

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Melissa Jane Williams (Applicant)
AND Kimberley Fashions Limited (Respondent)
REPRESENTATIVES Mr E Telle, Counsel for Applicant
Ms P Shaw, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 30 June 2005
DATE OF DETERMINATION 8 August 2005

DETERMINATION OF THE AUTHORITY

The applicant, Ms Melissa Williams, alleges that she was unjustifiably constructively dismissed by the respondent, Kimberley Fashions Ltd. She also alleges that she has been discriminated against on the basis of sex, the allegation relating to a requirement that she wear makeup. She also claims she was unjustifiably disadvantaged because she was victimised and that the respondent breached its good faith obligations by failing to take steps to rectify the situation.

Constructive Dismissal

In Wellington etc Clerical etc IUOW v Greenwich (1983) ERNZ Sel Cas 95; [1983] ACJ 965, the Court referred (at pp 112-113; p 985) to Wellington Road Transport etc IUOW, Re Hepi v Fletcher Construction Ltd ERNZ Sel Cas 59; [1983] ACJ 653, and stated that the essential questions to be addressed in constructive dismissal cases were what were the terms of the contract and was there a breach of those terms by the employer that was sufficiently serious to warrant the employee leaving? The Court of Appeal in Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd (1985) ERNZ Sel Cas 136; [1985] 2 NZLR 372 (CA) held that constructive dismissal included, but is not limited to, cases where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and/or
- (c) A breach of duty by the employer causes an employee to resign.

In this case it is a breach of duty that is being alleged.

The problem

The respondent sells women's clothing. Ms Williams was employed as assistant manager by the respondent in 2 July 2002, initially starting at the St Lukes store and then being transferred to Newmarket in August 2002. Ms Williams had difficulties with both of the managers under whom she worked. After complaints made by Ms Williams on behalf of the staff in February 2003 the first manager, Ms Allan, resigned. Ms Williams complained that that situation was handled very poorly by Kimberley Fashions as the manager knew who had complained and consequently the manager's last 4 weeks of employment were very stressful for Ms Williams. She said Ms Allan had begun to have a detrimental effect on her health. When I asked how she thought it should have been handled, given that Ms Allan had a right to know what the alleged problems were and who had complained (and that it was evident that Ms Williams was not the sole complainant but doing so on behalf of the staff), Ms Williams said she did not know.

After the complaint was made, Ms Allan was spoken to, and a programme of store and performance improvements were put in place. One of these was an instruction that she "Keep appearance of staff to a high standard and ensure that they wear a complete 'Kimberleys' look. Makeup must be worn to complete the look".

After Ms Allan resigned Ms Sheri Toumadj was appointed as manager. Ms Williams said it was apparent within days that there would be difficulties working with her also. Ms Williams's complaints included feeling that Ms Toumadj was constantly undermining her. It was readily apparent that the two women did not get on. Ms Williams said she raised this with Kimberleys and was told to work it out.

Ms Williams felt there were problems relating to Ms Toumadj's timekeeping. Unbeknown to Ms Williams, Ms Toumadj had an arrangement whereby she could come in late and have some flexibility in her hours. This created resentment as Ms Williams believed Ms Toumadj was illicitly taking time off and asking staff to lie for her. She said she tried to raise the issue with Ms Toumadj but they had an argument which culminated in Ms Williams suffering an epileptic attack. In her view the attack was caused as a result of the pressure she had been put under by Ms Toumadj. Ms Williams had been prescribed medication for her epilepsy but she did not take the medication. Ms Amy Harrison, the Human Resources manager, was informed of this incident by Ms Toumadj. The upshot was that both women apologised.

Lateness, illness and non-notification

Ms Williams suffered from epilepsy and a number of other medical conditions. Part of Ms Harrison's role involved monitoring staff illness. She was aware in March 2004 that Ms Williams had had time off sick and was using her holiday pay, which she had run out of, to cover her periods of illness. Ms Williams continued to be ill so Kimberleys agreed to pay her holiday pay in advance of her next entitlement to help her out.

Ms Harrison contacted Ms Williams on one of her days off sick as she had not called the store. They discussed the importance of her health, the possibility of her going on a sickness benefit or reducing work hours and Ms Harrison asked her to make sure she called Ms Toumadj to let her know when she was sick. Ms Williams agreed to do that.

In April Ms Williams was ill again and asked for a reduction in her working hours. Ms Harrison asked her to put her request in writing. There was no mention that this had anything to do with stress related to or caused by her employment. Neither does the doctor's letter say anything like this. Ms Williams asked for a reduction to a 4 day week. Kimberleys considered this and decided

that although it would involve taking on extra staff they could accommodate her by giving her three days as a sales consultant as they could not function without a full time assistant manager. Ms Williams decided she could not manage financially on this basis and rejected the offer.

In May 2004 Ms Harrison visited the Newmarket store to update employment contracts and job descriptions. She talked individually to staff including Ms Williams. Ms Williams said she did not get the new job description which includes a reference to the requirement to wear makeup. Ms Harrison asked how her health was and how things were in the store and with work generally. She reiterated that it was important for Ms Williams to let Ms Toumadj know if she was ill or going to be late. Ms Williams said nothing about having major issues with Ms Toumadj although she did say she wanted Ms Toumadj to respect her as an assistant manager and that they did not get on personally. Ms Harrison undertook to speak to Ms Toumadj and asked Ms Williams if she was able to maintain a professional relationship with Ms Toumadj. Ms Williams said she could. Ms Williams said she did not want to make too much of a big deal about Ms Toumadj as the situation with Ms Allan had been dealt with so badly and had caused her a lot of stress in the past. Neither did she mention problems relating to Ms Toumadj's timekeeping. There was nothing to alert Ms Harrison to the fact that Ms Williams was feeling very stressed by her relationship with Ms Toumadj and that she believed her health was suffering as a result.

Disciplinary Meeting 16 June 2004

Ms Williams was late again on 17 May and on 25 May Ms Harrison issued a memo about lateness. Despite this, Ms Williams was late and/or did not phone in on 1, 9 and 10 June. A decision was made that this issue needed to be addressed on a more formal basis. Ms Harrison sent Ms Williams a note to this effect. Ms Harrison prepared some questions for Ms Toumadj to ask Ms Williams at the meeting, after which a decision would be made as to what, if any, action to take. Prior to the meeting a note was given to Ms Toumadj. It reads:

On Tues 15/6/04 please let Melissa know that Marilyn wasn't happy with her appearance when up in Akl so they have asked you to send her home if she arrives at work unclean, not wearing makeup or untidy/look dress. Any Qs ring me or Marilyn. Thanks Amy

Marilyn McLaughlin is a director of the company. This note was not intended to form part of the disciplinary meeting. There is no reference to it in the meeting notes prepared by Ms Harrison for Ms Toumadj. Unfortunately, Ms Toumadj did not deal with this on the Tuesday but left it until after the disciplinary meeting on the next day.

Ms Williams said she assumed Ms Harrison would conduct the interview and was devastated when she realised it was to be Ms Toumadj. Ms Harrison said she never thought that anyone other than Ms Toumadj should conduct the interview as Ms Toumadj was Ms Williams' manager and Ms Williams had told Ms Harrison that she could work with Ms Toumadj on a professional basis.

The meeting was attended by Ms Toumadj, Ms Suzanne Enser (the sister of the owner and a staff member) and Ms Williams. Ms Williams did not bring a support person to the meeting. Ms Williams told me she thought she would be dismissed. This is despite the letter notifying the meeting stating:

If the allegations that you have breached this policy are found to have substance, you will be issued with a formal verbal warning which will be recorded in writing and valid for 12 months.

Ms Williams said that when Ms Toumadj told her in the course of the meeting that she could not at, her sole discretion, decide to make up time she was amazed as she believed this what Ms Toumadj herself did on a regular basis. She said:

At this point I really couldn't handle what was happening to me. I said that I think I would hand in my notice. It had just become almost too much for me.

The parties are agreed that Ms Williams was upset at the beginning of the meeting. Ms Enser noted that Ms Williams was shaking and crying and apologised for being so emotional. Despite this, the meeting proceeded. When I asked why, Ms Toumadj told me that she had been asked to conduct the meeting, this was her first experience of such a thing, and so she just proceeded. During the meeting Ms Williams said she was really sorry for being so emotional, really sorry she had done this and that she thought she would hand in her notice.

This was before the note was read to her.

The Note

At the end of the meeting Ms Toumadj read the note. Ms Williams said:

I'm sorry I look like this but I have been diagnosed with cancer and I am on medication.

She said she would have to buy makeup in the morning because she didn't own any and that after the note she was completely in shock. She said:

When Ms Toumadj read the note to me she read it with such joy as if to completely humiliate me. It was just further ammunition she could use against me with the other staff to further attempt to undermine and humiliate me as she had done on previous occasions.

This comment is in part a reference to a shoplifting incident which occurred when Ms Williams and Ms Enser were the only two staff in the shop. Mr McLaughlin, a director of the company, had sent a note about the incident to both women and a copy to Ms Toumadj. The note was marked "Attn: Newmarket store". Ms Williams said:

Ms Toumadj proceeded to show that memo to various other staff members to undermine me.

Ms Toumadj's evidence was that she used the incident as a training opportunity. Clearly, all staff had to be made aware of what had happened and how to avoid a similar situation in future.

Ms Williams said she had never worn makeup, although she agreed she had worn eyeliner. She said foundation reacted badly with her skin and that she objected to the wearing of makeup: it was a human rights issue and this was no longer the 1950s and women could choose. She felt the raising of the appearance issue constituted a personal attack which was being used to get rid of her. She said:

I was so upset about the comments concerning my attire. Effectively I felt Kimberleys was saying I was ugly and unattractive and therefore had to wear makeup. I was completely beside myself.

She went on to say that when she spoke to other staff members and none of them had been told to wear makeup and she felt she was being singled out and discriminated against for being ugly and

unattractive. She also felt she was being singled out as Kimberleys had only tightened up on lateness with her. This was a reference to Ms Toumadj.

Her resignation makes no reference to any of these issues. She simply says she is giving one month's notice. The company was attacked for not getting in touch with her during her resignation period. This is not surprising as the letter did not raise any issues and the company believed that she had been looking for alternative employment.

Ms Williams accepted that she had not told her employer that she was allergic to foundation nor had she queried what was meant by "makeup". She has assumed it meant what she called "full makeup", that is, lipstick, eye shadow and foundation.

Was the Disciplinary Meeting Unfair?

Mr Telle appeared to be arguing that because she had been ill, which the company knew, and that she had explanations for some of the lateness episodes it was unfair to hold a meeting. Mr Telle said the disciplinary meeting was procedurally and substantively unreasonable and unfair because it dealt with issues of lateness/absenteeism which should not have resulted in a disciplinary meeting and/or some of which should not have been raised at the meeting. I cannot accept this submission. An employer is entitled to deal with issues of concern. The disciplinary meeting was not unfair.

The Note

Bringing up the appearance matters at the end of a disciplinary meeting when Ms Williams was very distressed and talking about resignation was hardly the wisest or most sensitive of actions. It should have been left to another time and dealt with in another forum. Having said that, I do not think that Ms Williams would have reacted well regardless of who brought the appearance issue up or how it was dealt with. Neither do I think that the employer could have anticipated, with the knowledge it had, the extreme reaction to the issue evidenced by Ms Williams. Ms Toumadj had spoken to Ms Williams previously and suggested she put on some lipstick. Ms Williams had declined to do so and had not got upset.

It was evident that Ms Williams felt distressed and vulnerable before there was any mention of the need to wear makeup. I do not doubt at all the genuineness of Ms Williams' distress. However, the distress was not deliberately created or induced by the employer and the reaction could not have been anticipated.

It is the instruction to wear makeup that Ms Williams took most exception to, this despite the fact that on her own evidence she had worn makeup herself previously. She felt picked on and got at.

Was there a Suspension?

Mr Telle submitted that Ms Williams was effectively suspended without any prior notice. Ms Williams was told that if her appearance was unsatisfactory she would be sent home. That was a possible event. Whether or not the sending home of Ms Williams would have constituted an illegal action would be dependant on what took place at the time. In Business Distributors Ltd v Patel [2001] ERNZ 124 (CA), the Court of Appeal found that an employee was not entitled to treat himself as constructively dismissed in anticipation of something which lay well in the future and may well never have occurred. That is similar to the scenario in this case.

Ms Williams was not suspended.

Terms of the Employment Agreement

Kimberleys sells fashion clothing. It is entitled to expect that staff will be well groomed and well presented. Regardless of whether Ms Williams received the revised job description or not, Kimberleys was entitled to ensure that its sales staff looked good. The situation would be different if the nature of the industry was different, for instance, it would be unreasonable for a cleaning company to expect its staff to wear fashion clothes, high heels and make up when cleaning offices during the night. There is nothing unreasonable in a fashion retailer wanting its staff to look good, and that must include, within reason, the requirement to wear makeup. This requirement does not breach the relationship of trust and confidence nor is it contrary to an employee's human rights.

Was there a breach of the employment contract of sufficient seriousness to warrant the termination action taken by the employee?

In Wellington Clerical Workers IUOW v Greenwich (1983) ERNZ Sel Cas 95 the Court said at p104:

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

In Edmonds v Attorney-General [1998] 1 ERNZ 1, Finnigan J said at p14 that in considering whether the facts amounted to a repudiatory breach of the trust and confidence term, the standard of care had to be measured against reasonable conduct. In Oats v Hovenden [1997] ERNZ 614, the Court noted that raising performance matters during the discussions about hours of work was less than tactful, but not a breach of the employer's duty that could justify the appellant's belief that he was constructively dismissed.

While the raising of the appearance issue at the end of a meeting during which the employee was clearly upset was not, as I have indicated, the most sensitive behaviour, it cannot be said to be repudiatory conduct which would entitle an employee to treat the contract as being at an end.

Ms Williams was not constructively dismissed and does not have a personal grievance. She was not victimised and she was not discriminated against. Nor was the respondent in breach of its duty of good faith in failing to take any steps to "reconcile the situation" before or after the resignation.

Costs

Costs were reserved. If the parties are unable to resolve the issue of costs the respondent should file a memorandum 28 days after the date of this determination. The applicant should then file a memorandum within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of Employment Relations Authority