

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 53  
5430943

BETWEEN            LYNNE BARROW  
                                 Applicant  
  
AND                    LODGE EQUESTRIAN  
                                 LEATHER AND CANVAS  
                                 LIMITED  
                                 Respondent

Member of Authority:    P R Stapp  
  
Representatives:        Jol Bates, Counsel for the Applicant  
                                 Gary Tayler, Advocate for the Respondent  
  
Investigation Meeting:    23 and 24 April 2014 at Napier  
  
Submissions Received:    24 April 2014  
  
Determination:            28 May 2014

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**DETERMINATION OF THE AUTHORITY**

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**Background**

[1]    Lynne Barrow commenced employment with Lodge Equestrian Leather and Canvas Limited trading as the Tack Shop (the Tack Shop) in Napier, on 22 November 2010. She was employed as the administration manager/duty manager. Her hours were 36 hours per week, and she was paid \$17.33 per hour; plus \$1.17 per hour duty manager allowance when Mr Nick White (the general manager) was not on site or unavailable for more than four hours at a time.

[2]    The Tack Shop is an equestrian products retailer. The Tack Shop relies on Mr White running the business; accountants, a licensed private investigator (Third Eye Limited), an employment consultant; and it has an administration/duty manager, and one part time pay clerk.

**Employment relationship problem**

[3] Mrs Barrow says she was dismissed from the Lodge Equestrian and Canvas Limited by its sole director, Mr Nick White. He says he reasonably relied upon Mrs Barrow resigning from her employment on 11 December 2012 when he and his private investigator were informed by an angry Cameron Darwin (Mrs Barrow's partner) that Mrs Barrow would not return to work and would not meet with them. His angry stemmed from a conversation with a friend and co-worker of Mrs Barrow who told then that he had been sexually harassed at work and Mr Darwin was not going to allow Mrs Barrow to continue working at the Tack Shop in such an environment. Underlying this Mr White had engaged a private investigator to put in place CCTV to investigate anyone's involvement in possible misappropriation of property and theft from the business. Mrs Barrow claims that she was unjustifiably dismissed on 12 December 2012.

[4] Mrs Barrow has claimed \$8,679.25 for three month's lost wages (based on her average earnings per month); and \$25,000 compensation for hurt and humiliation. She is also seeking costs.

[5] At the conclusion of the Authority's investigation meeting the Tack Shop withdrew its claims for penalties from Mrs Barrow for allegedly breaching the terms and conditions of her employment agreement and the Employment Relations Act for breaches of good faith. It also is seeking costs. It denies all Mrs Barrow's claims.

**The facts**

[6] Sometime between March and October 2012 Mr White arranged for camera surveillance (CCTV) to be put into the business's premises to investigate suspicions about missing property and theft. He left it to a licensed private investigator to install the camera and monitor the activity. The brief for the private investigator was to arrange the camera surveillance and in doing so observed Mrs Barrow's arrival and departure. As a consequence the private investigator discovered discrepancies in Mrs Barrow's arrival and departure times on eight occasions, after comparing the footage with timesheets. Mrs Barrow accepted that the video footage showed what it did, but she says she was able to explain herself in regard to her timesheets because she was working off site, would be doing the banking and would enter from a door not

covered by the CCTV. In conjunction with Mr White, the private investigator prepared a letter dated 10 December 2012 outlining some allegations, the possible consequences if the allegations were proved to be true and set a time for a meeting to be held on 12 December 2012 to investigate the allegations. The allegations were serious matters involving an allegation of misappropriation of property and alleged theft involving Mrs Barrow, including the use of her personal account and what hours she worked. The focus of the Authority's investigation has not been on investigating the alleged misappropriation of property and alleged theft because the respondent says Mrs Barrow resigned, and its defence has not been to justify a dismissal for such allegations. Also, it is not the role of the Authority to substitute its opinion for that of the employer and not to undertake the employer's investigation for it.

[7] On 11 December 2012 Mrs Barrow was called to a meeting attended by Mr White and the private investigator, where the private investigator handed to Mrs Barrow a pre-prepared letter putting her on notice of the allegations. The letter invited her to obtain the services of a representative if she wanted one. She left work with the belief that she was told to leave by Mr White, and that she had no choice in having to leave. Mr White and the private investigator say it was her decision to take time before the meeting or to stay at work. Mrs Barrow denies this and says she had to leave and her legal representatives have interpreted the evidence from Mrs Barrow that she had been suspended.

[8] In the meantime Mr Darwin and Mrs Barrow had a discussion with a co-worker, also accused of theft, who told them that he was sexually harassed at work. On 11 December 2012 Cameron Darwin, Mrs Barrow's partner, went into the workplace and met Mr White. Mr Darwin was angry about what he had been told by the co-worker. Mr Darwin informed Mr White that Mrs Barrow would not be returning because he did not want her working in an environment involving sexual harassment.

[9] Mr White informed Mrs Barrow by text that her understanding of what she thought had happened, and her claim that she had been suspended, were wrong. He informed her that she had not been suspended and her text reply to him was "sweet". She understood that she would be paid for 10 and 11 December 2012 while she was not at work.

[10] Also, on 11 December 2012 the private investigator says he prepared a letter to Mrs Barrow with three more particulars and informed her of a change of meeting date to 13 December 2012. Mr Darwin and Mrs Barrow say they did not receive that letter. There is no proof that they received the letter, and there was no address and reference on it as to the place of delivery. There is no proof that it was delivered. However, Mr Darwin and Mrs Barrow accept that they both knew of the change of meeting date to the 13<sup>th</sup> because of the text message from Mr White. Mr White and the private investigator, however decided, based on their understanding of what they say Mr Darwin said to Mr White and the private investigator by telephone, that Mrs Barrow would not be returning to attend the meeting; they decided to proceed and make a decision, but decided to do so on the original date of the meeting. That is they brought the meeting back without notice and did not inform Mrs Barrow, and they did not advise her that they would proceed and make a decision in her absence.

[11] They made a decision in Mrs Barrow's absence.

[12] On 12 December 2012 Mrs Barrow was informed by letter that she had been *summarily dismissed for theft as a servant*. The decision was based on Mr White and the private investigator reviewing the CCTV footage in regard to the following:

- *On 16 November 2012, your client stole the fuel vouchers from our client.*
- *Your client has claimed and been paid for hours that she did not work, this point is subject to further investigation in an attempt to quantify how much time your client has stolen and the value to be repaid to our client.*
- *Your client has deliberately under-charged herself for items on her staff account, and deliberately over credited herself for items she has returned. This point is also subject to further investigation and calculation to establish how much your client owes ours.*

[13] The email (dated 12 December 2012) continues with the following two important comments.

1. *The findings that have been made constitute serious misconduct in your client's behalf and accordingly, she is hereby summarily dismissed for theft as a servant.*

2.

3. *Further information has come to light which also indicates that your client's theft goes further than what has been revealed to date.*

[14] The email conveyed to Mrs Barrow that:

*Following further investigation the Tack Shop may consider that criminal prosecution is appropriate on the basis that the Tack Shop considered that Mrs Barrow was trying to blackmail Mr White into paying Mrs Barrow more money.*

[15] The email also advised Mrs Barrow of the possibility of penalty options under the Employment Relations Act (the Act) being pursued for multiple breaches of the employment agreement by Mrs Barrow and that any penalties could be up to \$10,000 for each and every breach.

[16] On 14 December 2012 Mrs Barrow retained a lawyer, who advised Mr White's representative (by this time the employment consultant, separate to Third Eye Investigators) that he was getting instructions from his client (Mrs Barrow) and made a request for a copy of the wage and time record.

[17] On 19 December 2012 Mrs Barrow's lawyer raised a personal grievance. The letter of the same date claimed that Mrs Barrow had resigned and that this was because she had been sexually harassed. What this related to was her being told by the co-worker that he had been sexually harassed. Also, the letter raised a number of claims of unjustified disadvantage on various matters and claimed that the respondent did not follow the correct procedure.

[18] Mr White did not personally reply to Mrs Barrow's lawyer's letter, although Mr White's employment consultant asked Mrs Barrow's lawyer a number of questions about the claims. The questions were not answered. The next significant event that took place was that Mr White contacted the Police and made an allegation of theft against Mrs Barrow and the co-worker. The Police executed a search warrant at Mrs Barrow's family home in regard to items that Mr White claimed had been stolen. The Police in executing the search warrant had Mr White in attendance and he was allowed to identify property to be removed inside Mrs Barrow's house. At the time Mrs Barrow was sick in bed when all this was happening. The Police

subsequently took no further action against her. She was not charged. At the time she engaged a criminal lawyer to help her.

[19] In September 2013 Mrs Barrow engaged another lawyer (the third lawyer involved) for the employment matter, and the new lawyer filed a statement of problem in the Employment Relations Authority based on her claims contained in the letter of grievance dated 19 December 2012. The claim was essentially about unjustified constructive dismissal and unjustified actions. The statement in reply from the Tack Shop denied the claims and made a counterclaim for penalties. The counter claim has since been withdrawn.

[20] Much later, on 12 September 2013, Mrs Barrow was informed that another and entirely different employee from the Tack Shop was telling other people that Mrs Barrow had been fired from the Tack Shop *because of stealing*. Mrs Barrow sent a text to the person involved to say that she had resigned and had not been fired, to make it sound better than being dismissed (Page 256 of the bundle).

[21] On 19 December 2013 Mrs Barrow's lawyer filed an amended statement of problem in the Authority. This changed the claim from a constructive dismissal claim to an actual unjustified dismissal claim and extended the claim for remedies to include lost wages (previously not included), and confirmed compensation for hurt and humiliation (\$25,000) and costs.

[22] During the Authority's investigation meeting Mrs Barrow's evidence is that she was dismissed by Mr White and the private investigator. First, that she was informed to leave work, and second, that on 12 December 2012 by letter from the private investigator she was dismissed from her employment at the Tack Shop. The Tack Shop denies that she was dismissed and relies on Mrs Barrow resigning on 11 December 2012.

### **Determination**

[23] I hold that there was no express suspension imposed on Mrs Barrow on 11 December 2012. It is more likely than not that she was allowed to go home on the basis:

- a. That she was given the letter with the allegations to read and consider for an explanation,
- b. That Mr White was not aware that there was a suspension provision that could be activated in the employment agreement,
- c. That Mr White had received advice from the private investigator that there were too many difficulties around suspending her from her employment and that it was not the practice of the private investigator and Mr White's employment consultant to recommend the use of suspension because it might be considered as pre-determining an outcome.
- d. That there is Mrs Barrow's text message that concurred by using the word "*sweet*" with Mr White's advice that he was not suspending her and that he would pay her for 10 and 11 December 2012. She accepted the position, I hold.

[24] Incidentally, it appears that the Tack Shop has not paid Mrs Barrow for the two days, 10 and 11 December 2012. Mr White did not know what had happened, but agreed she should be paid for the two days. He did not pursue the matter again and it was not covered in any way in final submissions so I assume that he agrees that Mrs Barrow was not paid. I will formalise an order for the payment to be made to Mrs Barrow later in the determination.

[25] I can understand the reasoning why Mr White says that Mrs Barrow resigned based on Mr Darwin's angry meeting with him on 11 December 2012. Mr White also relies on other evidence to support the claim such as Mrs Barrow's changed approach to her employment relationship problem (from a constructive dismissal to an actual dismissal). I have considered this, but clearly the different lawyers involved and the changing information available may explain why Mrs Barrow changed from a claim of sexual harassment and constructive dismissal to a claim that she was unjustifiably dismissed. Moreover it emerges she had no direct involvement in the sexual harassment claims and was only reacting in regard to what she had been told. I am sure Mrs Barrow and Mr Darwin might now consider that they should have been more dispassionate in that matter. However, the fact of the matter is that a fair and reasonable employer could not reach a fair understanding that Mrs Barrow had

resigned when Mr Darwin was in an angry state and that he said that Mrs Barrow would not be returning and would not meet and requested that the final pay and holiday pay should be made up. The employment relationship was between the employer and Mrs Barrow, not Mr Darwin. There is no clear indication that Mr Darwin was acting as her representative other than being an angry person supporting his partner based on information they had from another employee. Mrs Barrow was not even directly involved in the sexual harassment claims from the co-worker. A fair and reasonable employer could have looked beyond Mr Darwin's behaviour with much more of a sense of caution as to whom it was dealing with and to keep its eye on a fair process for Mrs Barrow, especially since it had activated a process in regard to some very serious and grave matters and had involved an advisor to assist. It is expected that a fair and reasonable employer could have done more than rely on Mr Darwin's comments and to get confirmation of what Mrs Barrow actually wanted and at least identify the problem, and then if she clearly was not going to be involved and to respond to put her on proper notice. I understand Mr White's representative's submission that the resignation meant everything else would not apply, and it hinges its defence on this, but in the heat of the moment a fair and reasonable employer could be expected to provide time to cool down and to follow a proper process. Also Mrs Barrow received the private investigator's dismissal letter that she was entitled to rely on. I will be returning to these points shortly because there are other elements of procedural unfairness involved in the employer's process.

[26] Second, Mrs Barrow was dismissed by the employer on 12 December 2012. The letter is sufficient proof of that. Mr White accepted that he deliberated on the matter in Mrs Barrow's absence. He accepted responsibility and the private investigator was acting on instruction. There is no proof that the investigator was acting alone in the employment matter without authority. The email is unambiguous and clear in regard to a decision being made, and Mr White has taken responsibility for it as the employer as the letter was sent to Mrs Barrow. Furthermore, the private investigator who wrote the letter conceded that this was a dismissal as did Mr White. The private investigator took the view that as Mrs Barrow would not be returning to work, the meeting should proceed as originally planned at the earlier original time and decided that she had waived all her rights to any further information that may have been available. This is wrong. At the very least, a fair and reasonable employer could have properly advised Mrs Barrow that she faced the prospect of a decision being

made in her absence on the basis of the information available if she did not attend a meeting as planned. The process should have been put in writing and Mrs Barrow given the opportunity to inspect the information at a prearranged time and place before the next step occurred. This is especially so given Mr Darwin's most unfortunate emotional behaviour.

[27] Furthermore, the investigation was incomplete. For example it emerged during the Authority's investigation that Mr White had spoken to other people at the time, and that Mrs Barrow had absolutely no knowledge of this occurring, and she certainly was not advised of it earlier. Mr White says he spoke to the other people and got oral reports from them. Without putting that information before Mrs Barrow or even on notice that it existed, he has acted unfairly especially since the information was part of the consideration at the time. This is a matter, given the decision made by the employer on the 12<sup>th</sup> that required the employer to conduct a thorough investigation given its resources.

[28] It was also unfair and not the action of a fair and reasonable employer to bring the meeting back to the original earlier time and not inform Mrs Barrow that the arrangements had been changed again. Mrs Barrow should have been properly advised so she could act on an informed basis. Whilst the employer says it was willing to provide the video footage for Mrs Barrow to view, i.e. provide her with full access, it did not do so and it did not provide her with the details of the primary information it was relying on in regard to the allegations about the use of her personal account. Indeed, Mr White conceded that the CCTV footage did not highlight any matters associated with the personal account. Therefore the email decision was wrong in that respect. Also it has emerged from Mrs Barrow she has details of the sums and deposits in her personal account that are different to the sums the Tack Shop has relied upon. A proper investigation might have resolved this and at least made a difference, but Mr Darwin's behaviour meant that Mrs Barrow could not have any input and/or her failure to attend the meeting (at the time she knew about) meant her input would not be taken into account, especially as the meeting was actually held at another time (a change that she did not know about). In affect she did not even know the meeting was happening after it had been changed again. She was never put on proper notice of the impact of any decision not to attend.

[29] Because I have found that Mrs Barrow did not resign and that a fair and reasonable employer could not have relied on what Mr Darwin said, then the events after 11 December follow for consideration. A fair and reasonable employer could not rely on Mr Darwin's comments. The fact is the 12 December email letter formally dismissed Mrs Barrow and it and the process were defective.

### **Orders of the Authority**

[30] It follows that the Tack Shop has not been able to justify the dismissal and failed in the procedure that it was required to follow.

[31] Mrs Barrow is entitled to remedies. Her lost wages amount to three months wages in the sum of \$7,956 on the basis of \$17 per hour for 36 hours per week. I am satisfied that there is some contribution. Mrs Barrow has to take some responsibility for Mr Darwin's behaviour because she never made any attempt afterwards to correct it and to be communicative and responsive to her employer and its concerns. I am not satisfied that the employer has proved any other untoward behaviour by Mrs Barrow to add to the contribution. Her lost wages are deducted by 20% (\$6,364.80).

[32] She is entitled to compensation for hurt and humiliation based on the impact of the dismissal on her and including the aggravating evidence of Mr White's decision to involve the Police afterwards and that he attended Mrs Barrow's home during the search warrant in what was essentially an employment matter because Mr White was not relying on a Police complaint to make any decision about Mrs Barrow's employment. I award her \$8,000 less 20% (\$6,400).

[33] Lodge Equestrian Leather and Canvas Limited is required to pay Lynne Barrow:

- a. The sum of \$6,364.80 lost wages
- b. The sum of \$6,400 compensation for hurt and humiliation under s 123 (1) (c) (i) of the Act
- c. By consent I enter an order for Mrs Barrow to be paid for 10 and 11 December 2012 in the sum as I have calculated as being \$244.80.

[34] Costs are reserved.

P R Stapp,  
Member of the Employment Relations Authority