

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Sharon Patricia Wyatt. (Applicant)
AND Whangarei Boys' High School. (Respondent)
REPRESENTATIVES Barry Nalder for applicant.
Katharina Friedli for respondent.
MEMBER OF AUTHORITY Ken Raureti
INVESTIGATION MEETING 28 February 2007
DATE OF DETERMINATION 21 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem.

[1] Mrs Wyatt commenced employment at Whangarei Boys' High School (WBH) on 6 March 2006 as an Accounts Officer. Her areas of responsibility were Financial Administration with the primary objectives being the management of creditors and debtors for the School and its Hostel, preparing monthly financial reports, and to provide assistance to the Executive Officer.

[2] Mrs Wyatt says she was unjustifiably constructively dismissed on the 28th March 2006. WBH says that Mrs Wyatt was not dismissed from her employment, either directly or constructively.

Background.

[3] Mrs Wyatt was interviewed for the position by Mrs Nees and one other person. Within two hours of returning home from the interview, Mrs Nees rang Mrs Wyatt and told her that her application was successful and she offered her the job. Mrs Nees had recently been appointed to the Executive Officer position; she was the previous Accounts Officer. Up until Mrs Wyatt was employed, Mrs Nees was effectively doing both jobs; she said she was basically doing 7 day weeks starting early in the morning and often finishing around 9.00pm.

[4] Mrs Wyatt's first day of work was to be Monday 6 March 2006, but she was told to start on Tuesday 7th because things were very busy at the time although she would be paid from Monday. She worked at WBH for seventeen days. Her last physical day of work was Tuesday 28 March. Mrs Wyatt's job was that of Accounts Officer with the responsibilities and objectives as described above, including providing assistance to Mrs Nees, the Executive Officer.

[5] Mrs Wyatt was responsible to and reported directly to Mrs Nees. Mrs Wyatt says that in the first week she was there, Mrs Nees spent time with her showing her the systems, where everything was, and basically what she required from her.

[6] There is some dispute about the detail of the training and how much actual time was spent in training Mrs Wyatt. Mrs Wyatt says that Mrs Nees was a very busy person and kept getting

called away for other matters making her introduction to the job quite messy. Mrs Wyatt said that overall, Mrs Nees would have spent four days with her.

[7] Mrs Nees says that in the first week she worked closely, one on one with Mrs Wyatt supervising and training her in various aspects of her work, of which she listed. In the second week, she says she gave Mrs Wyatt further assistance and training which included going over and reinforcing some of the previous week's work. Mrs Nees gave Mrs Wyatt encouragement, positive feedback and indicated that she was making good progress. While it is not necessary to determine the actual detail and full extent of the training Mrs Wyatt received, it is apparent that there was no structured formal induction programme for Mrs Wyatt, however I am satisfied that Mrs Nees (albeit very busy at the time) provided reasonable introduction, encouragement and support to Mrs Wyatt in the first couple of weeks.

Thursday 23 March meeting.

[8] On Thursday 23rd March, Mrs Nees arranged a meeting with Mrs Wyatt to discuss the job to see how she was going and to raise some concerns that were apparent in the short time Mrs Wyatt had been there. The meeting was an informal meeting, but Mrs Nees had some quite serious concerns about Mrs Wyatt's experience and her ability to handle the position.

[9] Mrs Nees asked Mrs Wyatt how she was finding the job. Mrs Wyatt replied she thought things were going really well although she was working at a slow pace but as everything was new, she wanted to take her time to learn the job. Mrs Nees told Mrs Wyatt that her experience in creditor accounts was less than she had expected and she (Mrs Nees) was worried that Mrs Wyatt may not be able to cope with the accounts position in its entirety, because so far she had only learned a very small portion of the job and had not retained much of what she had been taught. Mrs Nees said that she did not feel confident to teach her anything new because she was still having difficulty with what they had covered to date.

[10] Mrs Wyatt thought it was unfair of Mrs Nees to arrive at such a conclusion after less than 3 weeks in the job. She indicated that the school accounts were vastly different to what she was used to. Mrs Wyatt said that to arrive at that conclusion taking into account the lack of a proper induction and lack of operating procedures was unfair.

[11] Mrs Nees explained that while she understood that Mrs Wyatt did not have several years experience in creditors, she felt that from reading Mrs Wyatt's CV, interview and references which said that she had taken charge of the creditors for the firm she had previously worked for that she (Mrs Wyatt) would have a good grounding in the basics of creditors, and if that was the case, why did she need to be taught the difference between an invoice and a statement. Mrs Nees said she was most puzzled by being asked some very basic accounting questions.

[12] Mrs Wyatt's explanation was that she only processed invoices and sent them on to Head Office. Mrs Nees told Mrs Wyatt that if that was what she did then she was only doing about 10% of what a creditor's job entailed. Mrs Nees told Mrs Wyatt again that she did not feel that Mrs Wyatt had the experience to handle all the other tasks that the position would require from her. Mrs Nees said she made it very clear to Mrs Wyatt that she was not questioning her ability to learn, her work ethics or even her personally, she was a good employee but her obvious lack of experience would mean she would "swim and maybe sink" in the position and she (Mrs Nees) was not able to teach her the job for fear of overloading her.

[13] Mrs Wyatt asked Mrs Nees if she thought she was not capable of learning the job. Mrs Nees said that in time she would probably manage to learn the job, but her concern was that with Mrs Wyatt's lack of experience Mrs Nees would have to spend more time than was possible with her, maybe as much as 6 months.

[14] Mrs Wyatt was understandably very upset by the meeting and took a break, and went out to the toilet; she said she got the impression that Mrs Nees wanted her to leave. When she came back, Mrs Wyatt was still visibly upset and she told Mrs Nees she had no intention of

leaving the job, if she wanted her to leave she (Mrs Nees) would have to tell her to go. Mrs Nees told Mrs Wyatt she could not do that, she had no intention of asking her to leave; she was just being open and honest about her concerns. Mrs Wyatt reiterated that if she wanted her to leave she would have to tell her to go. The meeting ended without anything being resolved or concluded.

Summary of evidence of Mrs Nees & Mr Woodward.

[15] At the suggestion of the Headmaster and the BOT Chairman, Mrs Nees sought advice from Mr Eric Woodward, a Personal/Industrial Relations Adviser for the New Zealand School Trustees Association. Coincidentally, Mr Woodward was going to be in Whangarei on Tuesday, so they arranged a meeting to discuss Mrs Nees' concerns.

[16] Mrs Nees told Mr Woodward about her concerns that she had with Mrs Wyatt, what in her mind was Mrs Wyatt's lack of fundamental accounting/debtors/creditors knowledge. She said that she couldn't see handing over the rest of the job to Mrs Wyatt. Mrs Wyatt gave examples to Mr Woodward of why she had formed that view, and some of the mistakes-lack of knowledge Mrs Wyatt had displayed. She also filled Mr Woodward in about the meeting she had with Mrs Wyatt a couple of days earlier. Mr Woodward explained to Mrs Nees that there was a whole range of options available to her to resolve the problem from doing nothing, to identifying the problem and putting in mechanisms/training/support etc to bring Mrs Wyatt up to speed, to a "dignified parting of the ways".

[17] Mr Woodward explained the "dignified parting of the ways" scenario to Mrs Nees which he explained could be canvassed with Mrs Wyatt in a "without prejudice" meeting. Mrs Nees said that she had never heard the terms "dignified parting of the ways" or "without prejudice" before, she had no understanding of those terms until Mr Woodward discussed them with her.

[18] During their discussion, Mr Woodward told Mrs Nees that he didn't know when he will be back in Whangarei, but should they see if Mrs Wyatt will meet with them while he was there.

Tuesday 28 March meeting.

[19] Mrs Nees said that at Mr Woodward's request he conducted the meeting. She said he introduced himself and explained his position and relationship with the school, and advised Mrs Wyatt that he wished to discuss concerns that Mrs Nees had with her apparent lack of experience in the position and some difficulties that had arisen. He explained to Mrs Wyatt that the meeting was on a "without prejudice" basis and explained what that meant. He further explained that if she did not wish to proceed with the meeting it could be postponed to another date or time.

[20] Mr Woodward advised Mrs Wyatt that she was entitled to bring a friend, family member, support person or lawyer if she wished and was told that at anytime during the discussions she could call an end to the meeting and reschedule or meet again at another time. He told her that she did not have to respond to anything if she didn't want to, but it was important that the concerns they had were put directly to her.

[21] Mr Woodward said she appeared to understand what he had explained and chose to carry on with the meeting and hear what they had to say. Mr Woodward explained Mrs Nees' concerns with her apparent lack of experience, some of the difficulties that had arisen and perceived short comings in her performance. Mr Woodward raised the same topics and issues that Mrs Nees had brought to her attention in their first meeting. Mr Woodward asked Mrs Wyatt if she had any suggestions as to how to resolve the issues, but she had none.

[22] Mr Woodward suggested to Mrs Wyatt that it was open to her to consider "a dignified parting of the ways" whereby if Mrs Wyatt agreed the position was beyond her capability the School could pay her a month's salary in lieu of notice in order that she could seek other employment. Mr Woodward said it was never put to her as an ultimatum, it was expressed as

an option because it was perceived that Mrs Wyatt was out of her depth and if Mrs Wyatt was of a similar position it would be prudent for them to go down that route.

[23] It is apparent that Mrs Wyatt had become quite upset and she asked for time out to go to the toilet and compose herself. When she returned, she was angry/upset. Mr Woodward asked her if she wanted the meeting stopped, but she chose to sit down and addressed some of the issues as she saw them. The meeting ended a short while after that resumption with Mrs Wyatt going home.

Summary of Mrs Wyatt's evidence.

[24] Between Thursday 23rd and Tuesday the 28th of March Mrs Wyatt continued working in her role. She said that during the morning of the 28th, Mrs Nees asked her into her office and there was a man present. She said she didn't know what the meeting was about, she wasn't sure or aware of what was happening, she wasn't expecting anyone else, nor did she know who he was or why he was there. She said the man introduced himself and she recalls him saying that he was there because of the concerns Mrs Nees had. He told her that Mrs Nees told him she was not suited to the position, she had been unable to learn the job within a reasonable timeframe, and she could not cope with it. She said she was being told she was incapable of doing the job.

[25] Mrs Wyatt said that Mr Woodward told her that if she resigned and went away the School would pay her the equivalent of one month's wages tax free. She said that at that point, she realised she had been sacked and being offered an inducement to go away. She said the proposal came without warning and the realisation of what was happening really upset her, she became really upset, and she was crying and got up and left the office.

[26] Mrs Wyatt said she cannot specifically recall Mr Woodward saying the "without prejudice" stuff, but she thinks it was after the offer of the month's wages to leave. Mrs Wyatt said that she was quite devastated by what had happened and she walked out of the office and rang her husband to pick her up. That afternoon after she had regained her composure, she sought advice from Mr Nalder. She made it quite clear to Mr Nalder that afternoon that she did not want to return to the school at all. She said there was no way she wanted to go back there. She gave the School's keys to Mr Nalder to return on her behalf, and made arrangements to have her belongings uplifted.

29th March.

[27] The following day, Mr Nalder contacted Mrs Nees and told her that Mrs Wyatt would not be returning to the School. He asked to have a meeting with her and Mr Woodward, and also asked Mrs Nees to pack up Mrs Wyatt's personal belongings and he would pick them up at the meeting that was to be arranged.

[28] They met that afternoon. Mr Nalder was informed that Mrs Wyatt's employment had not been terminated, that she was still on the payroll and was free to return to her duties, albeit discussion needed to occur in respect of the unresolved issues. Mr Nalder explained that Mrs Wyatt felt humiliated and did not wish to return, but he asked for more time for Mrs Wyatt to regain her composure. They agreed that Mrs Wyatt could have some time off on pay to regain her composure.

[29] There were several other discussions between Mr Nalder and Mr Woodward over the course of the following few days. In a second brief of evidence from Mr Woodward, he said he explained to Mr Nalder that at no time was Mrs Wyatt's employment terminated on 28 March or any other time. The meeting on the 28th was simply to address concerns that the School had with her performance and to try and find a way to assist her or find some other amicable solution. Mrs Wyatt did not return to work. She was paid her salary up until 7 April 2006.

Legal principles

[30] The legal principles to be applied to constructive dismissal claims have been set out in a number of Court decisions. In *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 the Court of Appeal held that constructive dismissal included, but was not limited to, cases where:

- i) *An employer gives an employee a choice between resigning or being dismissed;*
- ii) *An employer has followed a course of conduct with the dominant purpose of coercing an employee to resign;*
- iii) *A breach of duty by the employer leads an employee to resign.*

[31] What we are looking at in this case is the third category and whether the circumstances fall within it.

[32] In *Wellington Clerical Workers' Union v Greenwich* [1983] ACJ 965 Williamson J held that:

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

[33] In *Western Excavating Ltd v Sharp* [1978] 1 All ER 713 at 717 per Lord Denning MR, Lawton and Everleigh LJJ concurring it was held that:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."

Findings.

[34] The 23 March meeting reflected some contrasting positions. Mrs Nees objective for the meeting was to determine how Mrs Wyatt felt she was progressing in the job, and to raise her concerns about the level of experience and ability to handle the position. Mrs Nees had serious concerns about Mrs Wyatt's experience and she did not feel confident to teach Mrs Wyatt anything new because Mrs Wyatt was having difficulty with what they had covered to date, what had been covered had not been retained or full understood, and she didn't want to overload her. Mrs Nees openly and honestly communicated her concerns to Mrs Wyatt.

[35] Mrs Wyatt thought it was unfair of Mrs Nees to make such conclusions so soon into the employment, it was apparent to her that Mrs Nees had concerns about her ability to quickly come up to speed with the job. Mrs Wyatt got the impression that Mrs Nees wanted her to leave and she told her (Mrs Nees) that she had no intention of leaving; if she wanted her to go she would have to tell her to go.

[36] Mrs Nees was faced with a difficult predicament. She had come to the conclusion that Mrs Wyatt had not progressed far enough or fast enough because of her lack of experience and lack of understanding of some of the basics of financial management of creditors/debtors and general accounting knowledge. She did not feel that she could teach Mrs Wyatt the job for fear of overloading her, and to do it she would have to spend more time than was possible, maybe up to 6 months.

[37] It was incumbent on Mrs Nees to raise those concerns. In my view discussing those matters one on one in privacy, being open yet sensitive, providing Mrs Wyatt with examples of why she had those concerns, particularly given the early stages of the employment, and the potential impact it was likely to have on Mrs Wyatt was appropriate.

[38] Mrs Nees was at a loss on how to proceed beyond that point. She sought advice from Mr Woodward. They met and discussed the whole situation including the range of options to resolve the problem from doing nothing, to identifying the problem and putting in mechanisms/training/support etc to bring Mrs Wyatt up to speed, to a "dignified parting of the way". They took advantage of Mr Woodward being there and arranged a meeting with Mrs Wyatt without forewarning her of the nature of the meeting and what they wanted to discuss.

[39] The nature of the meeting had escalated from the meeting of three days earlier between Mrs Nees and Mrs Wyatt. Mr Woodward conducted the meeting, he covered all the bases of Mrs Wyatt's right to representation and support, she was told that at anytime during the discussions she could call an end to the meeting, and was told that she did not have to respond to anything if she didn't want to, and he went to some length to explain the term "without prejudice".

[40] Notwithstanding that Mrs Wyatt had told Mrs Nees twice during their meeting 3 days earlier that she had no intention of leaving, it is clear that a "dignified parting of the way" was one option that they were prepared to put to Mrs Wyatt. They (Mr Woodward & Mrs Nees) had discussed it earlier, and prior to meeting with Mrs Wyatt, they been given the authority to make such an offer from the Headmaster.

[41] In those circumstances, Mrs Wyatt was entitled to be told that her employer wished to meet with her, and the full extent of the matters they wished to canvass with her. Mrs Wyatt was not adequately informed of the meeting, and merely covering the bases as described above did not afford a real opportunity for her to clearly and without undue pressure or duress make an informed decision.

[42] Mrs Wyatt was asked if she had any suggestions to help resolve the issues and she didn't. WBH did not offer a menu of solutions, it is apparent that the only solution that was tabled was the "dignified parting of the ways".

[43] Conducting the meeting in the manner described above was a breach of duty by WBH that seriously eroded and undermined Mrs Wyatt's trust and confidence in her employer. The meeting, in all the circumstances was not constructive in establishing and maintaining a productive employment relationship.

Determination.

[44] Mrs Wyatt was unjustifiably constructively dismissed; she has a personal grievance and is entitled to remedies in settlement of that personal grievance.

Remedies.

[45] Having concluded that Mrs Wyatt was unjustifiably dismissed, it follows that consideration must be given to the remedies available to her under sections 123, and 128 of the Employment Relations Act 2000. I am bound by s.124 of the Act to consider the extent to

which Mrs Wyatt's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies accordingly.

[46] Mrs Wyatt was employed as an Accounts Officer for which advanced knowledge, skills and experience were required. Mrs Wyatt's CV does not convey an applicant with that sort of advanced technical job knowledge. I generally accept that Mrs Wyatt may not have had the advanced knowledge that WBH expected, and she may have displayed some fundamental knowledge gaps in the basics of accounting procedures, however, her CV does not exaggerate, inflate or misrepresent her technical knowledge. Mrs Wyatt's apparent lack of experience and technical knowledge may have been core to the problem, but it is not blameworthy conduct on her part. There shall be no reduction to the remedies.

[47] Mrs Wyatt says she was unemployed for a period of 9 weeks, from the 8th April 2006 to the 12th June 2006. She is seeking reimbursement of \$5,755.50, being the wages she lost for that period. **Whangarei Boy's High School is ordered to pay Mrs Wyatt the wages she has lost for that period.**

[48] I am satisfied that Mrs Wyatt suffered hurt, humiliation and injury to her feelings as a result of her personal grievance. **Whanagarei Boys' High School is ordered to pay Mrs Wyatt \$5000.00** pursuant to s.123 (1) (c) (i) of the Employment Relations Act 2000.

Costs.

[49] Costs are reserved. The parties are requested to attempt to resolve that issue themselves. In the event that costs are not resolved, Mr Nalder is invited to file submissions with the Authority and copy to Ms Friedli within 28 days of the date of this determination. Ms Friedli will have a further 14 days to respond and copy to the Authority and Mr Nalder.

Ken Raureti
Member of Employment Relations Authority