninterested in branch issues.

[5] In 2009 the regional manager came to have concerns about the Whanganui branch's performance, for which Ms Waldman was responsible, and therefore he had concerns about her performance. Ms Waldman considered that there were only financial issues from April 2009 at the earliest and these were compared to the set budget rather than on a year-on-year comparison, by which measure the branch's performance was actually improving.

[6] The country was in recession and beef and sheep farmers were having particular problems during this period. However, the regional manager considered that not only was Whanganui not reaching budget, but that things were getting worse, and that its turnover was reducing compared to other similar sized stores. In fact its performance was slipping in the ranking of Farmlands' stores over the relevant period.

[7] The regional manager sought to raise his concerns with Ms Waldman, which also included untidiness of parts of the branch and a failure by her to delegate tasks, in addition to financial performance. Ms Waldman claims that he did so unnecessarily repetitively in a hostile manner and by shutting her office door, closing the blinds, standing over her, thumping the table, and insisting that things change. There can be no certainty about events that occurred around two years ago, yet the Authority is required, on disputed issues of fact, to find in each case what is more likely to have occurred. In doing so, the absence of complaint at the time is relevant, as is any documentation created near to the time. I conclude that Ms Waldman's claims here are overstated. The regional manager admitted once thumping the desk in frustration during one of his twice monthly visits, to emphasise a point that Ms Waldman's long

hours of work could likely have been caused by her failure to delegate properly. However there was no evidence of Ms Waldman ever raising any concerns about these particular issues to anyone else in Farmlands at the time they allegedly occurred. Furthermore, the financial performance of the branch was such that the regional manager had reasonable grounds to target the branch, and therefore Ms Waldman's management of it.

[8] Instead of Ms Waldman's perception, I conclude that the regional manager's concerns were about his insistence that standards be improved, but that he may not have conveyed a difficult message quite as delicately as he might have on some occasions.

[9] Because of her concerns Ms Waldman attempted to contact the general manager operations (the regional manager's boss), to seek a private meeting with him, but for various reasons this did not ever happen.

[10] Unfortunately, the situation worsened further over June and July. The relative financial position of the branch degenerated. This did not assist the state of the relationship between Ms Waldman and the regional manager, who continued to make it clear to Ms Waldman that he was seeking improvements. However I do not accept that the regional manager ever threatened Ms Waldman with a warning for this, or her alleged failure to discipline her staff to the regional manager's satisfaction, during this period.

[11] I do so on the basis that the evidence of the regional manager was reasonably consistent (especially given my previous finding about the nature of his behaviour towards Ms Waldman), that he was prepared to accept in evidence matters that did not necessarily put Farmland's position in the best light and that he had genuine grounds to pursue the issue of the branch's performance under Ms Waldman. By contrast, Ms Waldman's evidence also seemed genuine, at least in that she genuinely appeared to believe it, although it is possible that she may have unconsciously added to it, or conflated different events into one and/or taken comments out of context.

[12] By 3 August 2009, Ms Waldman felt that she had to take matters up with someone else in Farmlands. Accordingly, she emailed its general manager people and organisation, to arrange a discussion with him. He called her that day. I prefer the general manager people and organisation's evidence about that conversation in

general. In particular, I conclude that Ms Waldman did raise her concerns about being bullied by the regional manager. She was asked to explain this and gave a number of examples – including unnecessary repetition of commands and verbal abuse. In the context of the performance of the Whanganui branch, I accept that the general manager people and organisation saw this as an issue about how the regional manager was delivering hard messages. He asked Ms Waldman if she wished to pursue a formal complaint (which then could have been dealt with under Farmlands' harassment policy), but Ms Waldman, for whatever reason, which may have been a fear of retribution, declined to do so. Instead it was agreed that he would have a discussion with the regional manager about how he interacted with all his direct reports when giving feedback and/or criticism.

[13] I do not accept that the general manager people and organisation told Ms Waldman that one of her options was to resign, simply because that is not something that any experienced human resources manager would do. The same applies to her claim that he tried to dissuade her from making a complaint, which was not raised until her oral evidence.

[14] The conversation ended with the general manager people and organisation saying words to the effect that this conversation *did not happen*. While Ms Waldman took that as a negative, I accept that he was simply trying to impress upon Ms Waldman that her confidentiality would be maintained when he spoke to the regional manager.

[15] I note that such an interpretation of the conversation is consistent with the evidence that the regional manager was spoken to in the terms agreed with Ms Waldman, and that she made no further complaints about his treatment of her following that phone call.

[16] Farmlands holds quarterly business review meetings led by the general manager operations, known as QBRs. The Whanganui branch meeting took place on Wednesday, 5 August offsite, in a small meeting room. Ms Waldman was to lead the presentation using a laptop. Despite knowing that it would be a difficult meeting, Ms Waldman did not seek assistance beforehand, such as taking up the offer of the regional manager to go through the presentation with him in advance.

[17] It was clear almost from the outset that the general manager operations was very concerned about the performance of the Whanganui branch and the standard of the presentation. On a number of occasions he used the “f” word and criticised Ms Waldman for the standard of the presentation, including spelling mistakes and comments inserted outside of the boxes provided, and that her performance was unacceptable.

[18] The general manager operations was very forceful in his comments, and his demeanour and language clearly showed his frustration and annoyance. Apart from the financial performance of the Whanganui branch, his other major concern was Ms Waldman’s failure to mention in her report a major initiative for Farmlands for the relevant period, called *share of wallet*. Ms Waldman had forgotten to place any reference to that initiative in her presentation and, when she told the general manager operations so, he asked her if she was *winding him up*.

[19] I accept that this meeting was in effect a direct confrontation with Ms Waldman. While others there may not have seen it so, Ms Waldman was the brunt of the general manager operations’ questions and direct and obvious frustration. It was simply unprofessional for him to use such language in a formal business meeting, and to be quite so negative towards Ms Waldman. If his intention was to shock Ms Waldman, it certainly had that effect. I do not accept that, even in the farming community, language like that needs to be used in a formal business meeting such as a QBR.

[20] While Ms Waldman initially tried to defend her position and therefore she and the general manager operations were often interrupting each other, I accept that she soon gave up, and simply did not respond to the general manager operations’ issues unless required to do so. On the other hand, I do not accept (on the balance of the evidence from witnesses in attendance) that Ms Waldman had made reference to the *share of wallet* activity in her presentation (which she should have), or even that she had referred in her presentation to the essence of it, without actually using the words *share of wallet*.

[21] Towards the end of the meeting, one of Ms Waldman’s staff told the general manager operations how hard Ms Waldman worked, to which he responded using the “f” word, stating that it did not matter how many hours she worked, it was how she

used them, in obvious reference to the delegation issues the regional manager had previously raised with her.

[22] The meeting concluded with Ms Waldman being told that she would be placed on monthly rather than quarterly reporting, and that if there was no significant improvement, there could be disciplinary consequences.

[23] Over the following three days, the regional manager had two meetings with Ms Waldman where many issues were discussed. In particular he had concerns about a pre-lamb canvassing report not having been completed using his set method. The regional manager gave Ms Waldman until Friday of the following week to complete the report. The other key issues were for Ms Waldman to formalise the process for dealing with managed accounts; to keep the offices clean; and to improve QBR presentations.

[24] These issues were confirmed in an email sent on 10 August to Ms Waldman by the regional manager under the heading “*Overall results*”, which stated that Whanganui was under-performing, that reviews would take place on a monthly basis and that a report of progress on each item would be required, including the hosting a shareholder event. The email concluded as follows:

I am not satisfied with the current performance of your branch or of yourself and immediate steps must be taken to improve. Should marked improvement not be forthcoming, you will give me no choice but to commence the formal performance process and issue warnings for poor performance. This process will either result in improved performance or termination of your employment.

[25] Ms Waldman was appalled at the prospect of not only meeting what she felt were unreasonable deadlines, but also having to face performance management and disciplinary proceedings. She contacted the chief executive officer (CEO) of Farmlands and told him that she was close to resigning, and that she had been subjected to bullying by the regional manager. He told her that he was taking note of her concerns, but needed to be impartial, and that he would get back to her.

[26] Although Ms Waldman trusted that the CEO would get back to her, she resigned two days later in another call to him. She was not prepared to wait for him to investigate matters because past events had been weighing on her so much, particularly the email with the prospect of disciplinary action. She could not see how

to resolve matters because by then she did not trust Farmlands' management. The CEO said that he was sorry and wished her the best for the future.

[27] Ms Waldman had decide to take her holidays in lieu of notice and thus intended to leave immediately. When no one contacted her within the next few minutes, she packed up her bags and left for good.

[28] Subsequently, Ms Waldman raised a personal grievance. The matter has been to mediation and subsequent efforts have been made to resolve it, but unfortunately this has not proved possible. It therefore falls to the Authority to make a determination.

Determination

[29] Whether Ms Waldman liked it or not, and even whether an objective outsider might consider that she did not deserve it, Farmlands was entitled to pursue issues of what it genuinely considered to be poor results from the Whanganui branch. As the manager, Ms Waldman was the obvious person to pursue these issues with.

[30] Furthermore, whatever Ms Waldman thought, the problems perceived by Farmlands' management were not being resolved. No doubt this was of great frustration to Farmlands and Ms Waldman. She was working hard, but the branch results were not acceptable to Farmlands. It was therefore entitled to pursue the prospect of disciplinary action. Furthermore, I am not satisfied that the corrective actions sought by Farmlands were unattainable or even unreasonable. They were all matters that Farmlands, given its managerial discretion, were entitled to have addressed by Ms Waldman.

[31] There was no bullying of Ms Waldman by the regional manager, although her treatment by him may not have been as sympathetic as one might desire in a perfect world. Her treatment by the general manager operations at the QBR meeting can never be condoned. It was unprofessional and could only have led Ms Waldman to conclude that he would not support her over any issues with the regional manager. However, his behaviour at the QBR meeting was not what caused Ms Waldman to resign. Instead, what appears to have been the final straw for Ms Waldman was the prospect of disciplinary action, which she simply could not face. Farmlands did, however, for the reasons given above, legitimately have that option open to it. Instead she chose to remove herself from the troubles she was having at work, troubles that

were no doubt mirrored in many businesses in rural New Zealand at that time, given the recession.

[32] There is no obligation when a resignation does not take place in the heat of the moment for an employer to give a worker time to reconsider their resignation. In this case, Ms Waldman had notified the possibility of her resignation two days earlier and then resigned. This was not a heat of the moment situation. Therefore, Farmlands was under no duty to advise Ms Waldman to take time out and reconsider her resignation.

[33] As is clear from my findings of fact, there was no course of conduct with the dominant purpose of forcing Ms Waldman to resign. Similarly, on the facts there is no breach of duty of sufficient seriousness to make it reasonably foreseeable that Ms Waldman would resign. Certainly she had expressed some concerns about her manager, but an employer who has concerns about an employee's performance is entitled, in fact obligated, to raise them with the employee before taking any disciplinary action, which is what Farmlands in effect did. There was therefore no serious breach of duty to Ms Waldman, even although the regional manager could have treated her more professionally, and Farmlands' general managers could have followed up her on her communications with her. None were sufficient to cause a fair and reasonable employer to foresee that Ms Waldman would not put up with her current work situation. I have already determined that the behaviour of the general manager operations at the QBR meeting, while completely unacceptable and a breach of duty to Ms Waldman, was a one off event that did not form a major part of her reasons for resigning and therefore is not relevant in this context. In any event, again (being a one off event) it was not sufficiently serious to make her resignation reasonably foreseeable, even in combination with the above factors.

[34] Even if I were to be wrong in my above analysis, Ms Waldman's claim could not succeed for an independent reason. That is because Ms Waldman had neither legitimate reason not to have faith that the CEO would investigate the situation, nor to believe that he would not address her concerns fairly. Instead, she simply gave him no real opportunity to undertake an investigation before she decided to resign. This is inconsistent with her obligation to be active and constructive in maintaining a productive employment relationship with Farmlands, including being responsive and communicative with it.

[35] It is impossible to conclude what such an investigation would have uncovered, or that solutions could not have been reached to Ms Waldman's satisfaction. In fact, Ms Waldman raised one possibility at the investigation meeting that she had never raised with Farmlands.

[36] In these circumstances, the initiative for Ms Waldman's leaving can not be seen to have come from Farmlands, but instead from her. This leads me to the conclusion that the most likely reason for Ms Waldman's resignation was because she did not want to face the prospect of performance management and disciplinary proceedings should her performance not improve.

[37] Ms Waldman's claims must therefore be dismissed.

Costs

[38] Costs are reserved.

G J Wood
Member of the Employment Relations Authority