

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 91
5431692

BETWEEN SIOBHAN BARRETT
 Applicant

AND COTTON ON CLOTHING (NEW
 ZEALAND) LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Ian Hard, Counsel for Applicant
 Bernard Banks and Jacob Greenleaf, Counsel for
 Respondent

Investigation Meeting: 20 August 2014 at Wellington

Submissions Received: Oral submissions for the Applicant
 Written and oral submissions for the Respondent

Determination: 23 September 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute about whether the applicant, Ms Siobhan Barrett, resigned from her employment with Cotton On Clothing (New Zealand) Limited (Cotton On), or whether she was unjustifiably dismissed.

[2] Ms Barrett says she was unjustifiably dismissed on 1 August 2013 when she raised a personal grievance about being bullied and advised her employer that she was “*getting a lawyer*”.

[3] Cotton On strongly denies Ms Barrett’s claim. It says Ms Barrett repeatedly and unequivocally advised it that she “*resigned*” or “*quit*” during a telephone discussion on 1 August 2013.

Relevant background information

[4] Cotton On is a retail clothing company which has a range of brand stores throughout New Zealand. Ms Barrett was employed as Store Manager to ‘Cotton On BODY’, one of six Cotton On brand stores located at Westfield Queensgate shopping centre in Lower Hutt, Wellington. She began her employment on 3 September 2012 pursuant to an individual employment agreement.

[5] Ms Barrett’s individual employment agreement contained the following:

23. *Termination of employment*
 (a) *Notice of termination*
Either party may terminate this agreement by giving written notice as set out in the table below unless otherwise provided for in the agreement.

<i>First 90 days of employment (trial period)</i>	<i>7 days</i>
<i>Remaining period of first five months of employment (probationary period)</i>	<i>14 days</i>
<i>After probationary period</i>	<i>4 weeks</i>

[6] In the morning of 1 August 2013 Ms Barrett was contacted by a store manager working at one of the other Cotton On brand stores in the Queensgate complex. The discussion centred on why Cotton On’s branded coat hangers were being used at a nearby chemist. Ms Barrett says her colleague’s confrontational approach amounted to bullying and that she was unfairly accused of giving away company property. At the end of the phone-call she rang her direct manager, Ms Arianna Simmonds to complain about the store manager’s behaviour.

[7] Ms Barrett says she told Ms Simmonds that she had been bullied by the store manager, as well as the Loss Prevention Manager and others. She raised additional concerns that she had been required to work six out of seven days covered by a medical certificate due to understaffing and expressed dissatisfaction that a vacant position was yet to be filled. She characterised Ms Simmonds as unsupportive about these matters and stated that if the bullying did not stop then she would contact a lawyer. Ms Barrett says she cried during the phone call but that she remained calm. She rejects any allegation that she was aggressive or threatening. Towards the end of the conversation she told Ms Simmonds that she had a scheduled doctor’s appointment later that morning and arrangements were made to obtain staff coverage.

[8] At the conclusion of the telephone conversation Ms Simmonds rang National Retail Manager, Ms Kerri Pollock. Ms Pollock asked her to detail the discussion in an email which Ms Simmonds quickly drafted and sent. That email largely reflects the content of discussion as described by Ms Barrett, although it records Ms Barrett as saying she “*will be calling the lawyers and close the store if it [the bullying] continues...*”. The email concludes with the following:

“Siobhan came across extremely abrupt and aggressive her language and tone was in a threatening manner was really unsure on how to advise her other than to assist her find cover so she does not need to work if she is unwell.”

[9] By way of background, Ms Simmonds’ evidence was that Ms Barrett had taken 16 sick or domestic leave days over the past 11 months and her entitlement to paid leave was exhausted. She says it was only during the phone call on 1 August that she became aware that Ms Barrett had worked through a medical certificate. Ms Simmonds agrees that Ms Barrett had been away from work for 1 & 1/2 days the previous week but says no medical certificate had been furnished. She says Ms Barrett had on occasion in or around this time told her that she felt unwell but says she had never indicated that she wasn’t well enough to work. She says she assumed Ms Barrett did not wish to take unpaid leave and that it was not for her to question how employees managed their finances.

[10] Ms Simmonds denies that Ms Barrett was required to attend work when sick. She says this concern was never raised before 1 August and with 5 other Cotton On brand stores based at Queensgate, other staff are available to cover sick leave.

[11] Ms Barrett’s evidence was confusing as to when exactly she had sent the relevant medical certificate to Cotton On’s payroll, if at all before 1 August, but it was accepted during the Authority’s investigation that a medical certificate (albeit recording her son as unwell) for the period 22 July and 29 July was faxed through to Cotton On after the phone call with Ms Simmonds.

[12] On receipt of Ms Simmonds’ email Ms Pollock rang Ms Barrett. This discussion was also fraught.

[13] The dispute between the parties stems from what was exchanged during the telephone call.

Ms Barrett's version

[14] Ms Barrett says Ms Pollock called her and advised that she wanted to discuss the serious allegations she had made. She says Ms Pollock then accused her of being unprofessional and abusive to Ms Simmonds and of making false allegations of bullying. Ms Barrett says she reiterated the complaints she had raised earlier and told Ms Pollock that Ms Simmonds was wearing her down and making her sick. She says she then said *"If this does not stop I will be contacting a lawyer and handing in my notice"*. She reports Ms Pollock was immediately angry and yelled *"hand over your keys to Lara and leave the store immediately. I accept your verbal resignation."* Ms Barrett says she replied: *"I did not resign. I said I would contact a lawyer and hand in my notice, not resign over the phone."* The discussion deteriorated and she hung up on Ms Pollock.

Ms Pollock's version

[15] Ms Pollack says she rang Ms Barrett to inquire about the allegations of bullying. She says Ms Barrett initially denied being bullied then proceeded to name several managers whom she considered were bullying her. She says Ms Barrett swore at her throughout the conversation and alleged Cotton's On's management were liars and that both she and Ms Simmonds were dishonest and incompetent.

[16] Ms Pollack says she made notes during the conversation on her iPad and immediately after. The end of the conversation is recorded as follows

*"She then said that she had had enough of it and she quits, she said she would leave her pos card and keys on the counter.
I asked her if she was sure that's what she wanted to do and she said yes, I quit I've had enough of this. I'll leave my keys on the counter.
For a third time I asked her to confirm what she was going to do and she said she quits and would leave her things on the counter. She told me we would hear from her lawyers. I told her I accepted her verbal resignation after that.
In her parting statement she said to me I'm taking you all down, I'm going public with this and you will regret it. You'll be hearing from my lawyer.*

[17] Ms Pollack agrees she asked Ms Barrett to relinquish Cotton On's property to another staff member working at the store.

[18] It is not in contention that Ms Barratt spoke to staff member Ms Lara Holt, who was present in the store at the time but not rostered to work. She told Ms Holt

“sorry Lara, I don’t work here anymore”. Ms Barrett gathered her belongings, placed her Cotton On card and key on the counter, and left.

[19] Ms Barrett attended her medical appointment and obtained a medical certificate which provided she was unfit to work until 5 August 2014.

[20] The following day, Ms Barrett received an email¹ from Ms Lucie Maxwell, an HR consultant employed by Cotton On, which advised the following:

Hi Siobhan,

I have recently been advised that you have decided to resign from your position as store manager of Queensgate BODY. I have further been advised that you verbally resigned over the phone and to date haven’t completed a resignation form. As such I want to contact you and request if you can please put your resignation in writing, so that we can process your final pay and pay out any outstanding leave entitlements. To assist you throughout the process I have attached a letter requesting this as well as a resignation form for ease. You can drop this into any store or simply reply to me by email. I look forward to hearing from you shortly.

[21] Ms Barrett responded to that email later that day in the following way:

Hi Lucie,

*This information is untrue.
I was told to hand my keys over and leave the store by Kerry Pollock.
I did as I was directed and therefore was unfairly dismissed from my position.*

I did not verbally resign from my position as Store Manager of Cotton On BODY Queensgate. I was dismissed for raising a personal grievance. I intend to progress with my personal grievance through legal representation. Once again I did not verbally resign from my position, I was told to hand my keys over and to leave the store immediately.

*Yours sincerely,
Siobhan Barrett*

[22] Cotton On had Ms Holt provide a written statement about her recollection of what she heard between Ms Pollock and Ms Barrett 2 to 3 days after the incident.

[23] On Monday 5 August 2013, Ms Maxwell responded to Ms Barrett’s email advising the following:

¹ The email included an attached letter setting out in more formal language the content of Ms Maxwell’s email

I wanted to acknowledge I have received your email and we have taken on board your response to my email.

Documentation states you commenced a phone call with Kerry Pollock at 10.20am on 1 August 2013, in which you verbalised your decision to resign to the Cotton On Group. Subsequently, HR has also been provided with a witness statement, further confirming your conversation with Kerry and that you resigned to her on the phone at approximately 10.30am on 1 August 2013. Following your phone call, you handed in your POS card and store keys to a team member and left the store.

Whilst I appreciate your desire to query the discussion had between yourself and your State Retail Manager, I confirm that Human Resources have been provided with statements, which support and confirm it was by your own decision to resign from the Cotton On Group. We note that at no stage were you dismissed from your position. Furthermore, the Cotton On Group termination policy utilised in the business outlines the due process afforded to all employees in good faith in the event a summary dismissal is being considered. Again we note that at no point was termination considered nor was the intention to commence the termination process with you.

The Cotton On Group confirms and accepts your verbal resignation from your position as Store Manager of Body Queensgate... If you have any further questions please do not hesitate to call me ...

[24] On 28 August 2013 Ms Barrett raised a personal grievance. The parties attended mediation but were unable to resolve their differences.

The claims

[25] Ms Barrett lodged her statement of problem with the Authority on 11 December 2013 alleging an unjustified dismissal. No claim of an unjustified disadvantage was made with respect to bullying and I have made no findings about that matter.

[26] Cotton On provided a statement in reply on 14 January 2014. In addition to responding to Ms Barrett's claim, numerous counterclaims for breach of contract and breach of good faith were made and it sought awards of damages and penalties against Ms Barrett. Three weeks prior to the date scheduled for investigation Cotton On advised it was no longer pursuing claims for damages.

[27] The meeting scheduled for 29 April 2014 was postponed due to illness and was timetabled for 20 August 2014. Over the course of the rescheduled investigation meeting Cotton On withdrew its claims for penalties.

The issues

[28] In determining whether Ms Barrett was unjustifiably dismissed, the Authority is required to consider:

- (a) Was Ms Barrett unjustifiably dismissed by Cotton On or did she resign from her employment;
- (b) If Ms Barrett was unjustifiably dismissed, what remedies, if any, is she entitled to?

[29] As permitted by s.174 of the Employment Relations Act, this determination has not set out all the information provided but states findings of facts and law and expressed conclusions on matters requiring determination.

Did Ms Barrett resign from her employment?

[30] Ms Barrett resolutely denies she resigned during the telephone discussion with Ms Pollock and says that at best she asserted she may resign if the bullying didn't stop. She says in this regard any suggestion of resignation was conditional and in any event was pre-empted by Ms Pollock's dismissal of her.

[31] Ms Pollock says Ms Barrett unequivocally and repeatedly resigned from her employment during their conversation on 1 August.

[32] Both Ms Barrett and Ms Pollock were unwavering in evidence as to the correctness of her version and it has been difficult to assess from the respective accounts what is more likely to have occurred.

[33] In these circumstances I have given careful attention to an email Ms Pollock sent to Ms Maxwell at 11.48am on 1 August and the file note Ms Pollock made on her iPad at the time of the conversation and following. I find both documents persuasive. The notes contained on the iPad were, in part, recorded while the crucial telephone conversation was being held although the entire file note was not drafted at that time. I have focused on the language which suggests close proximity to the event as opposed to those parts of that document which reflects information that became available after the conclusion of the phone call.

[34] I have been influenced by the email because it was sent within an hour or so of the conversation and before Ms Pollock was aware that the issue of whether Ms Barrett had verbally resigned was in contention. In these circumstances I consider it is unlikely to have been altered after it was sent and less likely that the account was fabricated. Both those documents reflect Ms Pollock's version of events.

[35] Ms Holt also gave evidence before the Authority although she no longer works for Cotton On. Ms Barrett does not dispute Ms Holt was standing behind the shop counter and relatively close to Ms Bartlett when she was on the phone to Ms Pollock. Ms Holt recalls Ms Bartlett swearing and saying she was "*really sick*". She reports that towards the end of the telephone discussion Ms Barrett said "*you are all bullies and I hand my resignation in*", that she was "*getting [her] lawyer involved*" and that she "*wants to make this public*". Under cross examination Ms Holt remained emphatic that Ms Barrett's reference to resigning was not premised on a request that something be done about the bullying or any other conditions. Ms Holt's statement more closely aligns with Ms Pollock's version of events and the documentary evidence.

[36] I consider it more likely than not that Ms Barrett did verbally tender her resignation. Ms Barrett implied Ms Holt's testimony was tainted but I have no evidence of a conspiracy and take this matter no further.

[37] However my finding does not resolve Ms Barrett's application for two reasons.

[38] It is accepted law that an employer should ensure an employee genuinely intends to resign and has not acted impulsively. In *Boobyer v Good Health Wanganui Ltd*² Chief Judge Goddard (as he was then) set out differing categories of cases where "*an employee is, against his or her will, treated by an employer as having resigned*". He described one category in the following way:

"...where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once the "heat of the moment" had passed..."

[39] The Chief Judge observed:

² EMC Wellington WEC3/94

“Examples of a sudden flare up being treated as a resignation are scattered through the [law] books. Some feature either extreme actions by the employee including emphatic language and expressive conduct extending to actually walking out or using words of resignation, only to return to recant later. Each case turns on its own facts but it is at least clear that ‘[a]n apparent resignation can also amount, notwithstanding the words used, to a dismissal’.”

[40] In *Kostic v Dunn*³, a case about a resignation purportedly given by an employee *“in an atmosphere of anger and other emotions”* Judge Couch referred to *Boobyer* and held:

“A fair and reasonable employer would not take at face value what was said in such circumstances. Rather, such an employer would allow a cooling down period and then discuss with the employee what had occurred.”

[41] I regard Ms Barrett’s purported resignation was made in the heat of the moment and in this respect is analogous with that described in *Kostic*⁴. It is clear from the list of complaints documented on Ms Pollock’s iPad as the phone call progressed that Ms Barrett was volatile and upset. Ms Pollock’s own file note records Ms Barrett’s inconsistent statements about whether she had been bullied.

[42] While I accept Ms Pollock found the discussion with Ms Barrett challenging, Ms Pollock was cognisant that Ms Barrett had reacted badly to the store manager’s inquiry about company property and was considering resigning in response to her perception she was being bullied. Ms Simmonds had also made Ms Pollock aware that Ms Barrett felt unwell, had complained of working through a medical certificate and (in her opinion) had behaved in an aggressive manner during their earlier conversation.

[43] I consider a fair and reasonable employer faced with an employee who was becoming increasingly volatile and agitated over the phone, as occurred in this matter, would have registered that emotions were running high and have sought to end the phone call. I am unwilling to accept that Ms Pollock could, in the circumstances, have concluded Ms Barrett’s verbal resignation was a genuine intention to resign. A more prudent approach would have been for Ms Pollock to acknowledge Ms Barrett’s assertion and request she consider the matter overnight so as to allow for a period of *“cooling off”* and advise that the matter would be discussed the following day.

³ *Kostic v Dodd t/a Allan Milligan Cars and/or Motorworld Systems Ltd* CC14/07 11July 2007

⁴ *Ibid* at 2

[44] Cotton On is not able to rely on Ms Barrett's purported resignation as a complete defence to Ms Bartlett's claim. Even if I am wrong, my second reason for concluding that Ms Barrett did not resign during the 1 August telephone call is compelling.

[45] Ms Barrett refers to her employment agreement. She submits she cannot have resigned orally because her employment agreement allows only for resignations to be in writing.

[46] Clause 23 of the individual employment agreement (set out at para.[5] of this determination) contemplates notice of termination, given by either party, is to be in writing. There is nothing at clause 23 which allows either party to furnish notice by any other means⁵.

[47] There is no statutory requirement which regulates how an employee (or employer) should communicate notice of termination of employment. In this regard parties to an employment relationship are free to make their own arrangements. However, having chosen a means by which notice of termination of employment will occur, a party to an agreement cannot choose to ignore the agreed methodology.

[48] I am unable to conclude that Cotton On was able to accept an oral declaration of resignation where the employment agreement does not provide for that action. Ms Barrett did not resign in accordance with the agreement and Cotton On cannot have regarded her as having done so. I consider it more likely that Cotton On was aware Ms Barrett needed to furnish her resignation in writing and that was the purpose of Ms Maxwell's email of 2 August 2013.

Was Ms Barrett unjustifiably dismissed?

[49] Having found that Cotton On, acting as a fair and reasonable employer, could not have relied on a purported oral resignation made in an atmosphere of anger and other emotions, and in any event the resignation was not in accordance with the employment agreement, I need to determine whether Ms Barrett was dismissed unjustifiably.

⁵ I note the employment agreement allow for the parties to vary the employment agreement but any variation must be agreed and reduced to writing, and did not occur in this instance.

[50] In *Taylor v Milburn Line Ltd*⁶ a case also about whether or not an employee resigned from employment, Judge Couch made the following observation:

In the years since the Chief Judge made his observations in Boobyer, the nature of the mutual obligations which underpin the employment relationship has changed significantly. The longstanding obligations of trust and confidence have been supplemented by the mutual obligation of good faith. Since the 2004 amendments to the Employment Relations Act 2000, the obligation of good faith specifically “requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative”. Guided by the test of justifiability in s 103A, employers must now ensure that, in taking any step which may disadvantage an employee, they do what a fair and reasonable employer would do in all the circumstances.

[51] The test of justifiability in this matter requires an objective assessment of whether Cotton On’s actions and how it acted were what a fair and reasonable employer could do in all the circumstances.

[52] In *Taylor*⁷ Judge Couch found that where there was doubt about an employee’s resignation, a fair and reasonable employer would make further inquiries and ensure that its response was based on the employee’s actual intentions.

[53] Cotton On appears to submit that it did make inquiry with Ms Barrett when Ms Maxwell emailed Ms Barrett on 2 August. On any objective assessment I am unwilling to conclude that the email was an inquiry about Ms Barrett’s intentions. Further, it was clear from her response that she did not consider she had resigned but rather she had been unjustifiably dismissed.

[54] Cotton On submits it undertook a fair and reasonable investigation into the circumstances of Ms Barrett’s resignation and formed a view that she had indeed resigned. I am unable to agree.

[55] I accept Cotton On did undertake an investigation of sorts, but I find the information gathered was limited to obtaining support for its view that Ms Barrett had resigned. Ms Barrett was only made aware of the investigation on 5 August after its inquiry finished and Cotton On had concluded she had resigned. Cotton On’s submission that it could fairly conclude Ms Barrett intended to resign cannot be sustained and was not a decision that a fair and reasonable employer could make. I find Ms Barrett was unjustifiably dismissed.

⁶ [2011] NZEmpC 164

⁷ Ibid at 6

Remedies

Reimbursement of wages

[56] Section 123(1)(b) of the Employment Relations Act provides that the Authority may reimburse “*the whole or any part of the wages or other money lost by the employee as a result of the grievance*”. At s.128(2), if the Authority determines that an employee has a personal grievance, and has lost remuneration because of the grievance, the Authority must order the employer to pay to the employee the lesser of the sum equal to the lost remuneration or three months’ ordinary time remuneration.

[57] Ms Barrett conceded in evidence that following her dismissal she did not seek alternative employment after her employment terminated. Prior to the events which led to her dismissal Ms Barrett and Cotton On had agreed Ms Barrett would be taking two weeks unpaid leave in August to undergo a medical procedure and to recover. That procedure and recovery commenced one week after her dismissal. Ms Barrett advised she had a history of experiencing periods of depression and that following her recovery she was placed on a sickness benefit. Ms Barrett did not advance an argument (or provide evidence to the effect) that the actions of Cotton On prompted her depression and I make no finding about the matter.

[58] Ms Barrett’s evidence leads me to find that during the medical procedure and recovery period no wages were lost as a result of the personal grievance as a consequence of the arrangement she made with Cotton On. Further, placement on a sickness benefit implies she was unable to work and again no wages were lost. I conclude that loss of wages was confined to the week following her dismissal. Subject to my assessment as to contribution Ms Barrett is entitled to a sum equal to reimbursement of one week’s wages.

Compensation

[59] Ms Barrett seeks compensation of \$15,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Despite direct questioning Ms Barrett gave very little evidence about the effect her dismissal had on her other than to state she felt humiliated about being dismissed in front of Ms Holt and a customer. This evidence is at odds with cross examination undertaken on her behalf, and which I accept, that Ms Holt was unable to hear Ms Pollock’s dialogue during the telephone

call. I consider however that Ms Barrett must have felt some humiliation by her dismissal but evidence to support this aspect of her claim was weak. Subject also to my finding as to contribution I award \$3,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Contribution

[60] Good faith obligations under s 4(1A) of the Act to be active and constructive in maintaining a productive employment relationship apply to both employees and employers. I consider Ms Barrett must take some responsibility for the situation which led to her personal grievance. I have already found that she repeatedly stated that she was resigning and/or quitting and I accept that she both swore at, and criticized Ms Pollock, which contributed to the deterioration of their conversation. I am satisfied that she took an unnecessarily aggressive approach on 1 August which nurtured Cotton's On view that the employment relationship was over.

[61] In evidence Ms Barrett said she expected a meeting or a phone call from Cotton On to discuss the matter after she responded to Ms Maxwell's first email. The content of her reply on 2 August does not reflect that possibility, and I find on the evidence that her response likely discouraged Cotton On from making proper inquiry. Ms Barrett did not act in good faith over the course of these events.

[62] I consider a 50 per cent reduction of remedies is required to take account of Ms Barrett's actions in bringing about the end of her employment with Cotton On.

Costs

[63] Costs are reserved.

Summary of orders

[64] Cotton On Clothing (New Zealand) Limited is ordered to pay Ms Barrett:

- i.* reimbursement of \$384.61 pursuant to sections 123(1)(b) and 128(2) of the Act as the sum equal to one week's wages minus 50% to reflect Ms Barrett's contribution.

- ii.* compensation of \$1,500⁸ pursuant to s.123(1)(c)(i) of the Act.

Michele Ryan
Member of the Employment Relations Authority

⁸ The sum of compensation payable following a 50% reduction for contribution